LIST OF SMSC COURT OF APPEALS OPINIONS

Index Vol. 1
1995-2001

IN THE COURT OF APPEALS OF
THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Docket No. 001-94

THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY BUSINESS COUNCIL, STANLEY R. CROOKS, KENNETH ANDERSON, AND DARLENE MATTA, INDIVIDUALLY AND JOINTLY, THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY ENROLLMENT COMMITTEE, ANITA BARRIENTEZ (CAMPBELL), SUSAN TOTENHAGEN, AND CHERIE CROOKS-BATHEL, INDIVIDUALLY AND JOINTLY,

Appellants,

vs.

LOUISE B. SMITH, WINIFRED S. FEEZOR, LEONARD L. PRESCOTT, AND PATRICIA L. PRESCOTT, AND OTHERS SIMILARLY SITUATED,

Appellees,

Docket No. 002-94

LOUISE B. SMITH, WINIFRED S. FEEZOR, LEONARD L. PRESCOTT, AND PATRICIA L. PRESCOTT, AND OTHERS SIMILARLY SITUATED,

Appellants,

vs.

THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY BUSINESS COUNCIL, STANLEY R. CROOKS, KENNETH ANDERSON, AND DARLENE MATTA, INDIVIDUALLY AND JOINTLY, THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY ENROLLMENT COMMITTEE, ANITA BARRIENTEZ (CAMPBELL), SUSAN TOTENHAGEN, AND CHERIE CROOKS-BATHEL, INDIVIDUALLY AND JOINTLY,

Appellees.

MEMORANDUM OPINION AND ORDER

Summary

By this Memorandum Opinion, we decline to recuse ourselves, based on the Rule of Necessity; we affirm the decisions appealed from and remand for an expedited proceedings to reach the merits of this case; and we direct that, in the interests of finality, further proceedings on the merits of this case will take place before all three judges of this Court, pursuant to Rule 25 of the Rules of Civil Procedure of the Court of the Shakopee Mdewakanton Sioux (Dakota) Community.

1. The Appeals. This matter is before us on two appeals: (1) an appeal (Docket No. 001-94) by the Defendants below ("the Community Appellants") from the decision of Judge John E. Jacobson, issued on March 15, 1994, which was supplemented by a Memorandum dated June 10, 1994, enjoining the Defendants below from implementing a January 11, 1994 action of the General Council of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community") that purported to grant membership in the Community to thirty-one persons, and directing that escrow accounts be established for monies which they would otherwise would be paid from the Community if they were members, during the pendency of this litigation; and (2) an appeal (Docket No. 002-94) from the Plaintiffs below ("the Smith Appellants") from the decision of Judge Robert A. Grey Eagle, issued on July 8, 1994, lifting that injunction as to nine persons.

2. Recusal. After the appeal of the Community Appellants had been briefed and argued, the Smith Appellants moved to have all the

three judges of this Court declare themselves disqualified and recuse themselves. We will deal with that motion at the outset.

As Judge Buffalo noted in Memorandum of Law in In re Leonard Louis Prescott Appeal from July 1, 1994 Gaming Commission Final Order, No. 041-94 (filed December 8, 1994)--

> ...where recusal of an arguably disqualified judge would destroy the jurisdiction of the only Court which could hear the matter, the rules regarding disqualification yield to the Rule of Necessity".
>
> (Ibid., at 3.)

The Court of the Shakopee Mdewakanton Sioux (Dakota) Community consist of three judges. The ordinance by which the Court was created, Ordinance No. 02-13-99-01, contains no provision which explicitly or implicitly permit the appointment of other judges for specific or general purposes. And the same ordinance clearly gives all of the judicial authority of the Community to this Court.

So, although we do not agree with the Smith Appellants' contention that any Judge of this Court has a conflict of interest which would require his recusal, if there were other Judges available to hear this matter, the plain fact is that the Smith Appellants' contention in this regard is moot, given the structure of this Court. We must and will hear these appeals.

3. Developments Subsequent to the Appeals. To say the least, considerable activity has occurred in other forums since the March 15, 1994, June 10, 1994, and July 8, 1994 Orders were entered in this matter.

The March 15, 1994 and June 10, 1994 Orders were explicitly predicated on the fact that, at the time the Orders were entered,

two attempts by the Community to enact Adoption Ordinances--Ordinance No. 10-27-93-001 and Ordinance No. 11-30-93-002--had been disapproved by the Area Director of the Minneapolis Area Office, Bureau of Indian Affairs ("the Area Director").

The provisions of Ordinance No.l 11-30-93-002 permits the Community to adopt into membership persons who are lineal descendants of enrolled members of the Community, who are not enrolled in another tribe, and who possess either a land assignment or a lease on the Community' Reservation (provided that minor children are exempted from that latter requirement).

In Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, Bureau of Indian Affairs, 27 IBIA 163 (Feb. 8, 1995), the Area Director's decision with respect to Ordinance No. 11-30-93-002 was reversed and remanded with instructions that the Ordinance be approved. On February 17, 1995, the Area Director complied, and approved Ordinance No. 11-30-93-002; and by a letter dated May 23, 1995, the Assistant Secretary of the Interior for Indian Affairs ("the Assistant Secretary") declined to overturn that approval.

Meanwhile, on May 17, 1995, the Assistant Secretary rescinded the Area Director's February 17, 1995 approval of an Enrollment Ordinance which the General Council of the Community had passed--Ordinance No. 12-28-94-005--on the grounds that too much time had expired between the Area Director's receipt of the Ordinance and its approval and therefore that the Area Director had no jurisdiction to approve or disapprove the Ordinance. And despite

this absence of jurisdiction, the Assistant Secretary also opined, apparently on behalf of this Court, first that Ordinance No. 12-28-94-005 was inconsistent with Ordinance No. 02-13-88-01, which established this Court and its jurisdiction over enrollment matters, and had not received the "supermajority" vote required by Ordinance No. 02-13-88-01 to withdraw jurisdiction from this Court; and second, that Ordinance No.6-08-93-001, an earlier version of the Enrollment Ordinance, also was invalid because of its purported effect on this Court's jurisdiction. In thus ruling on behalf of this Court, the Assistant Secretary did not apparently conduct any analysis which might sever any portions of either Ordinance that might offend Ordinance No. 02-13-88-01 from the portions that might not.

Then, on June 2, 1995, in a letter to the Area Director, the Assistant Secretary announced her refusal to approve a Secretarial Election on proposed Amendments to the Constitution of the Community, based on the Assistant Secretary's concerns with respect to the persons who had and had not been permitted to vote in the election. The Assistant Secretary directed that a hearing examiner or administrative law judge be appointed to determine the eligibility to vote of certain persons who were the subject of challenges in that election; and she further directed that, once that process is completed, a new election be held. To the knowledge of the Court, no proceedings have taken place with respect to making those determinations.

4. <u>The Community Appellants' Appeal.</u> The Community

Appellants argued, in Docket No. 001-94, that the Orders of March 15, 1994 and June 10, 1994 should be reversed because (1) the Community always has had the authority, under Article II, section 2 of the Community's Constitution, to adopt persons who may not meet the enrollment requirements specified in Article II, section 1 of the Constitution; and (2) since the Adoption Ordinance, Ordinance No. 11-30-93-002, now has received the approval requisite under the Community's Constitution, the General Council's vote on January 11, 1994 should be interpreted as taking place under the Adoption Ordinance.

The Smith Appellants, on the other hand, argued, in Docket 001-94, that the General Council which voted on the Adoption Ordinance, and which then voted on the thirty-one persons on January 11, 1994, was filled with persons who are not qualified to be members of the General Council; and the Smith Appellants also contended that the subsequent approval of Ordinance No. 11-30-93-002 did not operate to validate the January 11, 1994 vote, but at most meant that a process--the process of ascertaining whether the persons at issue in the Community Appellants' appeal are qualified for adoption--could begin.

After considerable soul-searching, we have concluded that, in the context of appeals from preliminary relief, the appropriate course for us is to leave intact the status quo established by the March 15, 1994 and June 10, 1994 Orders, as modified by the July 8, 1994 Order, and to initiate an expedited process which will enable the Court to rule definitively on the authority of the Community to

adopt persons into membership, in the past and in the future, and to determine the effect which any uses of that authority, whether under the name of enrollment or adoption, has had on the membership of the Community over time.

It may well be that our conclusion will be that the action of the General Council on January 11, 1994 was a wholly valid exercise of that authority. If so, the protective provisions contained in the March 15, 1994 Order and the June 10, 1994 Order will ensure that those persons at least will not be damaged monetarily by our continuing the injunction in effect.

The critical thing, in our view, is for the Court to have a comprehensive and completely illuminated picture of the entire history of enrollment and adoption into the Community before making our decision.

5. The Smith Appellants' Appeal. As with the Community Appellants' Appeal, so with the Smith Appellants' Appeal: in the context of an appeal from decisions on preliminary relief, we do not think it would be appropriate to modify the status quo established by the July 8, 1994 Order.

The Smith Appellants, in Docket No. 002-94, suggest that Judge Grey Eagle's July 8, 1994 decision to vacate the preliminary injunction with respect to the nine persons should be reversed because, they assert, the nine were not notified that, after the Enrollment Committee acted favorably upon their applications for membership, they were being challenged by the Smith group, and were not give ten days to rebut the challenges before the General

Council acted upon their applications. But as to that argument, the fact is that the General Council approved their applications, so clearly the nine were not prejudiced by any failure to give them notice and rebuttal rights.

The Smith Appellants also argued that Judge Grey Eagle erred when he vacated the preliminary injunction with respect to the nine persons because he made no "determination as to the legitimacy of the General Council" which voted on the applications of the nine. (Smith litigants May 29, 1995 Reply Brief, at 4). This suggestion is of a piece with the Smith Appellants' position throughout these proceedings--that this Court, in the context of motions for preliminary relief, should dissect each vote taken by the General Council of the Community, in the past and in the future, using as a scalpel the volumes of genealogical and other materials submitted by the Smith litigants.

It is our view that such surgery would be altogether inappropriate in the context of preliminary relief, where the particularized inquiry and systemic protections, afforded by a full hearing on the merits, are lacking.

6. Conclusion. It had been the hope of this Court that the dispute underlying this litigation might be resolved and the matter settled. But the Court's own early attempts to facilitate that result came to naught; and succeeding months have produced neither progress in the litigation nor progress toward settlement. Instead, it appears that more and more resources of the Community and its members have been consumed, and the conflict underlying the

litigation has spilled into numerous other forums.

It therefore is our conclusion that this matter must be set on a course for final and speedy resolution within the Court established by the Community.

On June 14, Judge Grey Eagle scheduled a pre-trial conference for June 23, 1995; and today, Judge Grey Eagle has certified this action to be heard by all three of the Judges of the Court, under the provisions of Rule 25 of our Rules of Civil Procedure. Given the need to bring these proceedings to a close, a hearing by the three judges, which eliminates any appeal under our Rule 31, is appropriate. Therefore, at the scheduling conference on June 23, the three Judges of this Court will proceed to establish an orderly, fair, and expeditious schedule for the full resolution of all of the issues, and we thereafter will hear all and decide all of the issues in this matter as a three-judge panel.

ORDER

For the foregoing reasons, it is herewith ORDERED:

1. That the March 15, 1994, June 10, 1994, and July 8, 1994 decisions of this Court in No. 042-94 are affirmed; and

2. That, under Rule 25 of the Rules of Civil Procedure of this Court, all future proceedings in this matter shall be heard by all of the Judges of this Court.

Date: June 16, 1995

Judge John E. Jacobson

Judge Henry M. Buffalo

Judge Robert A. Grey Eagle

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ORDER

For the foregoing reasons, it is herewith ORDERED:

1. That the March 15, 1994, June 10, 1994, and July 8, 1994 decisions of this Court in No. 042-94 are affirmed; and

2. That, under Rule 25 of the Rules of Civil Procedure of this Court, all future proceedings in this matter shall be heard by all of the Judges of this Court.

Date: June 16, 1995

Judge John E. Jacobson

Judge Henry M. Buffalo

Robert Grey Eagle

Judge Robert A. Grey Eagle

IN THE COURT OF APPEALS OF
THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In re: Leonard Louis Prescott,
Appeal from July 1, 1994 Gaming
Commission Final Order

Ct. App. No. 003-94

Leonard Prescott,
Appellant,

vs.

Ct. App. No. 004-95

Shakopee Mdewakanton Sioux
(Dakota) Community Business
Council,
Appellee.

MEMORANDUM OPINION AND ORDER

Summary

These cases are before the Court of Appeals on two issues: whether the trial court judge correctly declined to recuse himself in each case below, and whether the trial court also correctly refused to disqualify the counsel of the Defendants/Appellees in each case below.[1]

Both issues arise from the facts that the three persons who have been appointed by the Shakopee Mdewakanton Sioux (Dakota)

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[1] Ct. App. File No. 003-94 was File No. 041-94, below, and was decided by Judge Buffalo on December 12, 1994. Ct. App. File No. 004-95 was File No. 043-95, below, and was decide by Judge Buffalo on April 5, 1995.

Community ("the Community") to serve as judges of this Court are also attorneys, engaged in the practice of law; from the fact that the persons who serve as counsel for the Defendants/Appellees in these cases also serve as judges for the Courts of other Indian tribal governments; and from the fact that the persons who serve as judges in these two cases may, in other matters before other tribal courts, appear as counsel before the persons who serve here as Defendants/Appellees' counsel.

No allegations of wrongdoing, or improper contact, or improper influence, relating either to the judges of this Court or to the counsel for Defendants/Appellees has been made. Rather, the Plaintiff/Appellant contends that the impartiality of the judge below--and all of the judges on the Court of the Shakopee Mdewakanton Sioux (Dakota) Community--might reasonably be questioned in the matters at bar, simply because, in the Plaintiff/Appellant's words, "...interlocking contacts between the Judges and Community Counsel give rise to a situation where the Judges [sic] impartiality might reasonably be questioned." (Appellant's brief, at 3).

On this basis, the Plaintiff/Appellant contends that Rule 32(b)[2] of the Rules of Civil Procedure of the Court of the Shakopee

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[2] In its entirety, Rule 32 of the Rules of Civil Procedure of the Shakopee Mdewakanton Sioux Community provides:

> Rule 32. Disqualification of Judge.
>
> (a) Any judge of the Court of the Shakopee Mdewakanton Sioux Community shall disqualify himself or herself in any proceeding, or portion of a proceeding, in which, in his or her opinion, his or her impartiality might reasonably be questioned.
>
> (b) A judge of the Court of the Shakopee Mdewakanton Sioux

Community also shall disqualify himself or herself in any proceeding, or portion of a proceeding, in the following circumstances:

(1) Where he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he or she served as a lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he or she has served in governmental employment, and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) Where the judge knows that he or she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) Where the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the knowledge of the judge likely to be a material witness in the proceeding.

(c) A judge should inform himself or herself about his or her personal and fiduciary financial interests, and make a reasonable effort to inform himself or herself about the financial interest of the judge's spouse and minor children residing in the judge's household.

(d) A judge may refer the question of whether to disqualify himself or herself to another judge on the Court. In the case of such referrals, Associate Judges shall refer the questions concerning their disqualification to the Chief Judge for decision; the Chief Judge shall refer questions concerning his or her disqualification to the Senior Associate Judge for decision.

(e) In deciding questions concerning disqualification, in matters being heard by a Three Judge Panel under the provisions of Rule 25 or Rule 31, a Judge may be disqualified from participating in one portion of a mater but not all portions of a matter, if the facts and law, and the Judge's position with respect to them, are substantially

Mdewkanton Sioux Community requires that all of the judges of this Court disqualify themselves. And the Plaintiff/Appellant asserts that the same "interlocking contacts" require that Defendants/Appellees' counsel be disqualified, to "dispel appearances of impartiality as well as to promote and protect public trust in its judicial system...". (Ibid., at 8).

As to the Plaintiff/Appellant's first contention, the trial judge observed that Ordinance No. 02-13-88-001 ("the Court Ordinance"), which created this Court, defines the organization and powers of the Community's judicial arm. He held that the Court Ordinance establishes (and limits) the complement of the Community's judges at three; it defines the manner in which the Court's judges are appointed; and it gives neither the Court nor any other officer of the Community the authority to appoint additional judges, absent a vacancy on the Court due to the death, resignation, or removal of a judge. Therefore, the trial judge, invoking the common law Rule of Necessity, held that, if these two cases are to be heard by this Court, they must be heard by the judges who have been appointed by the Community, interlocking connections or not.

As to the Plaintiff/Appellant's second contention--that counsel for Defendants/Appellees should be disqualified--the trial judge held that the motion raised issues under the Minnesota Rules of Professional Conduct or the Minnesota Canons of Ethics, and that he had no authority to interpret or enforce either body of rules.

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different in different portions of the matter.

He therefore held that, if Plaintiff/Appellant believed that Defendant/ Appellee's counsel had committed an ethical breach, a complaint to that effect should be filed with the Minnesota Lawyers Board of Professional Responsibility. He went on to opine, however, that, it "strains credibility" to assert that Defendants/Appellees' counsel violated any professional rules merely by the fact that they appeared before the Court of the Community, and also served as judges on the courts of other Indian tribal governments where the persons who serve here as judges may appear as counsel. (Opinion of Judge Buffalo, Court File No. 041-94 [Dec. 8. 1994], at 8).

Discussion

This Court takes very seriously any suggestion that its decisions may be regarded by litigants, or members of the Community, or the public generally, as being biased. But in our admittedly subjective view, that suggestion, in the cases at bar, is unfounded. And, perhaps more compellingly, from an objective standpoint it is pointless, because, as the trial judge correctly concluded, if the judges of this Court do not hear the Plaintiff/Appellant's cases, there is no judicial remedy available to the Plaintiff/Appellant within the Community's government.

It is undeniably true that, for historical and other reasons, the size of the bar which practices for Indian tribes in this nation is relatively small, and attorneys who serve tribes may tend to encounter one another more frequently than, perhaps, attorneys

in other areas of practice. It is true that each of the judges of this Court has encountered, and may in the future encounter, in different contexts, the attorneys who serve as counsel for Defendants/Appellants. Neither the judges of this Court nor the attorneys for Defendants/Appellant have attempted to hide this fact. Indeed, the facts were the subject of a formal "Letter of Disclosure", dated May 31, 1994, which appears in the record of this matter.

It also bears noting that this phenomenon, where one or more judges has encountered attorneys and parties in other contexts, is not one-sided, in these two cases. One of the judges of this Court, Judge Jacobson, in the past served as co-counsel, for a different client, with one of the attorneys who represents the Plaintiff/Appellant. And before he was appointed to this Court, Judge Jacobson also represented the Plaintiff himself, in certain matters unrelated to the facts of these cases. At a different level of connection, two of the judges of this Court, including the trial judge in these cases, were appointed to the Court at a time when the Plaintiff was Chairman of the Community.

But no judge of this Court has evinced any personal bias with respect to any party to these cases. None of the judges of the Court have served as counsel to either party concerning these cases, nor are any judges a material witness concerning these cases. And no judge, and no family member of a judge, has any interest in these cases, financial or otherwise. Therefore, there clearly is no requirement that any judge must disqualify himself

under the provisions of Rule 32(b) of the Rules of Civil Procedure of the Court of the Shakopee Mdewakanton Sioux Community.

But the Plaintiff/Appellee asserts that, nonetheless, Rule 32(a) of the Rules, requires each of us to disqualify ourselves, because the impartiality of each of us "might reasonably be questioned".

We do not agree--for the reasons we have just set forth. But even if we did agree, the matter would be moot, because we clearly are the only judges which the Community has, and we have no power to appoint other or substitute judges.

The Court Ordinance is extremely specific, with respect to the number of judges, and the appointment and removal of judges. Section IV.A. of the Court Ordinance provides:

> Appointment and Recall of Judges. There shall be three Judges on the Tribal Court. Except for the initial panel of Judges, who shall be selected pursuant to Section VI, the Judges of the Shakopee Mdewakanton Sioux Tribal Court shall be appointed by the Chairman with the advice and consent of the General Council voting by secret ballot at a meeting or by mail referendum. Balloting shall be supervised by the Court and if a special meeting is held to confirm an appointment, mail ballots shall be available to those members who request them. If a majority of the General Council does not disapprove a nominee within 30 days of written notice of nomination by the Chairman, such nominations shall be deemed to be approved. Once confirmed by the Council, the Judges of the Shakopee Mdewakanton Sioux Tribal Court shall be subject to recall with or without cause only upon the passage of a Resolution of Recall by absolute two-thirds majority of all of the enrolled and eligible voting members of the Shakopee Mdewakanton Sioux Community. Recall votes may only be cast by mail referendum or by secret ballot at a Special Meeting of the General Council.

Section V.D. of the Court Ordinance provides:

> Extraordinary Appointment of Judges. If the Chairman

and the General Council fail to appoint and approve any nomination to fill any vacancy on the Tribal Court within 90 days of the resignation, death, or recall of a Judge or Judges, the remaining Judge or Judges shall have the authority and the duty to appoint a qualified person or persons to fill the vacancy. Appointments made by the Tribal Court on this extraordinary authority shall be effective upon delivery of written notice to the Chairman and the Secretary-Treasurer.

Section VI of the Court Ordinance provides:

> Initial Panel of Judges. The Council hereby approves the following process to select the initial panel of Judges for the Tribal Court:
>
> > A. Nominees: The following persons are hereby appointed to serve as Judges:
> >
> > Henry Buffalo, Tribal Attorney, Fond du Lac Band of Chippewa Indians.
> > Kent P. Tupper, Tribal Attorney, Minnesota Chippewa Indians; Nett Lake Band of Chippewa Indians; Grand Portage Band of Chippewa Indians.
> >
> > B. Qualifications of Judge. All Judges of the Tribal Court shall be Attorneys at Law.
> >
> > C. Judicial Appointment. The persons appointed pursuant to Section VI A shall appoint a third Judges within 30 days of passage of this resolution. That appointment shall be effective upon delivery of written notice to the Secretary-Treasurer.

Finally, Section VII of the Court Ordinance provides:

> Appeals Cases shall be heard by one Judge, under assignment procedures which shall be determined by the Court. Upon the motion of any party, a matter may be certified for appeal to a three Judge panel of the full Court by any Judge of the Court. Motions for appeal shall be filed with the clerk of Court and served upon all parties not less than 15 calendar days after the date of entry of a final order for judgment. If the motion for certification is not granted within 30 days, no further appeal shall be granted.

Nowhere, in any of these provisions, is the slightest suggestion that the Community intended that the judges of the Court

could create additional judgeships, if some or all of the sitting judges recused themselves. This is not to say that the Court does not have inherent authority to appoint special masters, to hear certain matters and to make recommended decisions to the Court. But counsel for Plaintiff/Appellee, when asked about his views on special masters during the oral argument in these cases, indicated that if the authority to decide this controversy, finally and without appeal to the three judges of the Court, could not be vested in a special master, then the Plaintiff/Appellant's objections would not be resolved.

The Plaintiff/Appellant asserts to vest such power actually is possessed by this Court, under the following language of Section II of the Court Ordinance:

> ...The Tribal Court shall have the authority to formulate appropriate equitable and legal remedies to secure the protections of tribal law and the Indian Civil Rights Act for the Shakopee Mdewakanton Sioux Community and other Indians within its jurisdiction.

