

# ***Oneida Tribal Judicial System***

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## **Appellate Court**

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**Ron Kelly,**

**Appellant**

**Docket No. 13-AC-016**

**vs.**

**Date: May 29, 2014**

**Harvey Kosowski,**

**Respondent**

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## **APPELLATE DECISION**

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This case has come before the Oneida Tribal Judicial System, Appellate Court. Judicial Officers Winnifred L. Thomas, Carole Liggins (Pro-Tem), Lois Powless, Jennifer Webster, Stanley Webster presiding.

### **I. Background**

This case arises out of Oneida Tribal Game Warden, Harvey Kosowski's improper seizure of a rifle from Mr. Ron Kelly, when Mr. Kelly was being cited for trespass during the deer gun hunting season, in November 2012. Mr. Kelly sued the Oneida Conservation Department and Warden Kosowski for damages. The Trial Court dismissed the Conservation Department on sovereign immunity grounds and eventually ruled in favor of Warden Kosowski, denying Mr. Kelly's request for damages. We affirm.

#### ***A. Jurisdiction***

We have jurisdiction under Sec. 1.8-1 of the Oneida Administrative Procedures Act which permits us to hear appeals of contested cases.

## ***B. Factual Background***

The material facts surrounding the incident between Mr. Kelly and Warden Kosowski are not in dispute. In November of 2012, Mr. Kelly went on his first hunt within the boundaries of the Oneida Reservation since his retirement. He received a hunting license as an enrolled member of the Oneida Tribe and an elder. He received a map of designated hunting areas, labeled as a draft, and entered an area with both prohibited and permitted zones within it. Mr. Kelly passed signs that stated that hunting was prohibited except for those with a license and members of the Oneida Tribe.

On or about November 18, 2012, Mr. Kelly was hunting within tribal lands. On the same day or shortly thereafter Warden Kosowski issued Mr. Kelly a citation for a violation of Chapter 45.16 (violation #127) and Mr. Kelly's weapon was seized. The violation is described as trespassing in a wildlife area, park, or bow hunting area during the nine day gun deer season.

The hearing on the citation was scheduled for February 21, 2013 before the Environmental Resource Board. However, Warden Kosowski did not appear and the citation was dismissed. Mr. Kelly then sued Warden Kosowski and the Conservation Department in a new action in the Oneida Tribal Judicial System Trial Court. The Conservation Department was dismissed. The case against Warden Kosowski went forward and the Trial Court eventually entered judgment denying claims for damages. The Trial Court decision is internally inconsistent on the issue of attorney's fees.

## **II. Issues**

**Was the Trial Court decision arbitrary and against the weight of the credible evidence?**

## **III. Analysis**

**Was the Trial Court decision arbitrary and against the weight of the credible evidence?**

No. The Trial Court decision was not arbitrary nor against the weight of the credible evidence. By analogy and discussion of *Ex Parte Young*, 209 U.S. 123 (1908), the Trial Court found that only prospective injunctive relief was available. The relief requested by Mr. Kelly was all monetary in

nature. The Trial Court addressed four areas of damages requested by Petitioner: 1) Compensation for unlawful seizure of his weapon; 2) Compensation for future hunting expenses; 3) Compensation for damage to Mr. Kelly's reputation; and 4) Attorney fees. The Court addressed each in turn and denied all requests.<sup>1</sup>

These denials were appropriate. Prospective injunctive relief does not include monetary damages. Furthermore, as far as we can tell from the record, no evidence was provided to the Trial Court to support a finding of damages. It appears that Mr. Kelly made many arguments and assertions but did not offer any actual evidence to support the damage claims. For example, with respect to the unlawful seizure of Mr. Kelly's weapon, there is nothing in the record to establish that Mr. Kelly incurred any additional cost by purchasing or using another weapon during the time his weapon was unavailable to him. There was no psychological evidence of Mr. Kelly's mental suffering. There was no evidence from third parties that Mr. Kelly had suffered harm to his reputation and even if he did, there was no evidence that his diminished reputation had cost him any money. Mr. Kelly's appellate brief does not cite to any testimony or evidence in support of these claims. Rather, Mr. Kelly's brief states the claims were supported "by comment by counsel." Comments by counsel are not evidence.

Even if damages had been legally available, which they were not, in the absence of adequate evidence, the Trial Court had no choice but to decline Mr. Kelly's damage requests.

#### **IV. Conclusion**

The decision of the Trial Court is AFFIRMED. IT IS SO ORDERED.

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<sup>1</sup> The issue of attorney fees is addressed in two different places in the trial court decision in two different ways. On p.3, the decision states Respondent "shall pay" Petitioner's attorney fees in the amount of \$4,500; at the very end of the decision on p.5, it states that attorney fees are denied.