But this argument confuses remedies which the Court can fashion for a case it hears with the structure of the Court itself. If, in a matter over which this Court has jurisdiction, the Plaintiff establishes that he has been wronged, then indeed the Court Ordinance gives us considerable latitude in fashioning a remedy. But the Community has vested <u>in this Court</u> the duty to decide whether the Plaintiff has been wronged, and by the very specificity of the appointment and removal provisions in the Court ordinance the Community has made it clear that that deciding authority cannot be conveyed away by us.

Hence, the trial court correctly applied the Rule of Necessity--an ancient rule which has been adopted by courts of virtually every jurisdiction in the United States. See e.g., United States v. Will, 499 U.S. 200 (1980); and State ex rel. Gardner v. Holm, 241 Minn. 125, 62 N.W.2d 52 (Minn. 1954). The rule fundamentally is: it is error for a judge to disqualify himself or herself--even if he or she might otherwise do so--if there is no other judge to decide a case.

As to the decision concerning Plaintiff/Appellant's motion to disqualify Defendant/Appellee's counsel, we think the trial judge's decision was correct, albeit we believe that he read the Court's powers too narrowly. The trial judge held that any contention with respect to the propriety of the actions of Defendants/Appellees' counsel was a matter only for the Minnesota Lawyer's Professional Responsibility Board or the Minnesota Supreme Court. But this Court, under Rule 3 of its Rules of Civil Procedure, has established that membership before the bar of the Community is a prerequisite to practice before us. We believe that Plaintiff/Appellant is correct when he asserts that it is implicit, under that Rule, that we can establish and maintain standards of professional conduct for counsel practicing before us.

That having been said, however, we think that the circumstances at bar--where the offense alleged by Plaintiff/Appellant is simply being party to the same set of "interlocking relationships" which the Defendant/Appellees' counsel have objected to in the context of the judges of the Court; where

there has been no suggestion of any personal, professional, financial, or ethical misconduct on the part of counsel--we think the trial court clearly was correct in denying the motion to disqualify.

Order

For the foregoing reasons, the Orders of the trial court denying the Plaintiff's motions for recusal and for disqualification of Defendants' counsel, in File No. 041-94 and File No. 043-94 are AFFIRMED.

November 7, 1995

John E. Jacobson
Judge

Henry M. Buffalo, Jr.
Judge

Robert Grey Eagle
Judge

there has been no suggestion of any personal, professional, financial, or ethical misconduct on the part of counsel--we think the trial court clearly was correct in denying the motion to disqualify.

Order

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November 7, 1995

John E. Jacobson
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Robert Grey Eagle
Judge

COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT **STATE OF MINNESOTA**

Clifford S. Crooks, Sr., Appellant,	)	
vs.	)	Case No. APP. 007-95
Shakopee Mdewakanton Sioux (Dakota) Community, Respondent.	)	

OPINION AND ORDER

Procedural History

This is an appeal from a July 17, 1995 decision by Judge Grey Eagle, dismissing the Plaintiff's Complaint.

In his Complaint, the Plaintiff alleged that he is "fully qualified as a member" of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"); he alleged that he has followed the procedures mandated by the Community's Ordinance 6-08-93-001 ("the 1993 Enrollment Ordinance"); and he alleged that the Community's Enrollment Officer and Enrollment Committee had not processed his application in accordance with the requirements of the 1993 Enrollment Ordinance. He sought an Order from this Court declaring that he is a member of the Community, or requiring the Community's Enrollment Committee to act on his application; and he sought damages, in the form of retroactive "per capita" payments, for the

period during which he contended that the Enrollment Committee improperly had failed to process his application.

The Community moved to dismiss, on the grounds that the Plaintiff did not state a claim upon which relief can be granted, and on the grounds that the Plaintiff had failed to exhaust his administrative remedies. The Community asserted that the applicable law was Community Ordinance No. 12-28-94-001 ("the 1994 Enrollment Ordinance"); that the Plaintiff's application was being processed by the Enrollment Committee; and that the Court had no authority either to declare that the Plaintiff was a member of the Community or to require the General Council of the Community to make him a member of the Community.

Judge Grey Eagle granted the Community's motion to dismiss, Crooks v. Shakopee Mdewakanton Sioux (Dakota) Community, No. 054-95 (decided July 17, 1995), and this appeal followed. Apparently, after the Community's motion to dismiss was granted, the Enrollment Committee voted to recommend that Mr. Crooks' application be approved. The record does not reflect what if any action was taken thereafter by the Community.

Discussion

This Court's role in the enrollment processes of the Community is a limited one. We have repeatedly held that applicants for enrollment cannot use this forum as a mechanism for circumventing the Community's procedures. Welch v. Shakopee Mdewakanton Sioux (Dakota) Community, No. 023-92 (decided December 23, 1994). Absent

an affirmative vote of the General Council of the Community, no person can simply declare himself or herself to be a member of the Community, regardless of his or her lineage or personal history. And absent a patent violation of the Indian Civil Rights Act, 25 U.S.C. §1302 (1994), the General Council of the Community is the entity which decides whether a person who is seeking membership in the Community will become a member of the Community. Therefore, the Plaintiff's contention, in his Complaint, that he is "fully qualified as a member" of the Community, is clearly incorrect, since, by the Plaintiff's own admission, he had not been the subject of an affirmative vote of the Community's General Council (at least at the time this matter was argued on appeal).

Likewise, this Court's authority to award the sort of relief which the Plaintiff seeks is very limited. In cases where persons have been "voted in" as members, and have alleged that their admission has been improperly delayed, the award of retroactive per capita payments by this Court has been a rare and extraordinary remedy. Ross v. Shakopee Mdewakanton Sioux Community, No. 013-91 (decided June 3, 1993). (The Community has contended that any authority which this Court had to make such an award was withdrawn by an amendment to the Community's Business Proceeds Distribution Ordinance which were passed on October 27, 1993; Judge Jacobson recently has held that, in fact, that purported withdrawal was ineffective, because it was adopted by a vote which was insufficient, under the terms of the Ordinance which created this Court, Campbell v. Shakopee Mdewakanton Sioux (Dakota) Community,

No. 033-93 (decided December 5, 1995), appeal filed December 20, 1995; and Barrientez v. Shakopee Mdewakanton Sioux (Dakota) Community, No. 033-93 (decided December 5, 1995), appeal filed December 20, 1995; and that decision has been appealed to this Court. Because of our resolution of this matter on other grounds, we are not obliged here to opine on that question.)

Given the foregoing, we likely would affirm Judge Grey Eagle's dismissal of the Plaintiff's Complaint, save for one fact: we must take judicial notice that the text of the 1994 Enrollment Ordinance which was adopted by the Community's General Council differed, in small but nonetheless substantive and significant ways, from the text of the 1994 Enrollment Ordinance which was presented to the Area Director of the Minneapolis Area Office, Bureau of Indian Affairs, for approval, under the provisions of Article V, Section 2 of the Community's Constitution. See generally, the discussion of the differences in text in Amundsen v. Shakopee Mdewakanton Sioux (Dakota) Community Enrollment Committee, No. 049-94 (decided January 17, 1996).

Judge Grey Eagle's decision dismissing this matter was based on his belief that the 1994 Enrollment Ordinance was the law of the Community; but, given the textual differences just described, we are of the view that, in fact, the 1993 Enrollment Ordinance is the law which presently governs enrollment decisions of the Community.

It may well be that no difference in result may be warranted in this case; but we are of the view that the matter should be remanded to Judge Grey Eagle for that determination.

Order

For the foregoing reasons, the decision of Judge Grey Eagle dismissing this matter is reversed, and the matter is remanded to him for a determination as to whether the requirements of the 1993 Enrollment Ordinance would dictate a different result in this case.

January 24, 1996

John E. Jacobson,
Judge

Henry M. Buffalo, Jr.
Judge

Robert Grey Eagle,
Judge

Order

For the foregoing reasons, the decision of Judge Grey Eagle dismissing this matter is reversed, and the matter is remanded to him for a determination as to whether the requirements of the 1993 Enrollment Ordinance would dictate a different result in this case.

January 24, 1996

John E. Jacobson,
Judge

Henry M. Buffalo, Jr.
Judge

Robert Grey Eagle,
Judge

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COURT OF APPEALS OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Gary D. Stopp, et al., Appellants, vs. Little Six, Inc., et al., Appellees.	)	No. App. 006-95

MEMORANDUM OPINION AND ORDER

Summary

This is an action by four persons who seek to enforce the terms of written employment agreements into which they allege they entered with Appellee, Little Six, Inc. ("LSI"). The trial court dismissed the action, on the grounds that the Defendants/Appellees are immune from suit. We affirm, on the grounds that the agreements, upon which the Plaintiffs/Appellants rely, on their face explicitly retain the Defendants' immunity from unconsented suit.

Summary of Procedural History

The Plaintiffs/Appellants, in their Complaint, alleged that they were employees of LSI, and that LSI, in 1994, drafted the employment agreements upon which the Plaintiffs now seek to sue, to allay the Plaintiffs' concerns about their job security. The Plaintiffs further allege that LSI later violated the terms of the

agreements, to the Plaintiffs' detriment.

Each of the employment agreements at issue contains the following provisions:

> **8. Governing Law; Forum; Sovereign Immunity**
>
> **8.1 Governing Law.** This Agreement shall be governed and construed in accordance with the laws of the State of Minnesota.
>
> **8.2 Forum.** Any action to enforce this Agreement shall be brought in the Judicial Court of the Shakopee Mdewakanton Dakota Community. LSI and Employee hereby expressly consent to the jurisdiction of such Court.
>
> **8.3 Sovereign Immunity.** Nothing in this Agreement shall be construed to be a waiver of LSI's sovereign immunity.

Contemporaneously with the filing of their Complaint, the Plaintiffs/Appellants served interrogatories, requests for admission, requests for production, and notices of deposition, upon the Defendants/Appellees. The Defendants/Appellees moved to dismiss, under Rules 12(b)(1) and 12(b)(6) of this Courts Rules of Civil Procedure, and did not respond to the various discovery requests.

The trial court granted the Defendant/Appellees' motion, based upon its reading of section 8.3 of the employment agreements, quoted above.

Discussion

Because the trial court dismissed this matter based on its interpretation of the law, we review de novo.

All parties concede that the Defendants are cloaked with immunity from unconsented suit, absent an effective waiver. Hove v. Stade, No. 001-88 (SMSC Court, decided July 15, 1988). But the

Plaintiffs/Appellants argue that the trial court erred when it dismissed, because, they contend, the terms of the employment agreements at issue are not clear on their face, and therefore, under the "well-pleaded complaint" rule, they should have been entitled to discovery on the facts relevant to the jurisdictional issues.

In support of this contention, Plaintiffs/Appellants correctly note that no "magic words" are required to work a waiver of sovereign immunity from unconsented suit (citing Rosebud Sioux Tribe v. Valu-U Construction Co. of South Dakota, Inc., 50 F.3d 560 [8th Cir. 1995]). They note that an agreement merely "to submit the issues to federal court for determination" has been held to be a waiver of immunity that permits federal adjudication of a tribally executed contract (citing United States v. State of Oregon, 657 F.2d 1009 [9th Cir. 1981]). They argue that to give any meaning to section 8.2 of the employment agreements, that section must be interpreted to mean that the parties contemplated that LSI could be sued in the Court of the Shakopee Mdewakanton Sioux (Dakota) Community. Otherwise, they assert, section 8.2 of the agreements would mean that only LSI could sue to enforce the agreements, which "strains all logic and common sense, since clearly LSI need not consent to jurisdiction to bring an action in tribal court. (Appellants brief, at 11.)

In short, Plaintiffs/Appellants urge us to hold that, in section 8.2 of the agreements, LSI waived its immunity for actions to enforce the agreements before this Court, and that, in section

8.3, LSI retained its immunity from suit before all other courts.

In our view, it is the Plaintiffs/Appellants' interpretation of the agreements that strains logic. While it is true that no "magic language" is necessary for a waiver of immunity to be effective, still any waiver must be clear and unequivocal. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Here, it is the contrary which is clear: LSI expressly did not agree to be sued in this or any other court.

None of the cases cited by the Plaintiffs/Appellants is apposite, because none of those cases--not Valu-U Construction Co., nor State of Oregon, nor any case of which this Court is aware--has found a waiver of sovereign immunity in a contract containing language of the sort that appears in section 8.3 of the Plaintiffs/Appellants' agreements.

Nor does giving effect to the clear meaning of section 8.3 require us to ignore the provisions of sections 8.1 or 8.2. Certainly nothing in "the laws of the State of Minnesota", incorporated by section 8.1, speaks to the immunities of LSI. And section 8.2 can be given independent and consistent meaning by interpreting the section as eliminating a question that might well otherwise have existed, if LSI were to sue Plaintiffs/Appellants: whether a court other than this one would be the appropriate forum for that litigation.

Under these circumstances, it is our view that no construction of the Plaintiffs/Appellants' Complaint can make it well-pleaded, and therefore the trial court's decision to dismiss, rather than to

permit discovery to proceed, was correct.

January 29, 1996

John E. Jacobson,
Judge

Henry M. Buffalo, Jr.,
Judge

Robert Grey Eagle,
Judge

permit discovery to proceed, was correct.

January 29, 1996

John E. Jacobson,
Judge

Henry M. Buffalo, Jr.,
Judge

Robert Grey Eagle
Robert Grey Eagle,
Judge

IN THE COURT OF APPEALS OF
THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

DOCKET NO. CT. APP. 008-95

ANITA GAIL BARRIENTEZ &
SCOTT CLARENCE CAMPBELL

RESPONDENTS,

V.

SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY,

APPELLANT.

MEMORANDUM OPINION AND ORDER

SUMMARY

This matter is before the Court of Appeals on appeal from the Trial Court's denial of Appellant's Motion to Dismiss for lack of subject matter jurisdiction. The Respondents asserted a claim for retroactive per capita distributions at the Trial Court level to which the Appellants responded by moving to dismiss the claim for lack of subject matter jurisdiction and in support of their argument the Appellants claim the 1993 Business Proceeds Distribution Ordinance Amendments (hereinafter referred to as BPDO) rescinded jurisdiction of the Court to grant retroactive relief. The Trial Court determined Ordinance No. 02-13-88-01 which has come to be known as "the Court Ordinance" requires, in order to diminish the scope of the Court's jurisdiction, as in the issue before the Court, an absolute three-fourths majority of all enrolled and eligible voting members of

the Community is required. The Appellants cannot then rely on passage of a subsequent enactment such as the BPDO as a diminishment of the Court's scope of jurisdiction without such an enactment having first satisfied the "supermajority voting requirements". The argument on appeal therefore is not so much whether the Respondents are entitled to retroactive per capita distributions. The Trial Court will have to decide that question as it deems proper. The question is whether the BPDO effectively rescinded the Court's scope of jurisdiction as authorized by the Court Ordinance. The Trial Court concluded it did not. The Court of Appeals panel affirms.

DISCUSSION

The Trial Court in this matter concluded Ordinance No. 02-13-88-01 ("the Court Ordinance")".. gave this Court a very broad and serious mandate to protect the rights of the members of the Community under the Community's laws. ... and ... [i]f the power to grant remedies for wrongs is withdrawn, then the most fundamental principles of justice, which the Community sought to protect with the Court Ordinance is endangered. And if, by a simple majority vote, the Court can be deprived of its jurisdiction to hear claims of retroactive money damages, then a similar vote presumably could deprive Community members of the right to seek injunctions in illegal actions" .

The Trial Court held that it was not the Community's intention that the Court's jurisdiction could be diminished by a simple majority vote acting directly on the Court Ordinance itself or by subsequent separate enactment operating to diminish the scope of jurisdiction granted by the Court Ordinance.

The Community when first establishing their Tribal Court required a three-fourths vote as set forth in the Court Ordinance in order to diminish the scope of the court's jurisdiction.

The reasoning being it is both important and necessary to the Community in having a Court with adequate and appropriate jurisdiction, and that jurisdiction being fundamental to the structure of the Community's government and in addition it being essential for this Court to retain the full range of powers to award relief to Community members who may have claims for protections of tribal law and the Indian Civil Rights Act for the Shakopee Mdewakanton Sioux Community.

It is not every matter requiring a supermajority vote but only those matters which fall under the Prescott v. Shakopee Mdewakanton Sioux (Dakota) Community Business Council, No. 040-94 (Decided July 31, 1995) analysis which "is limited to matters like the Bylaws--matters which are fundamental to the structure of the Community's government." In the matter before the Court of Appeals now is the jurisdiction of the Court as originally provided in the Court Ordinance and how that jurisdiction may be amended or diminished. The Court is an institution of Community government and therefore fundamental to the structure of the Community's government. The Court and the Court's jurisdiction are virtually synonymous. The Community enacted, the Court Ordinance, Ordinance No. 02-

13-88-01 which under Section II provides for the range and scope of the Court's jurisdiction as follows:

> "The Shakopee Mdewakanton Sioux Tribal Court shall have original and exclusive jurisdiction to hear and decide all controversies arising out of the Shakopee Mdewakanton Sioux Community Constitution, its By-laws, Ordinances, Resolutions, other actions of the General Council, Business Council or its Officers or the Committees of the Community pertaining to: 1- membership; 2-the eligibility of persons to vote in the Community or Community elections; 3-the procedures employed by the General Council, the Business Council, the Committees of the Community or the Officers of the Community in the performance of their duty. The Tribal Court shall have jurisdiction to hear and decide all controversies arising out of actual or alleged violations of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, et seq.. The Tribal Court shall have the authority to formulate appropriate equitable and legal remedies to secure the protections of tribal law and the Indian Civil Rights Act for the Shakopee Mdewakanton Sioux Community and other Indians within its jurisdiction..."

The Community further addressed how the range and scope of the Court's jurisdiction could be amended or diminished by adopting the following language:

> [e]xcept as hereinafter provided this Ordinance may only be rescinded or amended by an absolute three-fourths majority of all of the enrolled and eligible voting members of the [community]. Amendments which add to but do not diminish the scope of jurisdiction of the Tribal Court may be passed by a majority of the members of the General Council; other amendments may be similarly passed by a majority of the General Council, but only after such amendments have first unanimously approved by the Chairman and a majority of the sitting Judges of the[Court].

We view the Court Ordinance, Ordinance No. 02-13-88-01 in requiring a "super majority vote" to diminish the Court's jurisdiction as entirely appropriate since the Court

and the Court's jurisdiction is fundamental to the structure of Community government. It lends to stability to have added protection in an area as significant as the Courts jurisdiction. The Court's jurisdiction should not subjected to whimsical winds of change that could easily derive from simple majority votes on diminishing the Court's jurisdiction. The so called super majority vote lends to stability.

We find it important to discuss briefly the Appellant's concern that the Community will have to overcome insurmountable supermajority voting requirements in even adopting mundane provisions of law. We cannot speculate at this point what the outcome will be over present hypotheticals except to say a super majority vote is required only on those matters which are fundamental to the structure of Community government. The underlying thought here is analogous to the discussions surrounding "separation of powers" doctrines and "checks and balances" in how the various entities and branches of government relate to one another. Further it is not so much the actual case at hand and whether the Respondents are even entitled to retroactive payments but rather the precedential value placed on legislation that diminishes the Courts jurisdiction. While it is important that the legislative component of government not infringe on the judicial branch it is equally important in the vice versa. As to future legislation regarding diminishment of Court jurisdiction, the Court will apply the Prescott analysis, as well as necessarily now that the question has been posed, doctrinal arguments on balancing the roles of Community government and what that means as to legislating within the parameters of law, and adjudicating matters within the law, and perhaps even to the extent of discussing

enforcement of the law. What is clear to the Court is that the case we now consider on appeal is subject to the Prescott analysis.

The super majority voting requirement is neither insurmountable nor an impossibility but rather an added protection and found in other areas of the government proceedings such as but not limited to certain constitutional amendment petition signing requirements, overriding presidential vetoes, number of votes required in impeachment of officials proceedings of which we view the area of the Court's jurisdictional base as important and should be afforded the added protection as was originally intended by the Community in first establishing the Court. Otherwise the Court would be a Court in name only without jurisdictional authority to fully adjudicate issues as was originally intended with the passage of the Court Ordinance, parties could argue futility and seek to find an off reservation forum to adjudicate their matters. The inherent disadvantage in off-reservation forums adjudicating Community matters is their having only rudimentary understandings of the Community's unique long-standing historical and legal relationship with the federal government as sovereigns on a government to government basis, the applicability and interpretation of Community enacted laws, and other attributes of self-governance. An adequate and appropriate jurisdictional base is fundamental to the structure of Community government and as such worthy of the added protection of the three-fourths vote as espoused by the Trial Court in this matter. We therefore affirm the Trial Court decision in this regard.

October 14, 1996

Henry M. Buffalo, Jr.
Judge

Robert Grey Eagle
Judge

John E. Jacobson
Judge

IN THE COURT OF APPEALS OF
THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Aubrey Welch, a minor, by
Allene Ross, her mother and
natural guardian, and
Alison Welch, a minor, by
Allene Ross, her mother
and natural guardian,

Appellants,

vs. Ct. App. No. 009-96

Shakopee Mdewakanton Sioux
(Dakota) Community,

Respondent

MEMORANDUM OPINION AND ORDER

This is an appeal by Aubrey and Alison Welch, minors, by their mother Allene Ross, from an Order by Judge Buffalo dismissing their Complaint. Their Complaint alleges that both Appellants are enrolled members of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"), and that they presently are being denied the benefits to which minor members of the Community are entitled.

On February 7, 1996, Judge Buffalo granted the Community's motion to dismiss for failure to state a claim upon which relief can be granted, under Rule 12(b)(6) of our Rules of Civil Procedure, stating that "the entire matter turns on the question of 'automatic' enrollment". (Opinion of the Trial Court, at 3).

This appeal is from that Order. The Appellants argue strenuously that the Trial Court read their Complaint erroneously--that the Complaint nowhere speaks of "automatic" enrollment. They also argue that, although the Trial Court acknowledged consideration of a motion to dismiss under Rule 12(b)(6) requires the Court to assume all facts alleged in the Complaint to be true and view the allegations in the light most favorable to the Plaintiffs, nonetheless the Trial Court actually did not follow that procedure.

Because the questions raised by the appeal are strictly issues of law, we will review the Trial Court's Order de novo.

On the face of things, the Appellants' arguments have some force. Their Complaint in fact does not use the phrase "automatic enrollment". The first paragraph of the Complaint simply states the conclusion that "Aubrey and Alison Welch are each an Enrolled member of the [Community] pursuant to Article II, Section 1(b) of the [Constitution of the Community]," and other paragraphs of the Complaint assert that the Community established trusts for the Appellants, and that for a period of time each trust received distributions of Community resources. The Complaint also asserts that those distributions have been stopped, and that the Community no longer gives the Appellants access to the rights which it affords its minor members.

So, if one did not scrutinize specifics, there would be weight behind the Appellants' assertion, on appeal, that what their Complaint truly is about is a disenrollment that does not comport

with the procedures which the Community has established for such matters (though, in fact, the Complaint does not expressly make that claim). One could agree that, given the benefit of the rules that are applicable to motions under Rule 12(b)(6), the Appellants should be given a chance to conduct discovery on their claims.

But then, when one looks more closely at the Complaint, other things appear. The Complaint does not simply say "Aubrey and Alison Welch are enrolled minor members of the Community, and are improperly being denied the benefits of that membership". It asserts the basis for the alleged membership: "Plaintiffs are enrolled minor members of the Community pursuant to Section 1(b) of the Community Constitution". (Complaint, ¶12). It asserts that "[t]he General Council is authorized to pass ordinances but ordinances may not conflict with Constitutional provisions". (Id., ¶13.) It asserts that both Aubrey and Alison Welch are "identified as minor children who are members of the Community within the Business Proceeds Distribution Ordinance No. 12-29-88-002 Roll of Minors" (Id, ¶17), and it attaches a copy of that Ordinance to the Complaint as Exhibit B. It asserts that both Aubrey and Alison Welch are recognized as "eligible minor members" in trust agreements executed in 1983 and 1985, (Id., ¶19), which agreements also are attached to the Complaint.

But, with these specifics stated, nowhere does the Complaint allege that the government of the Community has taken the necessary formal action, under any Enrollment Ordinance or Adoption Ordinance, to make the Plaintiffs members of the Community. The

list of minors appended to the Business Proceeds Distribution Ordinance does not purport to confer membership. Neither do the two trust instruments. The former simply is a list of minors who, in 1988, were to receive business proceeds from the Community; and although the trusts do say that they were established for "eligible minor members" of the Community, they do not confer such membership or identify formal actions of the Community government which did confer such membership.

Under these circumstances, it was not unreasonable or improper for the Trial Court to conclude that the Complaint alleges that the Plaintiffs' claim of membership arises outside the Community's Enrollment and Adoption Ordinances. Whether such a claim is termed one for "automatic membership" or not, it cannot survive a 12(b)(6) motion in this Court. Cermak v. Shakopee Mdewakanton Sioux (Dakota) Community, No. 039-94 (decided April 11, 1995). The conclusory allegations that the Plaintiffs/Appellants are "enrolled members" do not, in the context of the remainder of their Complaint, suffice to save their Complaint. See e.g., Fernandez-Montes v. Allied Pilots Association, 987 F.2d 278, at 284 (5th Cir. 1993).

If the Plaintiffs/Appellants contend that some formal action of the Community, under an Enrollment Ordinance or an Adoption Ordinance, in fact conferred membership in the Community upon them, they are free to file a Complaint which alleges that. But absent the ability to make such a claim, this Court has no role to play.

Order

For the foregoing reasons, the Order of the trial court granting the Defendant/Respondent's motion to dismiss, without prejudice, is AFFIRMED.

October 14, 1996

John E. Jacobson
Judge

Henry M. Buffalo, Jr.
Judge

Robert Grey Eagle
Judge

Order

For the foregoing reasons, the Order of the trial court granting the Defendant/Respondent's motion to dismiss, without prejudice, is AFFIRMED.

October 14, 1996

John E. Jacobson
Judge

Henry M. Buffalo, Jr.
Judge

Robert Grey Eagle
Judge

IN THE COURT OF APPEALS OF
THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

DOCKET NO. CT. APP. 012-96 & CT. APP. 013-96

LITTLE SIX, INC. A CORPORATION CHARTERED PURSUANT TO THE LAWS OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, MEMBERS OF ITS BOARD OF DIRECTORS, ALLENE ROSS, RON WELCH, MELVIN CAMPBELL, JAMES ST. PIERRE, AND THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, SOLE SHAREHOLDER OF LITTLE SIX, INC.,

RESPONDENTS,

VS.

LEONARD PRESCOTT, AND F. WILLIAM JOHNSON, INDIVIDUALLY AND AS CURRENT AND FORMER OFFICERS AND/OR DIRECTORS OF LITTLE SIX, INC.

APPELLANTS.

MEMORANDUM OPINION AND ORDER

This action was instituted by Little Six, Inc. (LSI), an arm of the Shakopee Mdewakanton Sioux Community[1] against William Johnson and Leonard Prescott. Between 1991 and June of 1994, Mr. Johnson served in various capacities for LSI, including president, chief executive officer and chief operating officer. Leonard Prescott is an enrolled member of the Shakopee Mdewakanton Sioux Community and is a resident of the Reservation. Prescott has served as

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[1] See, Culver Security Systems v. Kraus Anderson, Civ. No. 26-92 (Court of the Shakopee Mdewakanton County, June 14, 1994)

Chairman of the Board and Chief Executive Officer of Little Six, Inc.. On June 8, 1994, Johnson resigned from his position with LSI, and except for a single visit later in June of 1994, has not returned to the Reservation. Johnson resides in Edina, Minnesota and owns no real property located on the Reservation and has had no business contracts with the Reservation since 1994.[2]

On October 21, 1994, LSI filed a civil Complaint against Johnson and Prescott, alleging various torts, largely related to an alleged improper diversion of LSI funds. The allegations relate to the point in time when Johnson was employed by the Tribe and was present on the Reservation. Johnson was served by United States Mail at his home in Edina on October 21, 1994. In his Answer, Johnson, appearing specially, challenged the Court's subject matter and personal jurisdiction. Although Johnson engaged in discovery, he did so only with the express understanding that by doing so was not waiving his jurisdictional challenges.

The trial court held that it possessed both personal jurisdiction over Prescott and Johnson, and subject matter jurisdiction over the broad range of claims raised in the Community's Complaint. The trial court's conclusion with respect to subject matter jurisdiction was based on Ordinance No. 11-14-95-003. On appeal, Johnson and Prescott challenge this holding, asserting the Ordinance No. 11-14-95-003 cannot be applied retroactively. We disagree: for the reasons stated in the trial court's opinion, we are of the view that there is no bar, arising from the Indian Civil Rights Act, 25 U.S.C. §1302 (1994) or any other source, to the retroactive application of Ordinance No. 11-14-95-003, and we conclude that it does, indeed, give the trial court subject

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[2]Johnson is a member of the Turtle Mountain Band of Chippewa Indians but that fact plays no part of our decision today.

matter jurisdiction. In addition, we conclude that the terms of the Shakopee Mdewakanton Sioux (Dakota) Community Real Estate Ordinance No. 03-27-90-003 (the Real Estate Ordinance) independently gave the trial court subject matter jurisdiction over this matter in 1990.

The trial court also held that it had personal jurisdiction over Johnson, but it did note extensively discuss this issue. On appeal, Johnson strenuously argues that, in fact, we have no personal jurisdiction over him, because (i) he is not a member of the Community, (ii) he left the Reservation in 1994, (iii) he was served with process off the Reservation, and (iv) he has never returned to the Reservation. This issue, we think, deserves considerable discussion.

Shakopee Mdewakanton Sioux Community Ordinance 02-13-88-01, passed in 1988, indicates that the Court has personal jurisdiction over "all Community members and persons enrolled in a federally recognized Indian tribe who reside, or may be present on, the lands held in trust by the United States for the Shakopee Mdewakanton Sioux Community and shall be subject to the jurisdiction of the Shakopee Mdewakanton Sioux Tribal Court". In 1990 the Community passed the Real Estate Ordinance which granted the Community Court the authority to exercise personal jurisdiction "to the fullest extent permitted by law". See, Section 10.01. In 1995 the Community passed Ordinance 11-14-95-003 which provides that the Tribal Court has personal jurisdiction over "all members whose actions involve or effect the Shakopee Mdewakanton Sioux (Dakota) Community or its members, or where the person in questions enters into consensual relationships with the community or its members through commercial dealings, contracts, leases, or other arrangements.

Both parties have argued that this case either fits or does not fit into the analysis of the Supreme Court in Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245 (1981). In that

case the issue was whether the Crow Tribe of Indians had the authority to regulate non-Indian fishing and hunting on non-Indian-owned fee property located within the Crow Reservation. Id. 1249. The Montana case is now well known for its formulation of tribal regulatory authority over non-Indian conduct on non-Indian-owned fee property located within the Reservation. The Court held that --

> to be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on the Reservation even on non-Indian fee lands. A Tribe may regulate, through taxation, licensing, or other means the activities of non-Members who enter into consensual relationships with the Tribe or its members, through commercial dealings, contracts, leases, or other arrangements... A Tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its Reservation when that conduct threatens or has some direct effect on the political integrity the economic security or the health or welfare of the Tribe.

Id. 1258 (citation omitted).

Accordingly, the "Montana exception" to the bar against Tribal civil regulatory authority over non-Indians on a Reservation includes instances wherein there is a "consensual relationship" between the non-Indian and a tribal entity or where a non-Indian's conduct threatens the political integrity, economic security or health or welfare of the tribe. The Appellant contends that the Montana analysis supports a finding of no personal jurisdiction because it appears to require a "current consensual relationship" with the particular tribe.[3] The Community, on the other hand,

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[3] See p. 8, *infra*, for a discussion of the "current consensual relationship" argument.

submits that Montana plainly supports an exercise of personal jurisdiction over Johnson because the current situation fits within the first Montana exception, in that there was a consensual employment relationship between Johnson and LSI which gave rise to this Court.

Our view of Montana, Brendale[4] and Borland,[5] is that they do not address the question presented in this case. We are dealing here with civil adjudicatory jurisdiction over a non-member Indian, whose activities, beyond dispute, occurred on the Reservation. We are not dealing with a question of civil regulatory authority over non-Indian residents and property owners who are located on a Reservation. Here, we are concerned with the Court's authority to exert personal jurisdiction over a non-resident, non-member Indian whose conduct has given rise to a Tribal Court cause of action. Even were Montana, Brendale and Borland imported to this unique fact situation, those cases would only provide a resolution of whether the Court has subject matter jurisdiction over the Reservation based activity.

Similarly, the parties' arguments which are based on the comity/exhaustion of remedies cases, including Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987); National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985) and their progeny, do not advance the analysis of this Court's personal jurisdiction over non-member non-residents. The National Farmers and Iowa Mutual cases stand, primarily, for the proposition that --

> Tribal authority over the activities of non-Indians on Reservation lands is an important part of tribal sovereignty...Civil jurisdiction over such activities presumptively lies in the Tribal Courts unless affirmatively limited by a specific provision or federal statutes.

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[4]Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989).

[5]South Dakota v. Bourland, 508 U.S. 679 (1993).

480 U.S. at 18 (citations omitted)

The Appellant contends that Iowa Mutual's presumption is rebutted because it is limited by the Montana "consensual relationship" requirement which, in the view of the appellant, requires "current contacts" with the Reservation. The Community, on the other hand, submits that the Court has jurisdiction over the Appellant because this case relates to Reservation activities, and the Court's jurisdiction over such activities has not been limited by any treaty provision or federal statute. It is our view that, again, both parties miss the point. The rule of law which flows from National Farmers, and subsequently from Iowa Mutual, relative to Tribal Court jurisdiction relates to civil subject matter jurisdiction over non-Indians. As the Court notes in National Farmers:

> thus, we conclude that the answer to the question of whether a Tribal Court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed... Rather, the existence and extent of a Tribal Court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, executive branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions...We believe that examination should be conducted in the first instance in the Tribal Court itself.

National Farmers, 471 U.S. at 855-56.

Again, in this case the issue is not whether the activities occurred on Reservation, as they clearly did, or whether the Court would have subject matter jurisdiction over an on-Reservation

dispute between a tribal entity, such as LSI, and a non-member Indian employee, as these cases, as well as the Montana line of cases, clearly establish that it would. The question is whether the Tribal Court may reach beyond the confines of the Shakopee Reservation to secure service of process on a non-Indian non-resident calling him or her to Tribal Court to account for alleged tortious conduct occurring on the Reservation. Neither the Montana line of cases, nor the National Farmers line of cases answer this question and the arguments of counsel on these two lines of cases really are irrelevant to the Court's final decision.[6]

Likewise, we find A-1 Contractors v. Strate, 76 F.3d 930 (8th Cir. 1996) and the Appellants' arguments based thereon unpersuasive on the issue of personal jurisdiction. At most, and based on what we find to be flawed analysis, the Eighth Circuit in A-1 Contractors determined that the Fort Berthold District Court lacked subject matter jurisdiction over a tort claim arising out of an automobile accident between two non-Indians which occurred on a state highway traversing the Fort Berthold Reservation. The Court determined that the Fort Berthold District Court would lack subject matter jurisdiction unless the Tribe could establish that one of the two Montana exceptions applied:

> In our view, the Tribal Court in this case would not have subject matter jurisdiction under Montana unless the appellees can establish the existence of a Tribal interest under either of the two [Montana] exceptions.

76 F.3d at 935.

The Court performed a "Montana analysis" and determined that an accident between two

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[6] This is not to say, however, that these cases are not relevant as a backdrop for determining what personal jurisdiction reach a tribal court should have. See p. 7, *infra*.

non-Indians occurring on a state Highway which traverses the Fort Berthold Indian Reservation did not threaten the political, economic, or health and welfare interests of the Tribe, and neither did it represent a consensual relationship between the Tribe and those non-Indian members either of which would have given rise to trial subject matter jurisdiction under Montana:

> Because we have concluded that no tribal interest as defined in Montana exist in this case, we conclude that the Tribe does not retain the inherent sovereign power to exercise subject matter jurisdiction over this dispute through its Tribal Court.

76 F.3d at 941.

In short, A-1 Contractors represents the Eighth Circuit's rejection of a purely territorial definition of Tribal Court subject matter jurisdiction. This subject matter jurisdiction analysis does not advance the personal jurisdiction question here at issue.[7] Moreover, even if A-1 Contractors were offered as a challenge to this Court's subject matter jurisdiction over the Defendant Johnson, it is quite plain from the facts of this case that the Court would possess subject matter jurisdiction under the Eighth Circuit analysis. Hardly a "simple personal injury tort claim arising from an automobile accident" between two non-Indians on a state highway, this case involves a claim for tort damages arising directly out of a consensual employment relationship between an arm of the Government of the Shakopee Community and one of its officers, involving conduct which admittedly occurred on the Reservation. Accordingly, there not only is a plain "consensual relationship" basis for subject matter jurisdiction in this case,

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[7] The Eighth Circuit ruled only on subject matter jurisdiction despite the fact that the Defendants in the Tribal Court action entered a special appearance challenging both the subject matter and personal jurisdiction of the Court. 76 F.3d at 933. The Fort Berthold District Court determined it has subject matter and personal jurisdiction and the Northern Plains Intertribal Court of Appeals affirmed. Id.

there may also be a basis under the first Montana requirement of implicating the economic security of the tribe, inasmuch as the complaint alleges a diversion of tribal funds. However, this form of an analysis is merely an interesting discussion, as we conclude that A-1 Contractors does not, as the Appellant purports, defeat Tribal Court personal jurisdiction over Johnson.

The only case of which we are aware, which discusses Tribal Court personal jurisdiction over non-resident, non-Indians, is Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir. 1994). That case, relied on by the tribal court, involved Lynette Hinshaw's challenge to the Confederated Salish and Kootenai Trial Court's exercise of personal jurisdiction over her in a wrongful death case. 42 F.3d at 1179. Hinshaw framed her personal jurisdiction challenge in light of the United States Supreme Court's decision in International Shoe v. Washington, 326 U.S. 310 (1945), which allows states to exercise personal jurisdiction over non-residents where, among other things, they have had sufficient minimum contracts with the forum which are in some way related to the litigation. Rather than adopting International Shoe and its theoretical underpinnings, the tribal Court by analogy, ruled that it possessed jurisdiction over persons with "some relationship" with the Tribe such that it would be "reasonable for the tribal Court to exercise control over the parties" see 42 F.3d 1178, 1181. The Ninth Circuit found that such an analysis satisfies the due process requirements protected by the International Shoe test.

Therefore, Hinshaw is not necessarily in conflict with A-1 Contractors. As the Ninth Circuit recently has noted, "we reject Pease's contention that A-1 Contractors...is in conflict with Hinshaw. ...the Hinshaw Court implicitly concluded that state and tribal authorities coupled with the tortfeasor's specific contacts with the reservation created the requisite tribal interest under Montana." See Yellowstone County v. Pease, 96 F.3d 1169, 1175 (9th Cir.

1996). Similarly, here there is a plain tribal interest inasmuch as it is the party plaintiff. Moreover, there is no dispute that the action arose as a result of reservation-based conduct. As Yellowstone points out, Hinshaw and A-1 Contractors seem to agree that in such a situation, there is a sufficient tribal interest to satisfy Montana. Id. at 1181.

The Hinshaw Court's analysis of Tribal Court personal jurisdiction also is consistent with the tenor of Supreme Court precedent regarding tribal court authority generally. The Supreme Court has repeatedly recognized that tribal Court's are vital to promoting tribal self-government and self-determination and that civil jurisdiction over the activities of non-Indians on reservation lands presumptively lies in tribal Courts. Iowa Mutual, 480 U.S. 9, 18 (1987). It would be strange, indeed, to suggest that a non-Indian, or a non-member Indian could engage in tortious conduct on a reservation and not be held accountable because the tribal Court cannot reach beyond the reservation to call him before the Court. The more plausible position is found in Hinshaw, where the Court determined that tribal courts have personal jurisdiction over non-Indians' reservation based activities where there exists the proper tribal interest. To rule otherwise would render the authority of tribes as declared in National Farmers, Iowa Mutual and their progeny, and the federal policy underlying those decisions, meaningless.[8]

The Appellant's contend that the exercise of personal jurisdiction over non-Indians is only appropriate where there are "current consensual contacts". This argument boils down to a contention that personal jurisdiction ends when a non-Indian leaves the reservation: "a tribal government's authority over a non-member that may exist on reservation ceases when the non-

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[8] This decision thus does not represent an expansion of tribal Court jurisdiction, but rather an affirmance of a tribal court's ability to exercise that jurisdiction which it already possesses.

member leaves the tribe's lands". Appellant Johnson's Reply Brief of the Issue of Personal Jurisdiction at p. 3. But we have found no authority to support a current consensual contract requirement, and the Appellants provided none. We believe this argument must be rejected based on the tenor of tribal court jurisdiction cases (supra) which focus on jurisdiction over reservation-based conduct generally, without reference to or discussion of a physical presence requirement. In Iowa Mutual and National Farmers the Defendant insurance companies were subject to tribal court jurisdiction despite not being present (other than via their insured) on the Reservation.

The Appellants also contend that the Court cannot exercise personal jurisdiction because the Appellees would be incapable of enforcing any judgment the Court might render. While that may be true -- or it may not -- it is irrelevant. The Appellant again offered no authority, and we have found none, which premises a court's personal jurisdiction on speculation as to whether a judgment, should one be entered, would be collectible.

For the foregoing reasons, the trial court's decision of July 1, 1996 is AFFIRMED.

Date: December 31, 1996

BY THE COURT.

John E. Jacobson, Judge

Henry M. Buffalo, Jr., Judge

Robert A. Grey Eagle, Judge

For the foregoing reasons, the trial court's decision of July 1, 1996 is AFFIRMED.

Date: December 31, 1996

BY THE COURT,

John E. Jacobson, Judge

Henry M. Buffalo, Jr., Judge

Robert A. Grey Eagle, Judge

For the foregoing reasons, the trial court's decision of July 1, 1996 is AFFIRMED.

Date: December 31, 1996

BY THE COURT,

John E. Jacobson, Judge

Henry M. Buffalo, Jr., Judge

Robert A. Grey Eagle, Judge

TOTAL P.01

IN THE COURT OF APPEALS OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Louise B. Smith, Winifred S. Feezor, Cecilia M. Stout, Alan M. Prescott, Cynthia L. Prescott, and Patricia A. Prescott, Appellants, vs. The Shakopee Mdewakanton Sioux (Dakota) Community Business Council, Stanley R. Crooks, Kenneth Anderson, Darlene McNeal, in their official positions as members of the Shakopee Mdewakanton Sioux (Dakota) Community Business Council and individually; Shawn Bielke, James Bigley, Robert Bigley, Anthony Brewer, Teresa Coulter, Cheryl Crooks, Clarence Enyart, Stephen Florez, David Matta, Don Matta, Elizabeth Totenhagen, Robert Totenhagen, Barbara Anderson, James Anderson, Keith Anderson, Jr., Lesli Beaulieau, Lisa Beaulieau, Lori Beaulieau, Walter Brewer, Jennifer Brewer, Roberta Doughty, Selena Mahoney, Lori Ann Stovern, Linda Welch, and Maxine Woody, Respondents.	COURT OF APPEALS FILE NO. 011-96

MEMORANDUM DECISION AND ORDER

Before Judges John E. Jacobson and Robert GreyEagle. (Judge Henry M. Buffalo, Jr. took no part in this decision).

Summary

In this action, the Plaintiffs/Appellants contend that business proceeds owned by the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community") have been distributed to persons who are not eligible to receive those proceeds, under the Community's 1988 Business Proceeds Distribution Ordinance, Ordinance No. 12-29-88-001 ("the BPDO") and the 1993 amendment thereto, Ordinance No. 10-27-93-002 ("the Amended BPDO"). The Defendants/Respondents are the Business Council of the Community ("the Business Council"), the three persons who were serving on the Business Council at the time this action was filed, and the twenty-seven persons who, it is claimed, have improperly received the business proceeds.

This appeal is from a December 16, 1996 Order, by Judge Buffalo, granting the Defendants/Respondents' Motion to Dismiss the Amended Complaint for failure to state a claim under which relief can be granted, under Rule 12(b)(6) of the Rules of Civil Procedure of the Court of the Shakopee Mdewakanton Sioux (Dakota) Community.

Because prior decisions of this Court, and the record of the Community, clearly establish that the complained-of payments are consistent with the law, we affirm.

Scope of Review

As we stated in Welch v. the Shakopee Mdewakanton Sioux (Dakota) Community, App. No. 009-96 (Shak. Ct. App., decided October 14, 1996), the standard for this Court's review, on appeal, of an order of dismissal, under Rule 12(b)(6), is de novo.

Dismissals under our Rule 12(b)(6) are appropriate only if there is no reasonable view of the facts alleged in the Complaint which would support the Plaintiffs' claim. See generally, Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc., 988 F.2d 1157 (Fed. Cir. 1993). In making such a decision, we naturally begin with the four corners of the Complaint; but we also will consider pertinent matters of public record--statutes and ordinances of the Community, decisions of administrative bodies, and decisions of courts of record, including, of course, our own decisions. And in that last regard, we think it is appropriate to adopt the approach of the United States Court of Appeals for the Second Circuit, in Day v. Moscow, 955 F.2d 807 (2nd Cir., 1991), cert. denied 113 S.Ct. 71 (1992), and the United States Court of Appeals for the Ninth Circuit, in Commodity Future Trading Commission v. Co Petro Marketing Group, Inc., 680 F.2d 573 (9th Cir. 1982), which permits us to take judicial notice of matters which are of record in litigation which previously has been before us.

History of the Case

The Appellants initiated this litigation on October 18, 1995, and filed an Amended Complaint on January 9, 1996. On January 10 1996, the Respondents filed a Motion to Dismiss. The parties then attempted to settle the case; those attempts were unsuccessful; and on June 19, 1996, after a hearing on the record, Judge Buffalo

granted the Respondents' Motion to Dismiss[1]. On December 16, 1996, Judge Buffalo filed a written Memorandum setting forth in more detail the basis for the dismissal, and this appeal followed.

Discussion

In deciding this appeal we are again obliged to visit the history of the BPDO and the Amended BPDO, and the Community's history of accepting persons into Community membership under the provisions of Article II, section 2 of the Community's Constitution.

The BPDO was adopted in 1988. It mandated that the Business Council make monthly payments, from all of the Community's business proceeds, to persons who were named in lists which were appended to the ordinance. We have observed that the BPDO was adopted by the Community's General Council as a grand compromise, to resolve "nearly constant turmoil" over membership rights. See Ross v. Shakopee Mdewakanton Sioux Community, No. 013-91 (decided July 17, 1992), at 1.

It is clear from the face of the BPDO that some of the persons who received payments under the BPDO, including three of the individually named Respondents here (Walter Brewer, Cheryl Crooks, and Linda Welch), are not members of the Community. The list of

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[1] Appellants' counsel failed to timely file any response to the Motion to Dismiss, and accordingly was not permitted to make oral argument to Judge Buffalo on June 19, 1996. On appeal, the Appellants have moved to supplement the record with significant amounts of material which were not before Judge Buffalo. Judge Buffalo's decision certainly was not inappropriate, under the circumstances. But under the standard we have articulated in this opinion, we think the some of the materials submitted by the Appellants are appropriate for judicial notice, and we therefore have considered them in deciding this appeal.

names, on which those persons appeared, was captioned "Persons who are not Mdewakanton but who now receive payments as Indian spouses of members". Hence, when the BPDO was adopted, the Community's General Council obviously was perfectly aware that the persons on that particular list were not members of the Community; and the General Council nonetheless concluded that payment to those persons, for their health and welfare was appropriate and warranted.

Some time ago, this Court held that, under the BPDO, the Business Council had no discretion with respect to the payments that it made. Specifically, we held that during the effective life of the BPDO, the Business Council was mandated to make payments to the persons whose names appeared on the ordinance's lists. Welch v. Shakopee Mdewakanton Sioux Community, No. 022-92 (decided June 3, 1993), at 5.

The Community's payment system changed in 1993, with the passage of the Amended BPDO. Section 14 of the Amended BPDO denied any future payments, derived from the Community's gaming enterprises, to persons other than Community members. The General Council of the Community chose instead to provide for the welfare of non-members who in the past had received payments under the BPDO by adopting a Non-Gaming Program Allowance Ordinance, Ordinance No. 10-27-93-003 ("the NGPAO"). Section 2 of the NGPAO provides:

> The following individuals are receiving revenue allocations under the Business Proceeds Distribution Ordinance. However, because of new requirements issued by the Secretary of Interior, it has become clear that non-members of Tribes cannot receive revenue allocations from Tribal gaming revenues. These individuals cannot qualify to receive gaming

revenue allocations to them shall cease:

1. Todd Weldon
2. Ron Perrault
3. Linda Welch
4. Walter Brewer
5. Cheryl Crooks

Section 3.1 of the NGPAO provides that those five listed persons will receive an allowance of four thousand dollars per months from the Community's non-gaming revenues.

The provisions of the Community's Constitution which relate to Community membership, like the BPDO and the Amended BPDO, repeatedly have been before this Court; and those proceedings have established, inter alia, two conclusions--one general and one specific--which directly bear on this appeal:

First (the general conclusion), it is clear that from the earliest days, following the adoption of the Community's Constitution in 1969, the Community's General Council has interpreted the authority which is granted in Article II, section 2, to permit the "voting in" of new members to the Community without requiring those persons to demonstrate that they possess one-quarter degree Mdewakanton blood; and we have held that that practice was and is a reasonable and fair interpretation of Article II, section 2, of the Community's Constitution, to which we should defer. See, In Re: Election Ordinance 11-14-95-004, (decided January 5, 1996), at 11.

Second (the specific conclusion), all of the non-Business Council Defendants in this matter--except for Walter Brewer, Cheryl Crooks, and Linda Welch, who concededly are not members, and who do

not receive monies under the Amended BPDO--already have been determined by this Court to be members of the Community. Specifically, the membership of each of those persons was challenged in the last election of the Community; the extensive documentation relating to the adoption of each was examined by this Court; and the membership of each was upheld. Again, see In Re: Election Ordinance 11-14-95-004, supra.

With this background, it becomes apparent why Judge Buffalo's dismissal of the Amended Complaint must be affirmed. The entire thrust of the Amended Complaint was that the Business Council Defendants violated Community law by paying monies to the twenty-seven named individual Defendants, and that the twenty-seven individual Defendants should be required to disgorge the payments they received. The violation of Community law allegedly flowed from the fact that none of the twenty-seven was a "qualified enrolled member" of the Community. But, as we have noted, the payments which were made to the twenty-seven persons under the BPDO were mandated by the law of the Community; and the payments which have been made since, under the Amended BPDO and the NGPAO, are entirely consistent with the status of the twenty-seven recipients: the three persons among that group who are not members of the Community do not receive any monies under the Amended BPDO, and the remaining twenty-four persons previously have been determined by this Court to be members of the Community and therefore are entitled to receive monies under the Amended BPDO.

Nothing in the materials submitted by the Appellants to

"supplement the record" alters our conclusions. Among those materials are a decision by a Interior Department Secretarial Election Board, in connection with an April, 1995 election on proposed amendments to the Community's Constitution; a subsequent decision by the U.S. Department of the Interior's Assistant Secretary -- Indian Affairs, with respect to the same election; and a decision of the United States District Court for the District of Columbia, in Feezor v. Babbitt, Civil No. 96-1678 (D.D.C., decided December 20, 1996).

The Election Board decision and the decision of the Assistant Secretary set forth the views of those officials as to the eligibility of certain persons, who are not parties to this litigation, to vote in the Constitutional referendum election held by the Secretary of the Interior in 1995. Neither the Election Board decision nor the decision of the Assistant Secretary addresses or affects this Court's long-established conclusion that Article II, section 2 of the Community's Constitution always has permitted, and continues to permit, the Community to adopt persons into membership without scrutinizing their degree of their Mdewakanton blood. And neither of the two administrative decisions in any way concerns the propriety of payments made under the BPDO or the Amended BPDO.

Nor does the decision of the United States District Court in Feezor v. Babbitt impact this litigation. In that decision, United States District Judge James Robertson remanded, to the United States Department of the Interior, an appeal (by many of the

persons who are Appellants here) from an administrative decision approving the Adoption Ordinance under which the Community currently operates. Judge Robertson's holding was not that the Adoption Ordinance was invalid, but that the record of the Department's decision required supplementation. And as with the agency materials just discussed, nothing in the District Court's decision suggests to us that our conclusions with respect to the effect of Article II, section 2 of the Community's Constitution, or the BPDO, or the Amended BPDO, are erroneous.

The Appellants also submitted lists of persons receiving payments from gaming revenues. Assuming these are public records with respect to which we appropriately can take notice, the lists actually serve to confirm that the three non-member Defendants are not participating in those revenues. And nothing in the remainder of the documents (correspondence, handwritten notes on lists, etc.) operates to change our conclusion that the Amended Complaint was properly dismissed for failing to state a claim upon which relief can be granted.

ORDER

For the foregoing reasons, the decision to dismiss the Amended Complaint in this matter is AFFIRMED.

August 7, 1997

John E. Jacobson
Judge

Robert GreyEagle
Judge

IN THE COURT OF APPEALS OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Vance Gillette, Appellant, vs. Karen Anderson, Barbara Anderson and Keith Anderson, Appellees.	)	Case No. 014-97

MEMORANDUM DECISION AND ORDER

Before Judge John E. Jacobson and Judge Henry M. Buffalo, Jr.. Judge Robert A. Grey Eagle took no part in this decision

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In this matter, the Appellant ("Gillette") contends that he should receive certain monies from the Appellees as attorneys fees. He bases his claim on two documents, one signed by all of the Appellees on May 1, 1993, and the other signed only by Appellees Barbara and Keith Anderson, in July, 1993. On February 10, 1997, Judge Robert A. Grey Eagle, granted all Appellees' motion for summary judgment, holding that the undisputed facts in the record, coupled with the plain language of the Gillette's contracts, entitled Gillette to no greater fees than he already had received.

We affirm.

Summary of the Facts

The undisputed record in this matter includes the following

facts: During the period of time that is relevant to this litigation, each of the three Appellees became members of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"); and each of the Appellees were represented by the Gillette, pursuant to contingent fee agreements. The first contingent fee agreement ("the First Agreement") was handwritten by Gillette at a May 1, 1993 meeting, which each of the Appellees and several other persons attended. In its entirety, it says:

> I agree to have Vance Gillette represent me regards per capita payments as my attorney. The terms are $300 retainer, and 30% of any recovery/settlement.

Later, the Appellant mailed to each of the Appellees a one-page document, captioned "Contingent Fee Agreement" ("the Second Agreement"), which he also dated May 1, 1993. That second agreement was signed by Barbara Anderson and Keith Anderson on July 5, 1993. Karen Anderson did not sign the second agreement.

The Second Agreement stated that the "Nature of Claim", for which Gillette would provide representation, was "claim for benefits with suit in SMSC tribal court; and federal court if needed". It also says--

> The Client agrees to retain Attorney Vance Gillette on the basis of retainer fee of $300 and .30 per cent [sic] of any gross recovery . Recovery means .30% [sic] of any initial benefits, and backpay should backpay be recovered in tribal ct suit. No recovery no fee.

The record is undisputed that at the time that both the First and Second Agreements were signed, none of the Appellees were members of the Community; and each of the Appellees contended that they were, in fact, entitled to be members of the Community and

perhaps were entitled to receive retroactive per capita payments from the Community under a theory such as this Court adopted in Welch v. Shakopee Mdewakanton Sioux Community, 022-92 (Decided June 3, 1993).

After the document signing described above, Gillette filed suit in the Court of the Shakopee Mdewakanton Sioux (Dakota) Community, on behalf of the Appellees and others. Stovern v. Shakopee Mdewakanton Siuox Community, No. 031-93. No part of that litigation went to final judgment on the merits; however, it is clear from the pleadings which Gillette filed (e.g., the Supplemental Complaint, filed December 13, 1993), that Gillette's focus, when he spoke of "backpay", was the contention that his clients had wrongfully been excluded from receiving per capita payments by the Community's 1988 Business Proceeds Distribution Ordinance, Ordinance No. 12-29-88-002 ("the 1988 BPDO"). His contention and central focus was that the Appellees and others were entitled to receive per capita payments from the Community retroactive at least to the passage of the 1988 BPDO.

The litigation which Gillette filed on behalf of the Appellees apparently did not proceed to a judgment on the merits because it was interrupted by a series of events, some of which occurred before this Court. The Appellees were three of a considerably larger group of persons who sought or claimed membership in the Community; and the Community attempted to deal with those claims through legislative means. The name of each of the three Appellees appeared on a list appended to Community Ordinance Number 10-27-93-

001 ("the October, 1993 Adoption Ordinance"). The Ordinance was disapproved by the Acting Area Director, Minneapolis Area Office, Bureau of Indian Affairs, on November 12, 1993, on the grounds that it was inconsistent with the Community's Constitution, inasmuch as it would permit persons to become Community members who did not demonstrate that the possessed one-quarter degree Mdewakanton Sioux (Dakota) blood. Following that disapproval, the General Council of the Community enacted Ordinance No. 11-30-93-002 ("the November, 1993 Adoption Ordinance"); and on December 13, 1993, another Acting Area Director of the Minneapolis Area Office, Bureau of Indian Affairs, disapproved that Ordinance, on the asserted ground that it changed the membership criteria contained in the Community's Constitution. The Community appealed that disapproval to the Board of Indian Appeals of the U.S. Department of the Interior; and pending that appeal, the Community sought to start making per capita payments to the Appellees and all of the persons who had been adopted under the November, 1993 Adoption Ordinance. However, in Smith v. Shakopee Mdewakanton Sioux (Dakota) Community, No. 031-93, this Court directed that those payments be placed in escrow, pending the results of the Board of Indian Appeals proceedings.

The Board of Indian Appeals ultimately reversed the Area Director's disapproval of the November 1993 Adoption Ordinance; and this Court then dissolved its order and released to the Appellees and others the funds which had been accumulating in escrow. Since that time, each of the Appellees has been participating in the Community's per capita program.

Each of the Appellees has paid Gillette thirty percent of the first monthly per capita payment they received. However, Gillette claims that Barbara and Keith Anderson should pay him thirty percent of the their share of the released escrow funds--his argument is that those funds constitute "backpay", within the meaning of the Second Agreement. His claim against Karen Anderson is that she should pay him thirty percent of the escrowed amounts because she agreed to pay that fraction of "any recovery" she received as a consequence of litigation.

Analysis

Judge GreyEagle held that neither the First nor the Second Agreement was ambiguous--that both agreements contemplated that the Appellees would pay Gillette thirty percent of any retroactive per capita benefits they received, together with thirty percent of the first month's payment. We agree. The Second Agreement speaks of "backpay"--an awkward term, but awkwardness can't be invoked to help its author--clearly a term that looks to money which was owing from a time before the agreement was signed. And we think the Second Agreement, dated of the same date as the First Agreement, clearly was intended to supplement--to elaborate on but not to change--the First Agreement (which, standing alone, which could be argued to be so vague as to defy enforcement). So, in our view, Judge GreyEagle was correct in holding that when the First Agreement spoke of "any recovery" it was looking to any award of retroactive payments.

Clearly, given the history of record which is recited above, the release of the escrow, following the Community's successful appeal of the disapproval of the November, 1993 Adoption Ordinance, did not constitute the award of any "backpay". The escrowed simply accumulated ongoing, prospective payments, over a period of months. Absent this Court's Order in Smith, the money which briefly went into escrow would have been paid to the Appellees monthly as it was generated by the Community. In no way did the escrowed money constitute a payment for any portion of the period from 1988 through 1993, which was clearly Gillette's focus in his litigation.

Accordingly, having made the payments which they have made to Gillette, the Appellees have met their responsibility to him.

September 2, 1997

John E. Jacobson
Judge, Court of Appeals

Henry M. Buffalo, Jr.
Judge, Court of Appeals

IN THE COURT OF APPEALS OF
THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT **STATE OF MINNESOTA**

LITTLE SIX, INC., et al. Plaintiffs, VS. LEONARD PRESCOTT, et al. Defendants.	Case Nos. Ct. App. 017-97 & Ct. App. 018-97

MEMORANDUM AND ORDER

Plaintiffs Little Six, Inc., et al. (LSI) sued defendants Leonard Prescott and F. William Johnson alleging that in their former positions with LSI they expended monies for improper purposes and without authorization. Defendants filed for summary judgment. Among other claims, Prescott argued he possessed both absolute and qualified immunity from suit and Johnson asserted he possessed qualified immunity. The trial court rejected the immunity arguments, but granted partial summary judgment on other grounds. Prescott and Johnson filed proper notices of appeal, which were certified by the clerk of court. Plaintiffs contend that an appeal, even of the immunity issues, does not lie from a denial of partial summary judgment.

The parties appear confused regarding the proper forum to resolve this dispute. A properly filed notice of appeal divests the trial court of jurisdiction over those aspects of the case involved in the appeal. Griggs v. Provident Consumer Discount Co.,

459 U.S. 56, 58 (1982); Harmon v. Farmers Home Administration, 101 F.3d 574, 587 (8th Cir. 1996). Since the defendants have filed proper notices of appeal, this court now has jurisdiction to consider their claims. Although plaintiffs addressed their memorandum in opposition to the appeal to the trial court (without an accompanying motion), we will sua sponte consider their arguments as having been properly made in this court.

The parties disagree over the immediate appealability of various parts of the trial court order. The collateral order doctrine allows for an immediate appeal of orders which (1) conclusively determine disputed questions, (2) are separate from the merits of the action, and (3) which would be effectively unreviewable on appeal from a final judgment. P.R. Aqueduct & Sewer Authority v. Metcalf & Eddy, 506 U.S. 139, 144-45 (1993) (quotation omitted). Orders rejecting defenses of absolute or qualified immunity are immediately appealable because immunity is not simply a defense from liability, but entitles its possessor to complete protection against suit. P. R. Aqueduct, 506 U.S. at 143; Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). This protection is effectively lost if, based on the lower court's error, the matter goes to trial. Mitchell, 472 U.S. at 526.

The defendants' challenge to the trial court's rulings on immunity falls within the collateral order doctrine and will be heard by this court. The trial court's order conclusively determined the issues of absolute and qualified immunity, those issues are factually separate from the underlying claims, and the

defendant's immunity would be effectively unreviewable on appeal from a final judgment after having to stand trial.

LSI argues that Johnson v. Jones, 515 U.S. 304, 317 (1995) prohibits the immediate appeal of defendants' immunity claims because those claims do not involve "neat abstract issues of law" which are easily resolvable on interlocutory appeal, but rather involve issues of fact which require further development at trial. Johnson held that a defendant entitled to invoke a qualified immunity defense may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a genuine issue of fact for trial. 515 U.S. at 319-20. The public official defendants in Johnson sought to use the immediate appealability of their qualified immunity as a vehicle to obtain appellate jurisdiction over the sufficiency of the evidence regarding the underlying constitutional tort, and the Supreme Court properly rejected their effort. 515 U.S. at 313.

The defendants' attempt to appeal their immunity claims is consistent with Johnson because their claims do not depend on any disputed issues of fact. The trial court denied the immunity claims based on the positions held by defendant Johnson in the LSI Corporation, and defendant Prescott in both the Community and LSI Corporation, and based on its interpretation of various Community Ordinances and LSI's Corporate Charter. These factual matters are not in dispute, therefore, the trial court's rulings on immunity present "abstract issues of law" which can be resolved on interlocutory appeal. See Behrens v. Pelletier, 116 S. Ct. 834,

842 (1996) (explaining reach of Johnson) (citation omitted). Defendants are granted leave to appeal the adverse decisions concerning immunity, but not the merits of the underlying claims against them.

ORDER

For the foregoing reasons:

1. The Defendants are granted leave to file an interlocutory appeal of the adverse decisions below pertaining to the issues of absolute and qualified immunity; and,

2. The Parties will identify dates in which counsel will be available for setting a briefing schedule and to consider whether the matter should be consolidated for purposes of the appeal.

September 9, 1997

Henry M. Buffalo
Judge

IN THE COURT OF APPEALS OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Vance Gillette, Appellant, vs. Karen Anderson, Barbara Anderson and Keith Anderson, Appellees.	)	Case No. 014-97

MEMORANDUM DECISION AND ORDER

Before Judge John E. Jacobson and Judge Henry M. Buffalo, Jr.. Judge Robert A. Grey Eagle took no part in this decision.

On September 2, 1997, this Court decided the appeal of Vance Gillette from the decision the February 10, 1997 Order of Judge Robert Grey Eagle. On September 12, 1997, citing no rule of this Court, Gillette filed a "Brief for Rehearing", asking us to reconsider our September 2 decision. Pursuant to a scheduling order of the Court, the Appellees filed a responsive brief on October 23, 1997, and Gillette filed a reply brief on October 31, 1997.

Gillette seeks (1) a clarification of our September 2, 1997 decision, with respect the amounts which Judge Grey Eagle awarded to Gillette, and (2) a reconsideration of our September 2, 1997 decision--because, in his view, the decision misconstrued the record developed before Judge Grey Eagle and misapplied the law.

He also now, for the first time, seeks interest on all amounts owing to him in this litigation.

As to the first matter, Judge Grey Eagle awarded to Gillette, from the Appellees, thirty percent of the amount of the first per capita payment that was made to each of the Appellees by the Shakopee Mdewakanton Sioux (Dakota) Community. The dollar amount of the award to which Gillette was entitled, under Judge Grey Eagle's order, was $2,333.86 from each Appellee--$7,001.58, in total. It was the intention of this Court, on September 2, 1997, to affirm Judge Grey Eagle's decision in all respects; but we were under the erroneous impression that Judge Grey Eagle's award already had been paid by the Appellees. We therefore concluded our opinion by saying--

> Accordingly, having made the payments which they have made to Gillette, the Appellees have met their responsibility to him.

Gillette asks that we amend our September 2, 1997 decision to make it clear that, to the extent the payments ordered by Judge Grey Eagle have not been made, they should be made; and given our intent, on September 2, we think that is appropriate. If they have not been made, the payments owing to Gillette under Judge Grey Eagle's order, are to be made by each of the Appellees.

No other matter raised by Gillette in his "Brief for Rehearing" or his reply brief is properly before us. Gillette had a full opportunity to argue all of the issues he felt were appropriate for this Court's consideration, in his initial appeal. We weighed his arguments, and we rejected them for the reasons set

forth in our September 2, 1997 decision. The rules of this Court do not speak to rehearings following final decisions of the Court of Appeals; and there is nothing in the record of this case that would make such a rehearing appropriate.

Accordingly, the September 2, 1997 decision of the Court of Appeals in this matter is clarified as aforesaid, and the Appellant's request for rehearing is denied.

January 20, 1998

John E. Jacobson
Judge, Court of Appeals

Henry M. Buffalo, Jr.
Judge, Court of Appeals

IN THE COURT OF APPEALS FOR THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Clifford Crooks, Sr.,

Appellant,

vs. Ct. App. No. 016-97

Shakopee Mdewakanton Sioux (Dakota) Community,

Appellee.

MEMORANDUM OPINION AND ORDER

I. FACTUAL BACKGROUND

On May 19, 1994, Clifford Crooks, Sr., filed an application for enrollment in the Shakopee Mdewakanton Sioux (Dakota) Community. Approximately eight months later, when the Community had yet to act on his application, Crooks filed a complaint requesting a declaration from the Trial Court that he was in fact a member of the Community and requesting monetary damages. The Trial Court considered his complaint under the 1994 Amendments to the Enrollment Ordinance and dismissed it for failure to state a claim and for failure to exhaust the available administrative

remedies. On January 24, 1996, this Court reversed and remanded on the basis that his claims should have been analyzed under the 1993 Amendments to the Enrollment Ordinance rather than the 1994 Amendments. While Crooks' case was on remand, the Community approved his application for membership on June 20, 1996.

The Trial Court concluded that the Community's decision to accept Crooks as a member mooted a number of his original claims relating to his lack of membership status. In his brief and at oral argument, counsel for appellant did not dispute the Trial Court's decision in this respect, and we therefore do not reach those issues on appeal. The question appellant did raise in the Trial Court, and which he now raises on appeal, is whether his allegation that the Community improperly delayed consideration of his application states a claim upon which relief may be granted under the Due Process Clause of the Indian Civil Rights Act. 25 U.S.C. § 1302(8). Because we agree with the Trial Court that under Community law Crooks does not have a cognizable property interest in having his application acted upon within a certain period of time, we affirm.

II. DISCUSSION

Our review of an order dismissing a complaint under Rule 12(b)

is de novo. Smith et al. v. SMS(D)C et al., No. 011-96 (SMS(D)C Ct. App. Aug. 7, 1997) (8/7/97 order). Accepting the factual allegation in his complaint as true, we ask whether Crooks has stated a claim for which relief may be granted.

In order to invoke the protection of the Due Process Clause of the ICRA, a party must first show a liberty or property interest which has been interfered with. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989); Ragan v. Lynch, 113 F.3d 875, 876 (8th Cir. 1997). Only then does this Court inquire whether the procedures attendant upon that deprivation were constitutionally sufficient. Kentucky Dept. of Corrections, 490 U.S. at 460. Crooks argues that his status as an applicant for Community membership created a property right in the benefits of membership, and that this property right was interfered with by the delay in processing his application.

In order to have a property interest in a benefit, an independent legal source, such as the law of the Community, must give a claimant more than a unilateral expectation of receiving the benefit -- the person must have a legitimate claim of entitlement to it. Bd. of Regents v. Roth, 408 U.S. 564, 578 (1972). The difference between an "entitlement" and a mere "expectancy" of a benefit is determined by the extent to which the discretion of the

relevant decisionmaker is constrained by law. See, e.g., Mallette v. Arlington Cty. Employee's Supplemental Retirement Sys. II, 91 F.3d 630, 635 (4th Cir. 1996). If the decisionmaker has substantial discretion in deciding to grant or deny the benefit, it is not possible for the claimant to have a legitimate claim of entitlement because he does not know whether the benefit will be granted. We must determine, therefore, whether under Community law the relevant decisionmakers had substantial discretion to admit or deny Crooks' application for membership.

Article II of the Community Constitution outlines the requirements for membership. Crooks applied for membership under Article II, Sec. 1(c) of the Constitution which requires that people claiming membership must apply and be found qualified by the governing body of the Community. This application process is implemented under the terms of the Enrollment Ordinance, No. 6-08-93-001, which gives the Enrollment Committee and the General Council the power to recommend and approve applications for membership.

Crooks argues that if he meets the requirements for membership, the Community decisionmakers have no discretion and must admit him. His argument, however, assumes the very question the enrollment officials are responsible for answering -- does

Crooks meet the requirements for membership in the Community? It is up to the Community, not Crooks or this Court, to decide who meets the requirements for membership. Smith et al. v. SMS(D)C Business Council et al., No. 038-94 (SMS(D)C Tr. Ct. June 30, 1995) (7/8/94 order), *affirmed*, SMS(D)C Business Council et al. v. Smith et al., No. 001-94 (SMS(D)C Ct. App. June 22, 1995) (6/19/95 order). This Court has stated in the past that there is no automatic or self-enrollment under Article II, Sec. (b) or (c) for people who claim they meet the membership requirements -- applications for membership must be approved by the appropriate Community officials under standards established in accordance with the Constitution and the Enrollment Ordinance. Welch, et al. v. SMS(D)C, et al., No. 023-92 (SMS(D)C Tr. Ct. Dec. 23, 1994).

Under Community law, the Enrollment Committee and the General Council are given substantial discretion to determine if and when a person's application meets the requirements for membership. Nothing in the Constitution or Enrollment Ordinance requires the Enrollment Committee or General Council to approve or disapprove an application within a certain time frame. It is true, as Crooks notes, that Section 6 of the Ordinance requires the Enrollment Officer to offer a preliminary recommendation within 30 days of receiving an application. The Enrollment Officer, however, is not

a final decisionmaker in the enrollment process, and no comparable time limits are set on the decisions made by Enrollment Committee or General Council.

The Enrollment Ordinance also gives substantial discretion to enrollment officials for several other reasons. First, under the Ordinance the Enrollment Committee and the General Council have the authority to amend the information and mathematical formulas used to establish the Base Rolls for Community membership. Second, Section 6 of the Enrollment Ordinance gives the Enrollment Committee almost unfettered discretion in determining what evidence to consider when evaluating an application. It states that the Enrollment Committee shall accept or reject all applications "based on the record presented and other evidence deemed acceptable by said Committee" (emphasis added). In addition, Enrollment Ordinance requires the Enrollment Committee to consider challenges by Community members to the approval of an application, it provides no standards to guide the Committee's decision -- whether a challenge to an approved application is upheld or not is completely within the discretion of the Committee. Finally, the Ordinance provides that all applicants must appear before the General Council whether their application has been either approved or rejected. It also provides that it is the General Council who will make the

ultimate decision on membership, specifically stating membership decisions "shall be final and conclusive" and "[n]o appeal shall lie to any judicial, executive or legislative body", Section 7.

The discretion given to the Community officials and the General Council in evaluating applications means that Crooks could not have foreseen whether his application would be approved under Community law. This degree of uncertainty means that Crooks could not have had a legitimate entitlement to the benefit of Community membership when he submitted his application -- he had only a unilateral expectation of enrollment. Therefore, Crooks did not have a property interest in Community membership until his application was approved.

Crooks has failed to demonstrate that his status as an applicant for Community membership created a property interest in the benefits of such membership, and he has therefore not stated a claim upon which relief may be granted under the Due Process Clause of the ICRA. Since he has not demonstrated a cognizable property interest, it is not necessary for us to consider whether the process attendant upon his alleged deprivation was constitutionally sufficient. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989).

ORDER

For the foregoing reasons, the order of the Trial Court granting Appellee's Motion to Dismiss is AFFIRMED.

Dated: 1/30, 1998

Henry M. Buffalo
Judge

John E. Jacobson
Judge

IN THE COURT OF APPEALS OF THE

SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Patricia Kostelnik,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 019-97
	)	
Little Six, Inc., d/b/a	)	
Mystic Lake Casino,	)	
	)	
Appellee.	)	

MEMORANDUM DECISION AND ORDER

Before Judge John E. Jacobson and Judge Henry M. Buffalo, Jr.. Judge Robert A. Grey Eagle took no part in this decision.

Patricia Kostelnik ("Kostelnik") filed this tort action claiming Little Six, Inc. d/b/a Mystic Lake Casino ("Mystic Lake") was liable for injuries she suffered due to the negligence of its employees. Following a four-day bench trial, the trial court entered judgment in favor of Mystic Lake. Kostelnik appealed from that judgment.

For the reasons set forth below, we affirm the trial court.

I. FACTS

The record discloses the following: On April 27, 1993, Kostelnik was seated at the far

right end of a row of slot machines on the main floor of the Mystic Lake Casino. Her chair was affixed to the slot machine and she testified that she was positioned squarely on the chair with her feet on its metal base pointing toward the machine. She was looking straight ahead.

A money cart escorted by two Mystic Lake employees came in contact with her chair as it rounded the corner where she sat. She did not see the cart before contact, and could not testify as to the manner in which the cart was being operated or the conduct of the Mystic Lake employees. One of the Mystic Lake employees[1] testified that they were pushing the cart at a normal walking speed of less than one mile an hour, moving from Kostelnik's left to her right.

Kostelnik testified that after hitting her chair, the cart rolled over the metal base of her chair and came to rest on her right foot where it remained until the two cart operators removed it. In contrast, the cart operator testified that the middle of the cart brushed the back of Kostelnik's chair, but never rolled over the base of the chair or came in contact with her foot. An accident reconstructionist expert presented by Mystic Lake testified that it would have been physically impossible for the cart to roll over the metal base onto her right foot in the manner claimed by Kostelnik.

After the contact, a Mystic Lake employee called an emergency medical technician (EMT), who twice surveyed Kostelnik for possible injuries. The EMT testified that although he asked Kostelnik what happened, she never mentioned the cart hitting her foot. As part of his second survey, the EMT removed Kostelnik's shoes and socks, inspected her feet, and found no lacerations or cuts. He did, however, note that her right foot was slightly swollen.

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[1]The appellate brief for Mystic Lake notes that at the time of trial only one of the original cart operators, Chris Fairbanks, was still employed by the casino and he testified at trial. Mystic Lake explains the other operator did not testify because he could not be located.

Kostelnik was transported by ambulance to St. Francis Hospital where her foot and neck were x-rayed. The EMT testified that he did not think an ambulance was necessary, but Kostelnik requested one. Kostelnik testified that it was the EMT who requested the ambulance. Neither the ambulance nor the emergency room records indicate the existence of a cut, laceration, scratch, or bleeding injury to Kostelnik's foot or ankle, but the x-ray report from the hospital did note some swelling on her right foot.

Kostelnik testified that the next day she removed her ace bandage and saw a scratch on her foot which she cleaned with peroxide before rewrapping. She testified that any redness associated with this scratch went away within a few days. The next week, however, Kostelnik said she began experiencing headaches, achiness, fever, and fatigue. In June 1993, after consulting several medical professionals, an epidural abscess and a condition known as vertebral osteomyelitis were discovered in an isolated area of Kostelnik's spine. Both conditions are caused by bacterial infections. Vertebral osteomyelitis is a deterioration or displacement of spinal vertebrae. Kostelnik required surgery to remove the abscess and two spinal vertebrae.

Kostelnik presented evidence that the abscess and her spinal damage was caused by the accident at Mystic Lake. One of the doctors who treated her in June of 1993, Dr. Christopher Sullivan, testified that her spinal problems had been caused by a staph aureus bacteria which could have entered her body through a cut on her foot, such as the one she claimed to have received from the accident at Mystic Lake. Dr. Sullivan never treated the cut on Kostelnik's foot, nor did he ever review the other medical records relating to the casino incident. He relied on Kostelnik's description of the cut to arrive at the medical opinion that the cut was the most likely entry point for the staph bacteria. In order to link her spinal injuries to the incident at

Mystic Lake, Kostelnik also presented testimony from her daughter and a friend who stated she was in fine health before the incident, but that both her foot and general health deteriorated afterward.

Mystic Lake presented evidence to show that Kostelnik's injuries were not caused by the accident. The testimony of the EMT, his report, and the emergency room report all fail to note any cut caused by the incident at the casino. Dr. Gary Kravitz, a specialist in infectious diseases, testified that staph bacteria only enter the body through soft tissue wounds if the cut is so infected that it drains pus. Kostelnik had previously testified that she did not observe any pus draining from her foot. Mystic Lake also presented evidence that Kostelnik had a history of neck and back pain dating back to 1982, including a diagnosis of a degenerative spinal condition in the same location where her vertebral osteomyelitis was diagnosed in June of 1993. Both Drs. Kravitz and Sullivan testified that her age and degenerative spinal condition would make Kostelnik predisposed to developing osteomyelitis even before the incident. Lastly, Mystic Lake presented evidence that as part of an unrelated clinical study, Kostelnik had reported to doctors that she was in bed with neck and back pain for four days from April 14 to 18, 1993, only a week a half before the incident at Mystic Lake. Dr. Kravitz testified that the nature and timing of the reported pain in mid-April would be consistent with a diagnosis of vertebral osteomyelitis in June.

Based on these facts, the trial court concluded Kostelnik had failed to demonstrate the Mystic Lake employees were negligent in the operation of the cart or that her injuries were caused by the accident. On appeal, Kostelnik argues that Mystic Lake was negligent and that the trial court erred by admitting certain hospital records into evidence. Mystic Lake counters

that it was not negligent, that even if it was it did not cause Kostelnik's injuries, and that the disputed records were properly admitted.

II. ANALYSIS

A. Negligence. The first question we must address is whether the trial court erred in concluding that Kostelnik had failed to demonstrate that Mystic Lake was negligent?

The standards of review following a bench trial are (i) whether the trial court's findings of fact were clearly erroneous, and (ii) whether the court erred in its conclusions of law. Schweich v. Ziegler, Inc, 463 N.W.2d 722, 729 (Minn. 1990). Specifically, a question of negligence is for the trier of fact to determine, and the trial court's verdict should not be disturbed unless there is no evidence which reasonably supports the verdict or it is manifestly contrary to the evidence. Id.

To succeed on a claim of negligence, a plaintiff must demonstrate that the defendant (1) owed her a duty, (2) breached that duty, (3) that the defendant's breach was the proximate cause of her injury, and (4) that she suffered actual injury. Schweich, supra, at 729.

From the record before us, there appears to be no direct evidence that the defendant breached its duty to use reasonable care in the operation of the money cart. Kostelnik testified that she did not see the defendants operating the money cart and she offered no other witnesses to testify regarding the operation of the cart. One of the cart operators testified that he and the other operator were moving the cart at a normal speed of less than one mile an hour when they came in contact with her chair as they rounded a corner. Besides the very fact of contact, there is nothing in the record to suggest they exercised less than reasonable care in the operation of

the cart.

Acknowledging that she is unable to provide direct evidence that Mystic Lake breached a duty it owed her, Kostelnik maintains that the defendants are liable under a theory of res ipsa loquitur. The doctrine of res ipsa loquitur can create a rebuttable presumption that the defendant was negligent if the injury causing event (1) would not normally occur in the absence of negligence, (2) the instrumentality or agency which caused the accident was in the exclusive control of the defendant, and (3) the accident was not due to any voluntary action or contribution by the plaintiff. Warrick v. Giron, 290 N.W.2d 166,169 (Minn. 1980); Spannus v. Otolaryngology Clinic, 242 N.W.2d 594, 596 (Minn. 1976).

The parties disagree primarily on the first of these elements. Kostelnik argues that the contact between the cart and her chair, and the extent of her injuries, makes this an accident that could not happen in the absence of negligence. Mystic Lake argues that the existence of an accident does not compel a finding of negligence and that its employees used reasonable care in guiding a heavy change cart through the casino floor.

The trial court did not specifically address Kostelnik's res ipsa loquitur theory, but it did conclude that the mere fact of an accident is not sufficient to establish negligence and that Kostelnik had not demonstrated that the employees of Mystic Lake failed to exercise reasonable care.

We believe the trial court was correct. When considering whether an accident is one that would normally not occur in the absence of negligence, we consider common knowledge, the testimony of expert witnesses, and the circumstances relating to a particular accident. See generally, Newing v. Cheatham, 540 P.2d 33, 39 (Cal. 1975). Here, a cart operator testified

that the cart was operated in a normal manner, was moving at walking speed, and that the cart came in brief contact with the back of Kostelnik's chair as the cart rounded a corner in the casino. It seems plausible that, even exercising reasonable care, this type of accident could occur. Therefore, we hold that Kostelnik has failed to demonstrate the first element of res ipsa loquitur.

What is confusing about Kostelnik's argument, however, is that she appears to attempt to use res ipsa loquitur to bypass the causation element of a tort claim. Under her analysis, the mere fact that an accident occurred suffices to create liability on the part of Mystic Lake for all the subsequent injuries she claims were caused by that accident. In support of this analysis, Kostelnik cites Hoven v. Rice Memorial Hospital, 396 N.W.2d 569, 572 (Minn. 1986), where the Minnesota Supreme Court stated that res ipsa loquitur required that a plaintiff show the **injury** (rather than accident) was one that would not normally occur without negligence, that the cause of the **injury** was in the exclusive control of the defendant, and that the **injury** was not due to plaintiff's actions.

The problem with that test, as Hoven states it, is that, read formalistically, a defendant could argue that almost any injury, such as a broken leg, does not require negligence in order to occur and that res ipsa loquitur should not apply.

Mystic Lake responds by arguing that the more appropriate formulation of the res ipsa loquitur test is stated by Spannus v. Otolaryngology Clinic, supra, which clearly incorporates the causation requirement in its test for res ipsa loquitur. The formulation of the res ipsa loquitur test in Spannus requires that the "**injury causing event**" (1) would not normally occur in the absence of negligence, (2) the instrumentality or agency which caused the **accident** was

in the exclusive control of the defendant, and (3) the accident was not due to any voluntary action or contribution by the plaintiff. See also, Warrick v. Giron, 290 N.W.2d 166,169 (Minn. 1980).

In our view, the formulation of the test in Spannus is the sounder approach, because it requires a plaintiff to demonstrate causation while focussing on the nature of the accident within the defendant's control, not the nature of the injury.

And using the Spannus approach, even if Kostelnik showed the casino accident is one that would not normally occur in the absence of negligence, her res ipsa loquitur claim fails because she has not demonstrated that the incident at the casino was the injury causing event. While Dr. Sullivan testified that he believed the staph bacteria which caused her spinal complications had entered through the cut she claimed to have had on her foot, he acknowledged that his only source of information regarding the cut was Kostelnik. The EMT report and the emergency report never mentioned a cut--despite the fact that Kostelnik's foot was inspected in each of those examinations. Dr. Kravitz testified that while it was possible for a staph bacteria to enter the body through a soft tissue wound, urinary tract and respiratory infections were more common methods of entry, and that in the vast majority of cases, the entry point simply cannot be determined. Taken together, this evidence suggests to us that the trial court reasonably could have concluded that the incident at Mystic Lake was not the proximate cause of the bacterial infections which led to Kostelnik's spinal problems.

On appeal from a trial court verdict, the Appellant has the burden to demonstrate that the trial court committed clear error. If the Appellant cannot carry that burden, the trial court's decision must be affirmed. Here, from the record of the proceedings, Kostelnik has failed to

do that: She has failed to demonstrate that Mystic Lake breached a duty it owed her or caused her injuries, has failed to demonstrate the first element of her res ipsa loquitur theory, and has failed to show that the accident at Mystic Lake was the injury-causing event.

B. The Admission of Exhibit 25. Kostelnik contends, however, that the trial court committed reversible error in admitting certain evidence, which tended to suggest that Kostelnik's condition existed before April 27, 1993.

On appeal, a ruling on the admissibility of evidence should be overturned only if the trial court has abused its discretion. Betzold v. Sherwin, 404 N.W.2d 286, 288 (Minn. Ct. App.) (citing, In re Conservatorship of Torres, 357 N.W.2d 332, 341 (Minn. 1984)). And if an error was committed, relief should only be granted if it might have reasonably changed the result of the trial. Jenson v. Touche Ross & Co, 335 N.W.2d 720, 725 (Minn. 1983).

In the spring of 1993, Kostelnik was involved in a clinical trial for a new anti-depressant drug which was unrelated to her spinal problems. Exhibit 25, the admission of which Kostelnik contends was error, contains a progress report from that study dated April 19, 1993 and a side effect report written on or about July 21, 1993. Both sheets were filled out by Dr. Chastek who was on staff at Ramsey Mental Health Center and had treated Kostelnik in the past. In these reports, Dr. Chastek notes that she complained of neck and back pain starting on April 14, 1993 (or approximately two weeks before the incident at the casino) and that as a result she was in bed for four days. The reports were sent by telefax to Ramsey County Mental Health Center, and were maintained as part of Kostelnik's permanent file there. It appears from the record that at least one hand written sentence on the bottom of the side effect report was cut off by the telefax sheet.

Kostelnik argues that Exhibit 25 is hearsay, not relevant, unauthenticated, lacks foundation, and includes inadmissible conclusions of an expert. We disagree on all points; and we are of the view that, even if Exhibit 25 had not been admitted, ample evidence would have supported the trial court's decision.

Exhibit 25 is not hearsay because a hospital record is admissible as a business record if it relates to the medical history, diagnosis, or treatment of a patient. Lindstrom v. Yellow Taxi Co. of Minneapolis, 214 N.W.2d 672, 678 (Minn. 1974). The relevant portions of Exhibit 25 address the medical history and treatment of Kostelnik.

But Kostelnik argues that even if Exhibit 25 qualifies as a business record it should not have been admitted because the method or circumstance of its preparation was not trustworthy, inasmuch as a sentence apparently is missing at the bottom of one page of the document. See Minn. R. Evid. 803(6). However, the record custodian for Ramsey Mental Health Center testified that Exhibit 25 was an exact copy of the facsimile from the file and that they routinely receive and maintain such facsimile copies in their files. While the facsimile machine did cut off a portion of the record, the missing portion does not call into question the authenticity of the record or necessarily suggest that the method or circumstance of its preparation was not trustworthy.

Kostelnik also argues that the relevance of Exhibit 25 is conditioned on it being authenticated properly and that since it was not properly authenticated it should not have been admitted--and, indeed, authentication requires sufficient evidence to support a finding that the record is what its proponent claims. But here, the testimony of the record custodian of Ramsey Mental Health Center, combined with the lack of a credible challenge to the document's

authenticity, seem to us to provide sufficient evidence for the trial court to find the document is what Mystic Lake claims it is.

Next, Kostelnik argues that Exhibit 25 lacked foundation and contained inadmissible conclusions of an expert. But, while a doctor did fill out the form, Exhibit 25 does not, in fact, contain unsubstantiated expert opinions: it merely notes aspects of Kostelnik's reported medical history. Hence, Kostelnik's arguments based on rules relating to expert testimony seems to us to be misplaced.

Finally, Kostelnik argues the missing portion of the record violates the requirement which that if a duplicate is offered into evidence, it must have been produced by a means that accurately reproduces the original. But facsimile transmissions are a method that generally provide accurate reproductions. In our view, the controlling rules are those which permit the admission of a duplicate unless a genuine question is raised as to the authenticity of the original, or unless it would be unfair to admit the duplicate in lieu of the original. Since neither of those conditions applies here, the trial court did not abuse its discretion by admitting Exhibit 25.

Finally, Kostelnik has not demonstrated that she suffered actual prejudice from the admission of Exhibit 25: Exhibit 25 is relevant only to the issue of causation. If there is sufficient evidence to support the trial court's conclusion that Mystic Lake did not breach a duty it owed Kostelnik--as we have held there is--then any error regarding evidence of causation would not affect the outcome below. Even absent Exhibit 25, there was ample evidence to support the trial court's conclusion that Kostelnik failed to demonstrate causation. The EMT and emergency room reports failed to note Kostelnik's cut, Kostelnik's neck was the subject of examination immediately after the casino incident (suggesting that at that moment she was

experiencing pain), an expert accident reconstructionist testified that it was physically impossible for Kostelnik to be injured in the manner she claims, and Dr. Kravitz testified that the Mystic Lake incident did not cause her bacterial infection because there was no indication that her foot was severely infected.

For all of the foregoing reasons, the judgment of the trial court in this matter is AFFIRMED.

March 17, 1998

John E. Jacobson
Judge, Court of Appeals

Henry M. Buffalo, Jr.
Judge, Court of Appeals

IN THE COURT OF APPEALS FOR THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT **STATE OF MINNESOTA**

Leonard Prescott and F. William Johnson,	)	
Appellants,	)	
vs.	)	Ct. App. No. 017-97 & No. 018-97
Little Six Inc., members of its Board of Directors, and the Shakopee Mdewakanton Sioux (Dakota) Community,	)	
Appellees.	)	

MEMORANDUM OPINION AND ORDER

We decide today what, if any, forms of immunity an official of a tribally charted corporation is entitled to raise in response to a suit for money damages.

I. FACTUAL BACKGROUND

LSI is a corporation chartered by the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community") under the provisions of the Community's Corporate Ordinance, No. 2-27-91-004. Under its charter, LSI is wholly owned by the members of the Community, and the Community grants to LSI the sovereign immunity from suit that the Community possesses. See, e.g., LSI Articles of Incorporation § 3.1.

At the time the LSI charter was issued, Prescott was the Chairman of the Community, and therefore, a member of the Community's Business Committee. SMS(D)C Const. Art. III. The LSI charter provides that its board shall consist of seven members, three of whom shall be members of the Business Council. Prescott became a member of LSI's board and was elected as the board's first chairman and as LSI's first President. There is nothing in the Community law, however, or in LSI's charter or by-laws, that requires the Chairman of the Community government to also be the President of LSI, or vice versa.

Johnson was initially hired by the LSI board as the Corporation's first CEO and second president, succeeding Prescott in that latter position. Johnson later served as LSI's Chief Operating Officer. Besides his positions with LSI, Johnson did not hold a position in the Community government.

Appellees Little Six Inc., et al. (LSI) sued Appellants Leonard Prescott and F. William Johnson alleging, among other things, that in their former positions with LSI they expended monies for improper purposes and without authorization. During the tenure of Prescott and Johnson with LSI, the LSI board created an Executive Committee and delegated to it certain responsibilities. Both Prescott and Johnson served on the Executive Committee. Many of the allegations brought by the Community against Prescott and Johnson concern the scope and authority of the Executive Committee, the manner in which the Committee exercised its authority, and the representations made to the LSI board concerning the actions of the Committee.

In response to the Community's allegations, Prescott and Johnson filed separate motions for summary judgment, which the trial court considered together. Prescott argued he possessed both absolute and qualified immunity from suit and Johnson asserted he possessed qualified immunity. The trial court rejected the immunity arguments, reasoning that the Community had

waived LSI's immunity from suit, and that the immunity of LSI officials could not extend beyond the immunity of the sovereign entity they worked for.

Prescott and Johnson filed proper notices of appeal, which were certified by the clerk of court. LSI filed a motion resisting the appeal, primarily on the ground that a denial of summary judgment is not an appealable final order. This Court however, in an order dated September 9, 1997, allowed an interlocutory appeal from the trial court's decision to deny summary judgment on the immunity claims. See also P.R. Aqueduct & Sewer Authority v. Metcalf & Eddy, 506 U.S. 139, 144-45 (1993); Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). The scope of that order did not extend to the underlying merits of the summary judgment arguments.

II. DISCUSSION

An appeal from a denial of summary judgment is a matter of law which we review de novo. Welch et al. v. SMS(D)C, No. 009-96 (SMS(D)C Ct. App. Oct. 14, 1996) (10/14/96 order).

The issue before this Court is whether the appellants are entitled to a defense of immunity from suit. To answer this question we must address what, if any, types of immunity are available to tribal officials, and whether the Community has waived, abrogated, or modified these immunities in any way.

A. OFFICIAL IMMUNITY DEFENSES

Courts in the United States have developed a complex body of law regarding the immunities available to government officials. A brief review of this law may be helpful to the

resolution of the issues before us. However, it is important to note at the outset that federal cases are not necessarily binding on this Court and that there are substantial differences between the governmental structure of the Community and the United States that may warrant a different application of the law in any given circumstance.

In the United States, parties with a complaint against a government official may sue that person in either his official or individual capacity. See e.g., Kentucky v. Graham, 473 U.S. 159, 165 (1985). A suit for monetary damages against an official in his official capacity alleges that although acting within the scope of his office, the official nonetheless caused actionable harm to the complainant. American courts have treated official capacity suits as suits actually filed against the United States, because any judgment would be paid out of the United States' treasury. Id. at 166. Those courts have therefore held that sovereign immunity protects that official from suit to the extent that it would protect the entity for which he worked. Id. at 167.

Suits against officials in their individual capacities, on the other hand, attempt to impose personal liability on a government official. Kentucky, 473 U.S. at 165. There are, however, several different types of immunity that protect these officials from personal liability. Id. at 166-67. Absolute immunity is reserved for the highest government officials and completely excuses an official from the need to respond to a suit. See, e.g., Nixon v. Fitzgerald, 457 U.S. 731, 749-53 (1982). Qualified immunity is available to those officials who can show that their actions could reasonably have been thought consistent with the rights they are alleged to have violated. Anderson v. Creighton, 483 U.S. 635, 638 (1987).

The federal cases involving the liability of tribal officials in federal court seem to follow federal immunity law in general. When sued in their official capacity in federal courts, tribal

officials are immune from suit by virtue of the tribe's sovereign immunity. Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479-80 (9th Cir. 1985). When named in their individual capacity, they lose the protection of the tribe's sovereign immunity, but may resort to various individual immunities under federal law. Davis v. Littell, 398 F.2d 83 (9th Cir. 1968) (absolute immunity defense available to tribal general counsel); Sandman v. Dakota, 816 F.Supp. 448 (W.D. Mich. 1992), aff'd 7 F.3d 234 (6th Cir. 1993) (judicial immunity available to tribal judge).

Here, the Community is suing Prescott and Johnson in their individual capacities[1] in an attempt to impose personal liability on them for alleged acts of malfeasance. Prescott and Johnson collectively urge us to utilize the doctrines of absolute and qualified immunity, as those doctrines are used in federal courts, to protect them from suit.

First, we must determine whether Prescott and Johnson were acting as tribal officials for purpose of the allegations in this suit. The only allegations against Prescott and Johnson involve actions as officers of LSI. LSI is an entity created by the Community government to serve the membership of the Community. The Community delegated substantial responsibility and authority to LSI to carry out its mission of benefitting the Community, and like other government officials, Prescott and Johnson were required to act with the best interest of the Community in mind. See, e.g., SMS(D) Community Corporation Ordinance § 36. Therefore, we see no reason why officers of LSI should not be considered tribal officials for the purpose of raising immunity defenses, even in individual capacity suits. See, e.g., In re Greene, 980 F.2d 590, 596 (9th Cir.

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[1]In its brief, the Community notes that Prescott and Johnson were originally sued in both their official and individual capacities. However, the Community's decision to name Prescott and Johnson in their official capacities would not entitle it to any relief, because recovery in such cases is against the sovereign, not the individual. Kentucky, 473 U.S. at 166. Therefore, if the Community were to prevail in an official capacity suit here, it would simply be required to pay money from one of its own pockets to the other.

1992) (tribe's sovereign immunity extends to economic enterprises); Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479-80 (9th Cir. 1985) (tribal police officer treated as tribal official when sued in official capacity); Snow v. Quinault Indian Nation, 709 F.2d 1319, 1322 (9th Cir. 1983) (tribal revenue officer may assert immunity when sued in official capacity).

The Community argues that even if Prescott or Johnson acted as Community officials, this is not the appropriate factual context in which to apply official immunity. The Community notes that most federal immunity cases involve an individual bringing suit against a government or a government official. In that context there are numerous policy reasons to allow an official to take action for the greater good without having to unnecessarily worry about inadvertent harm to an individual, or without having to conduct extensive research on the state of the law before making a discretionary decision. The Community argues that this case is different, however, because here it is the Community as a whole who is bringing suit against two individuals, alleging that the individual officers violated their public trust to the Community. The Community argues that this case is more similar to a criminal proceeding against former officials, and like federal officials, Prescott and Johnson should not be able to claim immunity from such acts. See e.g., U.S. v. Dee, 912 F.2d 741, 744 (4th Cir. 1990).

While the Community's argument is not without force, we conclude that Prescott and Johnson may raise the defenses of immunity in this context.[2] This Court does not have criminal jurisdiction over Prescott and Johnson. If the Community believes the actions of Prescott and

[2]The Community argues that Prescott and Johnson should not be able to raise their immunity defenses because they did not raise those defenses in their answers. Prescott and Johnson, however, have properly raised these defenses in this instance. See, e.g., English v. Dyke, 23 F.3d 1086, 1089-90 (6th Cir. 1994) (immunity may be raised at summary judgment even if not raised in the answer); Ball Corp. v. Xidex Corp., 967 F.2d 1440, 1443-44 (10th Cir. 1992) (notice before trial of defense cures failure to raise immunity defense in answer).

Johnson warrant criminal proceedings, the appropriate remedy is to seek such sanctions from the federal authorities.

In addition, allowing the Community to fashion a civil suit to punish former officials it suspects of malfeasance would start a problematic precedent. Any time there was a change in administration, or a change in the political winds, present or former officials could find themselves completely exposed to suits for money damages. The lack of immunity defenses in such situations would encourage politically motivated suits and would burden officials with the personal expense and time commitment necessary to defend such suits. We are not willing to open that door by distinguishing instances where the Community brings a civil suit to punish its own officials from an individual suit claiming injury from an official's actions. In either case, official immunity defenses act to balance the need for civil redress with the need to allow tribal officials to perform their jobs as representatives of the Community. We conclude that tribal officials, including officers of LSI, may raise official immunity defenses, even in response to a suit initiated by the Community.

B. WAIVER

The trial court allowed Prescott and Johnson to raise official immunity defenses, but concluded that since the Community had waived the sovereign immunity of LSI in § 3.1 and § 3.2 of LSI's Articles of Incorporation, and waived its own sovereign immunity in § 2 of the Community's Court Code, it had also waived any official immunity LSI's officials might raise in response to a suit for money damages.

On appeal, Prescott and Johnson argue that the trial court confused the concepts of sovereign immunity and official immunity. They insist that sovereign and official immunity are

distinct doctrines and that their official immunity survives the Community's waiver of LSI's immunity from suit.

It is significant to note that in the courts of the United States, the relationship between sovereign immunity and individual official immunity is inconsistently treated. Some sources indicate that official immunity stems from an official's service to a sovereign and cannot extend beyond the immunity retained by that sovereign. See Restatement (Second) Torts, 895D cmt. j (1976) ("[a]s a general rule, the immunity of a public officer is coterminous with that of his government.") Other sources note that the recent trend is to justify official immunity on policy grounds unrelated to the concept of sovereign immunity. See e.g., Antieau & Mecham, Tort Liability of Government Officers and Employees §§ 1.4 through 1.7 (1990).

Regardless of what American courts see as the origin or scope of official immunity, however, it is clear that a sovereign authority has the power to waive the official immunity of its officers. See, e.g., Jackson v. Georgia Dept. of Transportation, 16 F.3d 1573, 1577 n.6 (11th Cir. 1994) (Georgia Constitution waives official immunity of officers); 1 Pa.C.S.A. § 2310 (1995) (". . . the Commonwealth [of Pennsylvania], and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign and official immunity and remain immune from suit except as the General Assembly shall specifically waive that immunity"). This result is consistent with either of the positions advanced by the parties in their briefs. If one accepts Appellant's contention that official immunity finds its source in the common law, it follows that a sovereign may modify or waive a common law doctrine through appropriate legislation. If one accepts Appellee's contention that official immunities stem from the immunity of the sovereign, it would likewise make sense to allow a sovereign to waive any official immunity held by its

officials.

Therefore, having concluded that Prescott and Johnson may raise official immunity defenses, we must consider whether the Community has waived any defense that Prescott and Johnson might claim. Any waiver of the Community's sovereign immunity must be clear and unequivocal, Stopp et al. v. Little Six Inc., et al., No. 006-95 (SMS(D)C Ct. App. Jan. 29, 1996) (1/29/96 order), and we see no compelling reason to adopt a different rule for when the Community waives the official immunity of its officers.

Here, the Community urges us to affirm the trial court's conclusion that sections 3.1 and 3.2 of LSI's charter exhibit a waiver of official immunity for the officers of LSI. Those sections read:

> 3.1 Sovereign Immunity of Corporation. The Shakopee Mdewakanton Sioux Community confers on the Corporation all of the Community's rights, privileges and immunities concerning federal, state and local taxes, regulation, and jurisdiction, and sovereign immunity from suit, to the same extent that the Community would have such rights, privileges, and immunities, if it engaged in the activities undertaken by the Corporation. Such immunity shall not extend to actions against the Corporation by the Community or Members of the Corporation.
>
> 3.2 Consent to Sue and be Sued Required. The Corporation shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Shakopee Mdewakanton Sioux Community or another court of competent jurisdiction; provided, however, that any recovery against the Corporation shall be limited to the assets of the Corporation delineated at Article 6 of these Articles of Incorporation, and that, to be effective, the Corporation must, by action of the Board of Directors, explicitly consent to be sued in a contract or other commercial document in which the Corporation shall also specify the terms and conditions of such consent. Consent to suit by the Corporation shall in no way extend to the Community, nor shall a consent to suit by the Corporation in any way be deemed a waiver of any of the rights, privileges and immunities of the Community. Consent shall not be required for an action commenced by a Member of the Corporation to enforce the provisions of these articles or the Shakopee Mdewakanton Sioux Community Corporation Ordinance in the Judicial Court of the Shakopee Mdewakanton Sioux Community.

Articles of Incorporation of Little Six, Inc., March 18, 1991.

Neither section makes a specific reference to the official immunity of any Community officer. While these sections clearly allow suits against the Corporation by the Community or its members in tribal court, the damages available against the Corporation are limited to the assets delineated in Article 6 of the Articles of Incorporation. This language indicates that these sections are primarily concerned with the potential liability of LSI, and not tribal or LSI officials. The Community, of course, could amend this section to waive the immunity of LSI officials, but until it does so explicitly, a waiver of official immunity will not be implied from this language.

Similarly, we do not read § II of the Community's Court Code as a clear or unequivocal waiver of official immunity for suits against tribal officials for money damages. Section II reads (in part):

> Jurisdiction The Shakopee Mdewakanton Sioux Tribal Court shall have original and exclusive jurisdiction to hear and decide all controversies arising out or the Shakopee Mdewakanton Sioux Community Constitution, its By-laws, Ordinances, Resolutions, other actions of the General Council, Business Council or its Officers or the Committees of the Community pertaining to: 1- membership; 2- the eligibility of persons to vote in the proceedings of the Shakopee Mdewakanton Sioux Community or in Community elections; 3- the procedures employed by the General Council, the Business Council, the Committees of the Community or the Officers of the Community in performance of their duty. . . .

SMS(D)C Ordinance 02-13-99-01, Section II. As with §§ 3.1 and 3.2 of the LSI Articles of Incorporation, there is no clear or unequivocal waiver of official immunity in the language of Section II. First, it only grants this Court with jurisdiction over certain types of claims, and a grant of jurisdiction is not necessarily a waiver of any type of immunity. SMS(D)C v. Stade, No. 002-88 (SMS(D)C Ct. App. April 18, 1989) (7/15/88 order). Second, even if read as a waiver of sovereign immunity, there is nothing in section II that specifically waives official immunity.

Section II(3) grants jurisdiction to this Court for controversies arising out of the procedures employed by tribal officers in the performance of their duties. This wording makes it more likely that this section was designed to confer jurisdiction for injunctive or declaratory relief rather than money damages. Without a specific indication that the Community intended to waive the immunity of its officials for money damages, we will not imply such a waiver from the language of Section II.[3]

Having concluded that Prescott and Johnson, in their roles at LSI, were tribal officials who could raise official immunity defenses in response to a suit for money damages, and that the Community has not explicitly waived those immunities, we must next ask what types of immunity, if any, are they entitled to.

C. ABSOLUTE IMMUNITY

Prescott argues that since he was Chairman of the Community at the same time he was President of LSI, he is entitled to absolute immunity from suit. The actions alleged in the Community's complaint, however, do not relate to Prescott's status as Chairman of the Community -- they all relate to his capacity as an officer of LSI. There is nothing in the Community Constitution, By-laws, or statutory or common law that requires the Chairman of the Community to be an officer of LSI or vice versa. Prescott's status as Chairman of the Community is simply not relevant to our evaluation of his absolute immunity claim.

Therefore, the question before us is whether Prescott is entitled to absolute immunity on

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[3]This result is not inconsistent with the trial court's decision in SMS(D)C v. Stade, 002-88 (SMS(D)C Tr. Ct. Apr. 29, 1989) (7/15/88 order). In Stade, the trial court concluded that Section II waived the Community's sovereign immunity from a suit for injunctive relief based on the types of claims specified under section II. The trial court specifically declined to consider whether section II waived the immunity of either the Community or its officers in the context of a suit for money damages. Id. at 6.

the basis of his status as an officer of LSI. In the federal context, absolute immunity is not the norm for government officials, and federal courts have reserved absolute immunity only for those officials whose special functions or constitutional status require complete protection from suit. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). Officials absolutely immune from suit are those who exercise substantial discretion in their jobs, and who if exposed to civil liability would not be able to perform their jobs effectively, if at all. Id. at 806-07. For example, federal cases have granted absolute immunity to the President of the United States acting in his official capacity, Nixon v. Fitzgerald, 457 U.S. 731 (1982), legislators acting in their legislative capacity, see e.g., Eastland v. United States Serviceman's Fund, 421 U.S. 491 (1975), and judges acting in their judicial functions, see e.g., Stump v. Sparkman, 435 U.S. 349 (1978).

Officers of LSI are not so high ranking, nor do they exercise such discretionary powers, as to warrant the application of absolute immunity. LSI was established by the Community to serve the Community, and all of its powers derive from the Community. Its actions are subject to the scrutiny of the Community and to the restrictions imposed in its Articles of Incorporation. The Community may alter the existence or structure of the LSI through appropriate legislation. Given the power the Community government retains over the creation and maintenance of LSI, the officers of LSI should be accountable to the Community and are not entitled to raise a defense of absolute immunity.

D. QUALIFIED IMMUNITY

In the courts of the United States, qualified immunity represents the norm for officials who are sued personally for money damages, and is designed to strike a balance between vindicating the rights of citizens and allowing public officials to perform their jobs. Anderson,

483 U.S. at 640. An official performing a discretionary function within the scope of their duty will be shielded from liability for civil damages as long as their conduct does not violate a clearly established right of which a reasonable official would have known. See Harlow, 457 U.S. at 818. In other words, an official is entitled to qualified immunity only if in light of pre-existing law, the unlawfulness of his conduct would be apparent to a reasonable official. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Federal courts have gone to great lengths to emphasize that this inquiry is an objective legal question that should be resolved at the earliest possible point in the litigation. Anderson, at 646 n.6. Therefore, addressing immunity questions at summary judgment is wholly appropriate. At the same time, federal courts have warned against focusing on the nature of the right rather than the nature of the conduct. Id. at 639-40.

Therefore, in order to succeed with a qualified immunity defense, an official must raise that defense in a timely manner and demonstrate that undisputed material facts reveal that his or her actions were objectively reasonable in light of the clearly established Community law.[4] If the official is able to do this, he is entitled to immunity from suit, and the case should be dismissed.

The first task of the trial court in this inquiry is to determine if the law was clearly established at the time the official acted. If it was not, the official could not be reasonably expected to anticipate subsequent legal developments and could not either actually or

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[4]Relying on federal law, Appellants argue that "Community law" should only extend to rights established either by statute or by the Community Constitution, and should not include the common law causes of action alleged by Appellees. This Court, however, is not concerned with preserving a federalist system of government as are the federal courts, nor does this Court have an explicit statute, such as 42 U.S.C. § 1983 to interpret. Therefore, a Community official may be held liable for a violation of any clearly established right under Community law, whether that right is statutory, constitutional, or common law.

constructively "know" that his actions were illegal. Harlow, 457 U.S. at 818-819. In such a case, summary judgment for the official would be appropriate.

If, on the other hand, the Community law is clearly established, a reasonably competent official is presumed to know the law governing his conduct, and the trial court should then determine if the material facts are undisputed. Id. Summary judgment should be entered for the official only if there are no disputed material facts, and those facts show the official did not violate any established right as a matter of law. If, however, there is a dispute over the material facts concerning whether the official violated a clearly established right, then summary judgment is not appropriate, and the case should move forward toward trial.

Because this is a case of first impression, and because the record below and arguments of the parties are not fully developed on appeal, we remand to the trial court to consider whether Prescott and Johnson are entitled to summary judgment on qualified immunity grounds as outlined in this opinion. We do so for several reasons. First, the trial court, relying on waiver, did not reach the merits of Appellant's qualified immunity claims, therefore, the record is less than fully developed on appeal. Second, this Court's opinion today does not precisely mimic the federal law regarding qualified immunity, as the briefs and oral argument of the parties apparently do. Therefore, the arguments of each party regarding qualified immunity are not fully developed. Third, since the trial court is more familiar with the allegations involved in this suit and the applicable Community law, we believe that court is best suited to first consider the claims of Prescott and Johnson for qualified immunity.

We note, however, that our remand is an exception to what we hope will become the rule. In the future, questions of official immunity should be resolved at the summary judgment stage

with, at most, one interlocutory appeal on the immunity issues, as outlined in our earlier order, dated September 9, 1997.

ORDER

For the foregoing reasons, the order of the Trial Court denying Appellant's claims of immunity is reversed. The case is remanded for further proceedings consistent with this opinion.

Dated: 4/16, 1998

Henry M. Buffalo, Jr.
Judge

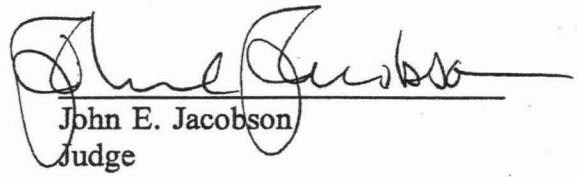
Robert A. Grey Eagle
Judge

DISSENT

I agree with the majority that the decisions which officers of LSI and similar businesses must make should not be subjected lightly to "Monday morning quarterbacking" in litigation brought by the Community or Community members. But I believe that the protection which is necessary, for such decisions, can and should be provided by providing the Community's business officials with the sort of good faith defense which commonly is available to corporate officers. And for the reasons I set forth in my decision as the presiding officer in the trial court, I believe

that any absolute or official immunity which Prescott and Johnson might otherwise possess, as a result of the fact that Little Six, Inc. is a business chartered and wholly owned by the Community, was waived by the Community, for litigation such as this, when the Community adopted sections 3.1 and 3.2 of Little Six's Corporate Charter. Those sections grant Little Six its immunities, and they expressly limit that grant in instances where litigation is brought by the Community. I do not believe that the Community intended to grant officials of Little Six a greater immunity than the corporation itself enjoys; and although I certainly grant the majority's point with respect to the explicitness that is required in order for a waiver of immunity to be effective, I think in this case--given that it is the Community itself which is suing--that standard is met.

I therefore respectfully dissent.



John E. Jacobson
Judge

IN THE COURT OF APPEALS FOR THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In re Leonard Prescott Appeal from 7/1/94 Gaming Commission Final Order	Ct. App. No. 015-97

MEMORANDUM OPINION AND ORDER

Before Judge John E. Jacobson, and Judge Robert Grey Eagle. Judge Henry M. Buffalo, Jr. took no part in the decision.

This appeal involves a dispute over a decision made by the SMS(D)C Gaming Commission ("the Commission") on Leonard Prescott's application for a gaming licence. In this present phase, Little Six, Inc. ("LSI") appeals both the trial court's order requiring two Commission members to recuse themselves due to bias, and its decision to remand this case back to the Commission for reconsideration of the underlying licencing dispute. We reverse the trial court's decision on bias, and invite further briefing from the parties on merits of the Commission's original decision on Prescott's licence.

I. FACTUAL AND PROCEDURAL BACKGROUND

The SMS(D)C Gaming Ordinance (Gaming Ordinance) requires "key employees" to apply for and obtain gaming licences in order to conduct gaming activities on the reservation. Gaming Ordinance § 300. A licence is obtained by submitting an application to the SMS(D)C Gaming Commission ("the Commission"). While a licence application is pending, the Commission may issue a Temporary Employment Authorization ("TEA") to the applicant, allowing him or her to engage in gaming activities until a final decision on the application is reached. Gaming Ordinance § 306.

Leonard Prescott, in his former position as an officer and board member of Little Six, Inc. ("LSI"), applied to the Commission for a gaming license, and was granted a TEA pending the outcome of a background investigation.

On May 5, 1994, the Commission suspended Prescott's TEA pursuant to § 205 of the Gaming Ordinance. After notice, a hearing was held on the suspension. The hearing lasted eight days and generated nearly 2,000 pages of oral testimony, as well as over one hundred tangible exhibits. On July 1, 1994, the Commission issued 117 Findings of Fact and 11 Conclusions of Law, ultimately concluding that Prescott was not entitled to licensure under the Gaming Ordinance ("the July decision"). Prescott appealed the Commission's decision to the trial court, as provided by the Gaming Ordinance. See Gaming Ordinance § 219.

While on appeal, an affidavit by Rodney M. Haggard, an investigator hired by Prescott, was submitted to the trial court. In his affidavit, Haggard stated that Thomas Guthery, former executive director of the Commission, told him of remarks made by two members of the Commission demonstrating bias against Prescott. The trial court declined to receive Haggard's affidavit into the record, see In re Leonard Prescott Appeal, No. 041-94 (SMS(D)C Tr. Ct. (Nov. 11, 1994 order)), but nonetheless remanded to the Commission for consideration of the allegations of bias.

On February 21, 1995, the Commission held a second hearing, this time on the bias claims. Consistent with his affidavit that the trial court declined to take into the record, Haggard testified that Guthery had told him about remarks indicating bias against Prescott by at least two Commission members. The Commission subpoenaed Guthery, but he did not attend the hearing. Instead, he sent a letter (labeled as an affidavit) to the Commission, the trial court, and each of the parties, disassociating himself from the investigation undertaken by Haggard. Guthery's letter was admitted into the Commission's record. The Commission issued its Findings of Fact and Conclusions of Law on January 19, 1996 (the January decision), concluding that the allegations of bias were not supported by the record, and that its earlier July decision suspending Prescott's licence should stand.

Prescott again appealed to the trial court, which reversed and remanded. Specifically, the trial court concluded that the

allegations of bias, when coupled with the familial and political relationships of certain Commission members, deprived Prescott of his right to a neutral and detached arbitrator, and violated his substantive due process rights. On remand, the trial court ordered two Commission members to recuse themselves before the remaining Commission members reconsidered the matter of Prescott's licence. Because we believe the trial court erred in considering material outside the record, and because we believe that on the record the Commission's decision regarding bias was not arbitrary or capricious, the decision of the trial court is reversed.

II. DISCUSSION

Our standard of review is a narrow one. The General Council has delegated to the Gaming Commission "the sole authority to regulate any and all gaming activity on the Shakopee Mdewakanton Sioux (Dakota) Reservation." Gaming Ordinance § 200(a). This Court will reverse a Commission decision only when its actions are arbitrary, capricious, or clearly an abuse of discretion. SMS(D)C Gaming Ordinance § 219. Under an arbitrary and capricious standard, our inquiry is limited to the record before the agency at the time it made its decision, not any record made on appeal. See, e.g., Camp v. Pitts, 411 U.S. 138, 142 (1973); Edwards v. United States D.O.J., 43 F.3d 312, 314 (3d. Cir. 1996). While our standard of review for the actions of the Commission is generally

a deferential one, this Court will review any legal conclusions of the Commission de novo. Gaming Ordinance § 219.

Looking at the administrative record that was before the Commission at the time it made its decision, we cannot say the Commission erred when it concluded there was insufficient evidence of bias. The only evidence of bias in the record came from the double and triple hearsay testimony of Haggard, an investigator employed by Prescott, who indicated that Guthery had heard, or knew of, biased remarks from at least two Commission members. Standing alone, the Commission could have reasonably doubted this testimony due to its hearsay nature and the fact that Haggard was employed by Prescott. However, there was also a letter in the record from Guthery distancing himself from Haggard's investigation. Given the absence of any other evidence of bias in the record, and given the tenuous nature of the evidence that was in the record, we are hard pressed to say the Commission's actions were arbitrary, capricious, or clearly an abuse of discretion.

The trial court, on the other hand, concluded that two of the Commission members exhibited at least an appearance of bias, if not actual bias, and that Prescott's substantive due process rights were therefore violated. To state a due process violation, a party must articulate a cognizable property or liberty interest. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 332 (1975). Even assuming, without deciding, that Prescott has articulated a cognizable liberty interest as an applicant for a gaming licence,

we cannot say that his substantive due process rights were violated.

While it is true that substantive due process, and common notions of fairness and decency, require that decisions affecting the rights of tribal members be made by a neutral arbitrator, a party claiming bias must still overcome the presumption of good faith, honesty, and integrity of the decision maker, and convince this Court that an actual risk of bias of prejudgment exists. See, e.g., Withrow v. Larkin, 421 U.S. 35, 47 (1975); Kenneally v. Lungren, 967 F.2d 329, 333 (9th Cir. 1992). This standard is consistent with our earlier cases requiring evidence of bias before requiring recusal. See In re Leonard Prescott Appeal and Prescott v. SMS(D)C Business Council (consolidated), Nos. 003-94, 004-94 (SMS(D)C Ct. App. Nov. 7, 1995)(11/7/95 order).

The trial court's finding of bias was in error because it relied at least in part on material not in the record. The trial court considered the fact that two of the Commission members were related to a political opponent of Prescott, and it concluded that these familial relationships, when coupled with the allegations of Prescott, created at least an appearance of bias, if not actual bias. However, there was no actual evidence in the administrative record concerning the political affiliations or loyalties of any Commission members, or that any members were politically biased against Prescott. Even if the trial court could have properly taken judicial notice of the blood relationships of Commission

members, inferring political bias on the basis of familial relationships is a tricky and inexact science at best. Particularly when reviewing a decision by an administrative agency, the trial court must confine its review to the evidence in the record that was before the agency at the time it made its decision.

In addition, even if it was shown in the record that certain Commission members were associated with different political factions than Prescott, this, standing alone, is not necessarily a reason to impute impermissible bias to a Commission member. Under the trial court's approach, second and third hand allegations of bias, accompanied by an undocumented assumption of political bias, would be sufficient to create a due process violation and require recusal of the relevant tribal decision maker. If that were all that was required, almost any member before an administrative tribunal would be able to allege bias and require the removal of an adjudicator he or she suspected of being politically opposed to the matter under consideration. This would be problematic for the governance of this Community because its governing bodies, such as the Gaming Commission, are composed of different members who will, in all likelihood, have different political affiliations and backgrounds.

The trial court's reliance on Midnight Sessions v. City of Philadelphia, 945 F.2d 667, 683 (3d. Cir. 1991) is also misplaced. In that case, the United States Court of Appeals for the Third Circuit noted that allegations of bias, bad faith, or improper

motives by a government adjudicator "may support" a claim for a violation of substantive due process. Id. However, the Midnight Sessions court did not state that allegations alone are sufficient to prove a violation of substantive due process. Id. Mere allegations of bias or bad faith cannot compel a substantive due process violation without actual evidence of animus to support it. Any evidence of bias or bad faith is properly evaluated by the fact finder, which in this case was the Commission. Midnight Sessions, at 683. Consistent with Midnight Sessions, our decision today requires a party to produce sufficient evidence to support a finding that there exists an actual risk of bias or prejudgment.

We affirm the Commission's January 19, 1996 decision that there was insufficient evidence of bias, in the administrative record, to warrant disturbing the Commission's original conclusion on Prescott's TEA. We hold only that the Commission actions were not arbitrary, capricious, or clearly an abuse of discretion. Whether we agree with the ultimate conclusion of the Commission is not relevant. Under the deferential standard of review mandated by Community law, as long as there is a reasonable basis in the record for the Commission's actions, we will affirm its decision.

The resolution of the bias issue leaves before us the merits of the Gaming Commission's July 1, 1994 decision to suspend Prescott's TEA and deny him a tribal gaming licence. Prescott appealed the Commission's suspension of his TEA on July 12, 1994; the issue was briefed in the trial court; and the administrative

record was properly submitted. The trial court's order dated February 20, 1997, which is the subject of this appeal, granted Prescott's appeal of the TEA revocation, and denied LSI's request to affirm the Commission's decision on the TEA. LSI's properly filed Notice of Appeal to this Court includes a request that we review the merits of the Commission's decision on the suspension of the TEA. Therefore, the merits of the Commission's decision on the TEA now are properly before us.

However, the parties have not briefed the TEA suspension on appeal. Therefore, in our view the most prudent course for us is to allow the parties to submit additional briefing on the merits of the Commission's decision to suspend Prescott's TEA. The question presented for briefing is: given the administrative record before it, was the Commission's decision to suspend Prescott's licence arbitrary, capricious, or clearly an abuse of discretion.

ORDER

For the foregoing reasons, the order of the Trial Court is reversed, and the Gaming Commission's findings and conclusions dated January 19, 1996 are affirmed. This Court will entertain further briefing on the merits of the Commission's July 1, 1994 decision, in accordance with this opinion. The schedule for further briefing will be established during a scheduling conference, the date and time of which will be set by the Clerk of

Court following consultation with counsel for the parties.

Dated: April 30, 1998

John E. Jacobson
Judge

Robert A. Grey Eagle
Judge

IN THE COURT OF APPEALS FOR THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Little Six Inc. Board of Directors, et al.,	)	
Appellants,	)	
v.	)	Ct. App. No. 010-97
L.B. Smith, et al.,	)	
Appellees.	)	

MEMORANDUM OPINION AND ORDER

In October 1995, thirteen members of the Shakopee Mdewakanton Sioux (Dakota) Community sued the Little Six Board of Directors (LSI) to compel the production of certain documents and to remove members of the LSI Board of Directors. Between that time and this, ten of those persons have been dismissed from the case. Now in this appeal, we must decide if subsequent events have rendered any of the remaining Plaintiff/Appellees' claims moot, and if they have, what remedy is appropriate at this stage in the litigation.

I. FACTUAL AND PROCEDURAL BACKGROUND

In October 1994, the Appellees and ten other members of the

Community asked in writing to inspect certain LSI documents under the terms of Community's Corporation Ordinance, No. 2-27-91-004, *as amended by* Resolutions 11-05-92-001 and 7-27-94-001 (the Corporation Ordinance). LSI denied these requests, contending that the requests did not conform to the requirements of Section 68 of the Corporation Ordinance. Specifically, LSI claimed some of the information was held by the SMS(D)C Business Council rather than LSI, and that compliance with other requests would be unduly burdensome.

In October 1995, the thirteen original Plaintiff/Appellees sued LSI to compel the production of documents and to remove the members of the LSI Board of Directors. LSI filed a motion to dismiss, which was granted in part and denied in part on April 30, 1996. LSI then appealed the part of the order denying dismissal.

While on appeal, Appellee Feezor submitted a second document request to LSI, dated January 8, 1997. Notably absent from this request were any documents held by the Business Council. LSI believed that this request conformed with Section 68 of the Corporation Ordinance; and after signing a stipulation of confidentiality with the Appellees (dated May 27, 1997) to cover the proceedings in this Court, LSI turned over the documents identified in the second request.

On September 11, 1997, in response to a motion made to this Court, ten of the thirteen Appellees were dismissed for failing to

prosecute their claims.

LSI now argues that the entirety of this case is moot, and that the trial court opinion from which it appeals should be vacated. Specifically, LSI contends that its production of documents under the second request moots Appellees' claims regarding the first document request, and that the dismissal of ten of the thirteen Appellees renders the action for removal of Board members ineffective and moot.

II. DISCUSSION

As an initial matter, Appellees suggest this Court is without jurisdiction to hear this matter because an order denying a motion to dismiss is not ordinarily an appealable final order. This Court is permitted to hear appeals by SMS(D)C Rule of Civil Procedure 31, which states that " . . . a party may appeal any decision of the assigned (trial) Judge that would be appealable if the decision had been made by a judge of a United States District Court."

It is true that a denial of a motion to dismiss is not ordinarily considered an appealable final order; but there are numerous circumstances under which non-final decisions of federal district courts are appealed as interlocutory matters. Under 28 U.S.C. § 1292 (1994), interlocutory appeals are allowed for orders (1) that involve controlling questions of law as to which there is substantial difference of opinion, and (2) where an immediate

appeal may materially advance the termination of the litigation. Here, the issues relating to mootness involve issues of first impression, which, if resolved, will materially advance the termination of this litigation. We are satisfied that a federal court could and would chose to hear this appeal on an interlocutory basis, and therefore, the requirements of SMS(D)C Rule of Civil Procedure 31 have been satisfied.

Appellees protest, however, that even if this order is the type that meets the substantive requirements of 28 U.S.C. § 1292 (1994), still this Court should not consider the appeal because LSI has failed to conform with the procedural requirements imposed by that section. But the text of our Rule 31 does not purport to incorporate all of the procedural requirements imposed on parties attempting to appeal a decision by a federal district court judge. Instead, our Rule 31 merely incorporates the substantive requirements of finality, with all the interlocutory exceptions that are used by federal courts to determine when an appeal may lie. Rules of this Court make it clear when they are intended to incorporate all the procedural requirements of specific federal rules (see, e.g., SMS(D)C Rule Civil Procedure 18, 21, 28) and Rule 31 does not do so. LSI filed this appeal within the time frame established by our Rules, and the procedural requirements of 28 U.S.C. § 1292 (1994) do not apply.

Having determined this Court may properly exercise jurisdiction over this appeal, we next must determine if the

Appellees' claims are moot. Legal issues generally are moot if the controversy is no longer "live", the parties lack a cognizable interest in the outcome of the litigation, the court can no longer fashion effective relief, or the substantially same relief has been obtained through other means. See, e.g., County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979); Alton v. Alton, 347 U.S. 610, 611 (1954); Blackwelder v. Safnauer, 866 F.2d 548, 551 (2d Cir. 1989). However, even if moot, an action still can be maintained if the issue is such that it is capable of repetition, yet evading review, or if public policy requires that the dispute be adjudicated. See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 23-35 (1994); Davis, at 631.

In our view, Appellees' claims regarding their first document request clearly are mooted by LSI's response to their second document request. The second document request obtained relief that was essentially identical to the relief sought by the first request. For example, in the first document request, Appellees asked LSI to turn over records of per capita payments made to Community members. This information is kept by the SMS(D)C Business Council, not LSI. The second document request asked for records of the gaming proceeds set aside by LSI for Community purposes -- which are records that LSI does keep, and which contain the same type of information that the per capita payment request sought. LSI turned this information over to Appellees, enabling them to obtain the same relief they sought from their first

document request.

Nor does there appear to be any further relief which this Court could grant. Appellees have not identified any outstanding documents that LSI has refused to turn over in violation of the Corporation Ordinance. So, as far the document requests are concerned, there is no longer a live issue to adjudicate.

Appellees argue, however, that exceptions to the mootness doctrine apply here. Specifically, they claim there is a threat of repeated harm without review, and that public policy warrants resolution of this issue.

We disagree. While the validity of a document request under Section 68 of the Corporation Ordinance certainly is an issue that is capable of repetition, it will not evade review in the future unless, as here, the party seeking the documents submits a second request that LSI honors and that provides essentially the same relief as the first request; and public policy is best served by adjudicating legal issues in light of actual disputed facts. Appellees' request that we rule on the document claim, despite the fact that they have already obtained the relief they sought, essentially is a request for an advisory opinion, and this court refrains from issuing advisory opinions in all but the most extreme cases. In re Advisory Request from the Business Council -- Payment of Revenue Allocation to Thirty One Members, No. 037-94 (SMS(D)C Tr. Ct. Feb. 11, 1994).

Appellees' request to remove LSI officers also has been mooted

by subsequent events. On September 11, 1997, this Court dismissed ten of the original thirteen Plaintiff/Appellees for failure to prosecute their appeal. Consequently, there are no longer the number of Appellees required to pursue an action to remove LSI officers. See Corporation Ordinance § 25.3 (requiring ten percent of the General Council membership to pursue a removal action). Hence, the removal action has been mooted because Appellees have declined to pursue the claim and the issue is no longer live.

None of the exceptions to the mootness doctrine are applicable to the removal action, any more than they are applicable to the document production issue. Certainly, an action to remove LSI officers is capable of being repeated, but it will only evade review in the future if, as here, sufficient numbers of persons fail to prosecute their claim on appeal. Appellees argue that the public policy of holding LSI accountable for its actions justifies adjudicating this claim; but where the requisite percentage of Community members no longer seek accountability, this Court will not step in on its own accord to adjudicate a claim that is no longer live.

Having concluded that the claims of Appellees are moot, in our view the most appropriate course in this case is to vacate the decision below, and remand with instructions to dismiss -- the established practice of federal courts in these circumstances. U.S. Bancorp, 513 U.S. at 22-23; Blackwelder, 866 F.2d at 550. This practice clears the path for the future relitigation of the

issues between truly adverse parties, and eliminates a judgment the review of which has been prevented by happenstance or by the unilateral action of party prevailing below. Davis, at 22-23.

Appellees argue that vacatur is not proper because they contend that the case was settled while on appeal -- at least as far as the document request is concerned. To support this contention, they point to their second document request, and the accompanying stipulation of confidentiality that was filed in this Court. But nowhere in those materials, or in the pleadings submitted to the court, is there any mention either of a settlement or a dismissal of claims. A stipulation of confidentiality, with nothing more, is not sufficient to indicate to us that the parties intended to settle and/or dismiss any of the claims between them.

The issues in this suit became moot, not through settlement, but through the unilateral action of Appellees. Their claims became moot because they submitted a second document request, and because a substantial number of Appellees failed to prosecute the removal action on appeal. Vacatur will be granted, because a successful party below should not be able to preserve a favorable ruling by taking actions which moot the case on appeal. Davis, 22-23.

ORDER

The decision of the trial court is vacated and the case is

remanded with instructions to dismiss.

Dated: May 27, 1998

John E. Jacobson
Judge

Robert A. Grey Eagle
Judge

remanded with instructions to dismiss.

Dated: May 27, 1998

John E. Jacobson
Judge

Robert Grey Eagle
Robert A. Grey Eagle
Judge

IN THE COURT OF APPEALS OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Clifford Crooks, Sr.,

Appellant,

vs. Ct. App. No. 016-97

Shakopee Mdewakanton Sioux (Dakota) Community,

Respondent.

MEMORANDUM OPINION AND ORDER
NUNC PRO TUNC

I. FACTUAL BACKGROUND

On May 19, 1994, Clifford Crooks, Sr., filed an application for enrollment in the Shakopee Mdewakanton Sioux (Dakota) Community. Approximately eight months later, when the community had yet to act on his application, Crooks filed a complaint requesting a declaration from the Tribal Court that he was in fact a member of the Community and requesting monetary damages. The Tribal Court considered his complaint under the 1994 Amendments to the Enrollment Ordinance and dismissed it for failure to state a claim and for failure to exhaust the available administrative remedies. On January 24, 1996, this Court reversed and remanded on the basis that his claims should have been analyzed under the 1993 Amendments to the Enrollment Ordinance rather than the 1994 Amendments. While Crooks' case was on remand, the Community approved his application for membership on June 20, 1996.

The Trial Court concluded that the Community's decision to accept Crooks as a member mooted a number of his original claims relating to his lack of membership status. In his brief and at oral argument, counsel for appellant did not dispute the Trial Court's decision in this respect, and we therefore do not reach those issues on appeal. The question appellant did raise in the Trial Court, and which he now raises on appeal, it whether his allegation that the Community improperly delayed consideration of his application states a claim upon which relief may be granted under the Due Process Clause of the Indian Civil Rights Act. 25 U.S.C. § 1302(8). Because we agree with the Trial Court that under Community law Crooks does not have a cognizable property interest in having his application acted upon within a certain period of time, we affirm.

II. DISCUSSION

Our review of an order dismissing a complaint under Rule 12(b) is de novo. Smith et al. v. SMS(D)C et al., No. 011-96 (SMS(D)C Ct. App. Aug. 7, 1997) (08/07/97 Order). Accepting the factual allegation in his complaint as true, we ask whether Crooks has stated a claim for which relief may be granted.

In order to invoke the protection of the Due Process Clause of the ICRA, a party must first show a liberty of property interest which has been interfered with. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989); Ragan v. Lynch, 113 F.3d 875, 876 (8th Cir. 1997). Only then does this Court inquire whether the procedures attendant upon that deprivation were constitutionally sufficient. Kentucky Dept. of Corrections, 490 U.S. at 460. Crooks argues that his status as an applicant for Community membership created a property right was interfered with by the delay in processing his application.

In order to have a property interest in a benefit, an independent legal source, such as the law of the Community, must give a claimant more than a unilateral expectation of receiving the benefit -- the person must have a legitimate claim of entitlement to it. Bd. of Regents v. Roth, 408 U.S. 564, 578 (1972). The difference between an "entitlement" and a mere "expectancy" of a benefit is determined by the extent to which the discretion of the relevant decisionmaker is constrained by law. See, e.g., Mallette v. Arlington Cty. Employee's Supplemental Retirement Sys. II, 91 F.3d 630, 635 (4th Cir. 1996). If the decisionmaker has substantial discretion in deciding to grant or deny the benefit, it is not possible for the claimant to have a legitimate claim of entitlement because he does not know whether the benefit will be granted. We must determine, therefore, whether under Community law the relevant decisionmakers had substantial discretion to admit or deny Crooks' application for membership.

Article II of the Community Constitution outlines the requirements for membership. Crooks applied for membership under people claiming membership must apply and be found qualified by the governing body of the Community. This application process is implemented under the terms of the Enrollment Committee and the General Council the power to recommend and approve applications for membership.

Crooks argues that if he meets the requirements for membership, the Community decisionmakers have no discretion and must admit him. His argument, however, assumes the very question the enrollment officials are responsible for answering -- does Crooks meet the requirements for membership in the Community? It is up to the Community, not Crooks or this Court, to decide who meets the requirements for membership. Smith et al.v. SMS(D)C Business Council et al., No. 038-94 (SMS(D)C Tr. Ct. June 30, 1995) (07/08/94 Order), *affirmed*

SMS(D)C Business Council et al. v. Smith et al., No. 001-94 (SMS(D)C Ct. App. June 22, 1995) (06/19/95 Order). This Court had stated in the past that there is no automatic or self-enrollment under Article II, Se. (b) or (c) for people who claim they meet the membership requirements -- applications for membership must be approved by the appropriate Community officials under standards established in accordance with the Constitution and the Enrollment Ordinance. Welch, et al. v. SMS(D)C, et al., No. 023-92 (SMS(D)C Tr. Ct. Dec. 23, 1994).

Under Community law, the Enrollment Committee and the General Council are given substantial discretion to determine if and when a person's application meets the requirements for membership. Nothing in the Constitution or Enrollment Ordinance requires the Enrollment Committee or General Council to approve or disapprove an application within a certain time frame. It is true, as Crooks notes, that Section 6 of the Ordinance requires the Enrollment Officer to offer a preliminary recommendation within 30 days of receiving an application. The Enrollment Officer, however, is not a final decisionmaker in the enrollment process, and no comparable time limits are set on the decisions made by Enrollment Committee or General Council.

the Enrollment Ordinance also gives substantial discretion to enrollment officials for several other reasons. First, under Ordinance the Enrollment Committee and the General Council have the authority to amend the information and mathematical formulas used to establish the Base Rolls for Community membership. Second, Section 6 of the Enrollment Ordinance gives the Enrollment Committee almost unfettered discretion in determining what evidence to consider when evaluating an application. It states that the Enrollment Committee shall accept or reject all applications "based on the record presented and other evidence deemed acceptable

by said Committee" (emphasis added). In addition, Enrollment Ordinance requires the Enrollment Committee to consider challenges by Community members to the approval of an application, it provides no standards to guide the Committee's decision -- whether a challenge to an approved application is upheld or not is completely within the discretion of the Committee. It also provides that it is the General Council who will make the ultimate decision on membership, specifically stating membership decision "shall be final and conclusive" and "[n]o appeal shall lie to any judicial, executive or legislative body", Section 7.

The discretion given to the Community officials and the General Council in evaluating applications means that Crooks could not have foreseen whether his application would be approved under Community law. This degree of uncertainty means that Crooks could not have had a legitimate entitlement to the benefit of Community membership when he submitted his application -- he had only a unilateral expectation of enrollment. Therefore, Crooks did not have a property interest in Community membership until his application was approved.

Crooks has failed to demonstrate that his status as an applicant for Community membership created a property interest in the benefits of such membership, and he has therefore not stated a claim upon which relief may be granted under the Due Process Clause of the ICRA. Since he has not demonstrated a cognizable property interest, it is not necessary for us to consider whether the process attendant upon his alleged deprivation was constitutionally sufficient. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989).

ORDER

For the foregoing reasons, the order of the Trial Court granting Appellee's Motion to Dismiss is AFFIRMED.

Date: November 2, 1998

Henry M. Buffalo, Judge
Court of Appeals

John E. Jacobson, Judge,
Court of Appeals

IN THE COURT OF APPEALS OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In re Leonard Prescott Appeal from 7/1/94 Gaming Commission Final Order.	)))	Ct. App. No. 015-97

MEMORANDUM OPINION AND ORDER

Before Judge John E. Jacobson and Judge Robert Grey Eagle. Judge Henry M. Buffalo, Jr. took no part in the decision.

Summary

The Shakopee Mdewakanton Sioux (Dakota) Community ("the Community") regulates its gaming enterprises under a Gaming Ordinance ("the Gaming Ordinance") which was adopted by the Community's General Council in early 1993. The Gaming Ordinance establishes a licensing system for "primary management officials" and "key employees" of the Community's gaming enterprises, in accordance with section 11(b)(2)(F)(i) of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §2710(b)(2)(F)(i) (1994). The licensing system is set forth in the Gaming Ordinance's Title III, and is administered by the Shakopee Mdewakanton Sioux (Dakota) Community Gaming Commission ("the Gaming Commission")

From 1991 to 1994, the Appellant, Leonard Prescott, was the Chief Executive Officer and Chairman of the Board of Directors of Little Six, Inc., the corporate entity chartered by and owned the Community which owns and operates the Community's gaming enterprises. After

the Gaming Ordinance was adopted, Prescott duly applied to the Gaming Commission for a license under Title III of the Gaming Ordinance and, pending the complete processing of that application, he was granted a Temporary Employment Authorization. In May, 1994, however, the Gaming Commission suspended Prescott's Temporary Authorization on an "emergency" basis; and then, following hearings in May and June, 1994, it revoked the Temporary Authorization.

Prescott appealed that revocation to the Trial Court arguing, inter alia, that evidence had emerged which suggested that two of the Gaming Commission's members had openly expressed a bias against him. The Trial Court remanded the matter to the Gaming Commission, directing that a hearing be held on the bias issues and suggesting that the Commissioners whose fairness had been questioned by Prescott refrain from participating in the hearing. The Gaming Commission then did hold additional hearings on the bias issue -- with the two Commissioners participating, however -- and in January, 1996, it concluded that the original revocation had not been tainted by bias and that Prescott's rights to due process had not been violated.

Prescott again appealed, and on February 20, 1997 the Trial Court held that the two Commissioners should have recused themselves, and that Prescott's rights to substantive due process had been violated in the 1994 proceedings. The Trial Court granted Prescott's appeal of his Temporary Employment Authorization termination. The Gaming Commission then appealed to this Court.

On April 30, 1998, we reversed the portions of the Trial Court's decision relating to the Commission's bias. We noted that under section 219 of the Gaming Ordinance, the Community's Courts can reverse factual determinations of the Gaming Commission only if they

are arbitrary and capricious or clearly an abuse of the Gaming Commission's discretion; and we concluded that there was a reasonable basis, in the record of the Gaming Commission's decision on the bias issue, to support the Commission's conclusion that bias had not improperly tainted the 1994 proceedings.

That left us with the Gaming Commission's appeal from the Trial Court's decision that the 1994 termination of Prescott's Temporary Employment Authorization had been improper. At our request, the parties submitted additional briefs and oral argument on that matter. Today, we conclude that the Trial Court committed error when it decided that the Gaming Commission's termination of Prescott's Temporary Employment Authorization was improper, and we reverse.

Discussion

Our analysis of this matter begins with and centers on section 219 of the Gaming Ordinance, which provides:

> Persons against whom action has been taken pursuant to Section 214 through 218 by the Gaming Commission and who have been heard before the Commission may appeal the Commission's decision to the Shakopee Mdewakanton Sioux (Dakota) Community's Tribal Court. In all appeals before the Tribal Court, there will be deference given by the Tribal Court to the determination of the Commission as the agency charged with responsibility for interpreting its own regulations. Findings of fact made by the Commission may be certified for review by the Tribal Court.
>
> Conclusions of law made by the Commission shall be reviewed *de novo* by the Tribal Court, that is, as though the Tribal Court were hearing the matter for the first time. The Tribal Court will overturn actions of the Commission only where it can be shown that those actions were arbitrary and capricious, or were clearly an abuse of the Commission's discretion. In all cases, the evidentiary standard on review shall be a preponderance of the evidence standard.

The arbitrary, capricious or abuse of discretion standard, established by section 219, is derived from the Federal Administrative Procedure Act ("the APA"). See, 5 U.S.C. §

706(2)(A). Generally, Federal Courts have held that an agency action is arbitrary, capricious or an abuse of discretion if the agency relies on factors the agency was not intended to consider, entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (1983). Additionally, failure of an agency to conform to prior procedure without adequate explanation for the deviation is arbitrary and capricious. Id.

The APA also utilizes a substantial evidence test, see, 5 U.S.C. § 706(2)(E), which, as we interpret the law, is no more than the application of the arbitrary and capricious standard to factual findings. Atlanta Gas Light Company v. Federal Energy Regulatory Commission, 140 F.3d 1392, 1397 (11th Cir. 1998). The substantial evidence test requires that an agency decision be based on relevant evidence sufficient to adequately support the decision. Pierce v. Underwood, 487 U.S. 552 (1988). It requires more than a mere scintilla of evidence but less than a preponderance of the evidence, Associated Electric Cooperative, Inc. v. Hudson, 73 F.3d 845 (8th Cir. 1996), and an agency decision will survive the substantial evidence test if the evidence is enough to justify, if the trial were to a jury, a refusal to direct a verdict. Universal Camera Corporation v. National Labor Review Board, 340 U.S. 474 (1951). Thus, when reasonable minds could arrive at the same conclusion as that reached by the agency, the substantial evidence test is satisfied. The basic requirement for application of the test is an adjudicatory hearing which produces a record that allows review. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414-15 (1971).

In the present case, the Gaming Ordinance imposes the arbitrary and capricious standard on this Court's review of Gaming Commission determinations which are not purely issues of law. But, as procedures followed by the Gaming Commission in this case permit review by resort to a factual record, we hold that both the arbitrary and capricious standard and the substantial evidence standard are applicable.[1] See, Gaming Ordinance, § 209-13. The arbitrary and capricious test is most suitable to review of the Gaming Commission's procedural actions, and the substantial evidence test provides a method of review for the Gaming Commission's factual determinations.

In employing the arbitrary and capricious standard and the substantial evidence test, we must engage in a meaningful inquiry into the record. Id. at 415. Although an agency decision is entitled to a presumption of regularity under both the arbitrary and capricious and the substantial evidence standard, that presumption does not shield the agency action from a thorough review. Id. The Gaming Ordinance requires that the Community Court accord deference to the Gaming Commission when a review concerns the Commission's interpretation of its own regulations, but this deference should not prevent the Court from engaging an in-depth review of such interpretations.

In applying these tests to the Gaming Commission's proceedings and the administrative record in this matter, we have taken the opportunity to examine the approach of courts of other gaming jurisdictions when reviewing the actions of their gaming commissions. Nevada, New Jersey and Mississippi courts have all have reviewed appeals from gaming commission decisions,

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[1] This Court explicitly limits its decision to review of licensing revocation procedures and withholds opinion over what standard of review would apply to other Gaming Commission determinations, where an adequate record might not be developed.

and in each state the law incorporates an arbitrary and capricious test and a substantial evidence test. Obviously, these cases do not govern this one -- the laws of the Community are unique to it. But we do feel that it is helpful to ascertain whether the results we reach here might be regarded as anomalous in another gaming jurisdiction; and we have concluded that they clearly would not be.

1. Nevada.

Nevada courts review the determinations of its gaming agencies using both an arbitrary and capricious standard and a substantial evidence standard. Nevada Tax Commission v. Hicks, 310 P.2d 852 (Nev. 1957); State v. Rosenthal (Rosenthal II), 819 P.2d 1296 (Nev. 1991); Redmer v. Barbary Coast Hotel & Casino, 872 P.2d 341 (Nev. 1994). In doing so, Nevada courts show "great deference" to gaming agency decisions, Redmer, 872 P.2d at 344, reasoning "[i]t is entirely appropriate to lodge such wide discretion in the controlling administrative agency when a privileged enterprise is the subject of the legislative scheme." State v. Rosenthal (Rosenthal I), 559 P.2d 830, 835 (Nev. 1977), appeal dismissed, Rosenthal v. Nevada, 434 U.S. 803 (1977). Purely legal questions are reviewed *de novo* however. Id.

2. New Jersey.

New Jersey courts also employ both an arbitrary or capricious standard and a substantial evidence test in reviewing gaming commission licensing determinations. In re Application of Tufi, 442 A.2d 1080 (N.J. Super. Ct. App. Div. 1982) (review determines "whether the findings of fact could reasonably have been reached on sufficient credible evidence present in the record"); Department of Law & Public Safety v. Gonzalez, 667 A.2d 684 (N.J. 1995) (review

by both arbitrary and capricious standard and substantial evidence test)[2]. Review is limited to the record on which the commission action was based. Id.; Adamar of New Jersey, Inc. v. Department of Law & Public Safety, Division of Gaming Enforcement, 593 A.2d 1237, 1249 (N.J. Super. Ct. App. Div. 1991). Questions of law are reviewed *de novo*. In re Application of Tufi, 442 A.2d at 1083.

3. Mississippi.

We were unable to find reported instances of Mississippi court review of Mississippi gaming commission license denials; however, Mississippi courts have articulated a standard for review of gaming commission determinations generally. The standard includes both an arbitrary or capricious standard and a substantial evidence test. Mississippi Gaming Commission v. Tupelo Industries, Inc., No. 98-CA-00729-COA, 1999 WL 367191 (Miss. Ct. App. Apr, 3, 1998)[3]; His Way Homes, Inc. v. Mississippi Gaming Commission, No. 98-CC-00690-SCT, 1999 WL 74782 (Miss. Feb. 18, 1999). Mississippi courts confer a rebuttable presumption in favor of the commission's decisions. Tupelo Industries, Inc., at *2. Review is limited to the record. Id. Appellate courts independently review the commission determinations. Id. Deference is accorded to commission interpretations of its own regulations. Id. at *3.

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[2] The Gonzalez Court held review was limited to three inquiries: (1) whether the agency action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings upon which the agency based application of legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors. Gonzalez, 667 A.2d at 688-89 (citations omitted).

[3] "The court will entertain the appeal to determine whether or not the order of the administrative agency (1) was supported by substantial evidence, (2) was arbitrary and capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party." Tupelo Industries, Inc., at *4.

Hence, we find that both the arbitrary or capricious standard and the substantial evidence test are common standards of review for Gaming Commission denials of gaming licenses. The standards are complementary. The arbitrary or capricious standard is best suited for review of procedural issues. The substantial evidence test is best suited for review of Commission factual determinations.

The Community has a strong interest in protecting and maintaining the integrity of its gaming enterprises and the agencies charged with protecting that integrity. To this end, it is imperative that Community courts engage in meaningful, careful and thorough review of Gaming Commission licensing determinations. On the other hand, court review should never make Gaming Commission determinations a merely perfunctory stopping point on the way to court review. The Community has created an agency invested with expertise in the regulation of gaming in the Community.[4]

This Court finds the substantial evidence test is best suited for review of the issue before the Court in the present case.[5] The issue before the Court can thus be stated: Does the record relied on by the Gaming Commission provide sufficient relevant evidence for a reasonable person to reach the result reached by the Gaming Commission?

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[4] The Community's General Council has delegated to the Gaming Commission "the sole authority to regulate any and all gaming activity on the Shakopee Mdewakanton Sioux (Dakota) Reservation." Gaming Ordinance § 200(a).

[5] The issues remaining before the Court are factual determinations and not issues of procedure. The procedural issues implicated in the present case have already been considered when this Court reversed the trial court's order requiring two Commission members to recuse themselves on the basis of bias, and its decision to remand the case for further consideration. See, In re Leonard Prescott Appeal from 7/1/94 Gaming Commission Final Order, Apr. 29, 1998. In that opinion, this Court found no due process violations when the Gaming Commission actions were reviewed under an arbitrary, capricious or abuse of discretion standard. Id.

We believe that it does. The record before the Gaming Commission establishes that in 1971 Prescott was convicted of a felony. That conviction was legally expunged in September, 1992. But prior to expungement, Prescott signed and submitted to the State of Minnesota two "Distributor Personnel Information", which called for disclosure of his criminal record; and in neither did he disclose his felony conviction. During this period he also submitted to the State of Minnesota two "Distributor Personal Affidavits," stating under oath that he had never been convicted of a felony. Before the Gaming Commission and the Court, Prescott argued that these documents were prepared by others and simply signed by him, and that he had no intent to deceive. But clearly it is the responsibility of a person who signs a document prepared by others, particularly a document like an affidavit, sworn to under oath, to ensure that the statements made therein are accurate.

From our review of the case law of other gaming jurisdictions in the United States, it is clear, first, that a felony conviction is a common ground for revocation of a gaming license.[6] And misrepresenting or not revealing the existence of such a conviction brings into question the character of the licensee sufficiently to permit a denial or revocation of the license on the grounds of the misrepresentation, as considered separately from the underlying conviction. See, cf., In re Application of Tufi, 442 A.2d 1080 (misrepresentations made to customs officials concerning money brought into country sufficient credible evidence of unsuitability for gaming

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[6] Other gaming jurisdictions have held a gaming commission may use a prior conviction as grounds for denial of a license even when the civil rights of the applicant had been restored, Rosenthal II, 819 P.2d at 1300, or that an applicant is entirely precluded from challenging the basis of any conviction "because of the strong public policy of maintaining integrity in the casino industry, a casino employee may not present evidence contradicting his or her convictions." Gonzalez, 667 A.2d at 686-87. For the purpose of this review, it is enough that the later expunged conviction could reasonably be seen as a conviction in fact at the time of the applications, and this Court does not advance any judgment relative to the conviction beyond that stated.

license).

Under the Gaming Ordinance and the rules by which the Gaming Commission has implemented that Ordinance, the Commission is required to consider whether a license applicant has "supplied in the license application false or materially misleading information" or "has omitted information." Rules Governing the Conduct of Hearings Before the Shakopee Mdewakanton Sioux (Dakota) Community Gaming Commission (Commission Rules) § 1.09(k). The Commission is also authorized to consider "all other information the Commission considers relevant or material to determine the suitability of the applicant." Commission Rules § 1.09(m)[7].

Thus, we believe that the Commission reasonably could base a revocation decision on the fact the licensee misrepresented to other licensing bodies the existence of a felony conviction. There is sufficient evidence in the record produced by the Gaming Commission hearing to allow a reasonable person to conclude that Prescott stood in conviction of a felony at the time of his application for three gaming distributor licenses in Minnesota. There is likewise sufficient evidence in the record to allow a reasonable person to conclude Prescott misrepresented the existence of such a conviction in applying for Minnesota gaming licenses. It is not enough that reasonable minds also could have come to a different conclusion. Rather, the Gaming Commission's decision must be upheld because a reasonable mind could have concluded as the Gaming Commission did.

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[7] Gaming Ordinance § 214(d) provides for immediate revocation for any licensee convicted of a felony. It is true that the Gaming Commission has within its power to waive the requirement that licensees have no felony convictions. See, Gaming Ordinance § 326. However, the issue is not whether the Commission could have allowed Prescott to retain his temporary license, but rather whether there is a reasonable basis for the Commission's revocation of his license.

Thus, the Gaming Commission's revocation of Prescott's TEA was not arbitrary and capricious, is supported by substantial evidence in the record, and is upheld.

ORDER

For the foregoing reasons, the Trial Court's decision granting Leonard Prescott's appeal from the revocation of his Temporary Employment Authorization is reversed.

July 29, 1999

John E. Jacobson, Judge

Robert A. GreyEagle, Judge

IN THE COURT OF APPEALS OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Little Six, Inc., members of its Board of Directors, and the Shakopee Community,	)	
Appellants/Cross Appellees,	)	
v.	)	Ct. App. No. 020-99, 021-99, 022-99
Leonard Prescott and F. William Johnson,	)	
Cross Appellants/Appellees	)	

MEMORANDUM OPINION AND ORDER

This case is before the Court on the cross appeals of each party from the Trial Court's most recent decision in Little Six, Inc. et al v. Prescott and Leonard, No. 048-94 (SMS(D)C Tr. Ct. April 8, 1999). In that decision, the Trial Court concluded that Leonard Prescott and William Johnson were entitled to summary judgment on a number of the claims raised by Little Six, Inc., its Board, and the Community (hereinafter the "Community"). However, on two claims the Trial Court concluded that the parties should proceed to trial. The Community has appealed the Trial Court's decision to the extent it grants summary judgment to Prescott and Johnson on certain counts in the Complaint. Prescott and Johnson have appealed those parts of the decision adverse to them. We affirm the Trial Court's decision in part and reverse in part.

FACTUAL BACKGROUND

The Community representatives originally filed their complaint in October of 1994. Their suit is one for money damages for alleged instances of misconduct by Prescott and Johnson in their former roles as officers of Little Six, Inc. (LSI). During the times in questions, Prescott was both the Chairman of the Community and President of LSI, (later leaving this latter post to become Chairman of the Board of Directors of LSI). Johnson was first employed as LSI's Chief Executive Officer and later succeeded Prescott as LSI's President.

In general, the Community alleges that in their former positions with LSI Prescott and Johnson engaged in a pattern of behavior by which they expended Community monies for improper purposes and without authorization.

During the tenure of Prescott and Johnson, the LSI Board created an Executive Committee and delegated to it certain responsibilities. Both Prescott and Johnson served on the Executive Committee. Many of the allegations brought by the Community against Prescott and Johnson concern the scope and authority of the Executive Committee, the manner in which the Committee exercised its authority, and the representations made to the LSI Board concerning the actions of the Committee.

Other allegations brought by the Community include a claim that Johnson breached his employment contract, and that Prescott misrepresented information in his application for a Community gaming license.

In response to the Community's allegations, Prescott and Johnson filed motions for summary judgement, claiming, among other things, that they possessed various forms of official immunity. The Trial Court granted summary judgment on some of Prescott and Johnson's claims, but denied their claims of immunity. LSI, et al v. Prescott and Johnson, No. 048-94 (SMS(D)C Tr. Ct. April 1, 1996). After allowing an interlocutory appeal on the immunity question, this court reversed the Trial Court and concluded that Prescott and Johnson could raise a defense of qualified immunity. Prescott and Johnson v. LSI, et al, No. 017-97 & No. 018-97 (SMS(D)C Ct. App. April 17, 1998). On remand, the Trial Court concluded that Prescott and Johnson were entitled to qualified immunity

on some counts in the Complaint, that they were entitled to summary judgment on some other counts, and that the parties should proceed to trial on two specific subcounts alleged in the Complaint. LSI, et al v. Prescott and Johnson, No. 048-94 (SMS(D)C Tr. Ct. April 8, 1998).

Since there are eight counts in the complaint, and numerous subcounts, and since the history of this case is complicated, our opinion today will go through each count and explain our disposition and reasoning. In the end, we affirm the District Court in part and reverse in part, with the net result being judgment in favor of Prescott and Johnson.

LEGAL DISCUSSION

Standard of Review

Review of a decision on summary judgment is a matter of law that we review de novo. Welch et al v. SMS(D)C, No. 009-96 (SMS(D)C Ct. App. Oct. 14, 1996). When reviewing a question of summary judgment, we ask if the material facts are undisputed, and if so, whether the moving party is entitled to judgment as a matter of law. Rule 28 SMS(D)C Rules of Civil Procedure; Welch v. SMS(D)C, No. 036-94 (SMS(D)C Tr. Ct. Nov. 27, 1995). In determining whether the facts are undisputed, we view the evidence in a light most favorable to the non-moving party. Barrientez v. SMS(D)C, No. 007-88 (SMS(D)C Tr. Ct. Sept. 7, 1990). However, to survive a motion for summary judgment, there must exist in the record enough evidence to raise a genuine issue of material fact – the non-moving party must "do more than simply show there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586 (1986). The dispute of material fact must be sufficient for a reasonable trier of fact to find for the non-moving party. Id. 475 U.S. at 587.

On the qualified immunity questions, however, our inquiry is slightly different. Our review is governed by our earlier decision in this case, in which we concluded:

> [a]n official performing a discretionary function within the scope of their duty will be shielded from liability for civil damages as long as their conduct does not violate a clearly established right of which a reasonable official would have

> known. See Harlow, 457 U.S. at 818. In other words, an official is entitled to qualified immunity only if in light of pre-existing law, the unlawfulness of his conduct would be apparent to a reasonable official. Anderson v. Creighton, 483 U.S. 635, 640 (1987)....
>
> The first task ... in this inquiry is to determine if the law was clearly established at the time the official acted. If it was not, the official could not be reasonably expected to anticipate subsequent legal developments and could not either actually or constructively "know" that his actions were illegal. Harlow, 457 U.S. at 818-19. In such a case, summary judgment for the official would be appropriate.
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> If, on the other hand, the Community law is clearly established, a reasonably competent official is presumed to know the law governing his conduct, and the [court] should then determine if material facts are undisputed. Summary judgment should be entered for the official only if there are no disputed material facts, and those facts show the official did not violate any established right as a matter of law.

Prescott and Johnson v. LSI, No. 017-97 & 018-97 (SMS(D)C Ct. App. April 17, 1998) at 13-14.

Prescott and Johnson's Scope of Duty

As an initial matter, the Community claims on appeal that the Trial Court erred in its qualified immunity analysis by not considering whether the alleged actions of Prescott and Johnson fell within the discretionary scope of their duties. We agree with the Community that in order to raise a defense of qualified immunity an official must have been acting within the scope of his or her duties as an officer of the Community. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Community's argument on this point, however, sweeps too broadly.

The Community maintains that if Prescott and Johnson cannot prove that the alleged actions were within the scope of their authorized duties, they are not entitled to a defense of qualified immunity. Plaintiff's Brief to the Appellate Court at 5. Under this reasoning, only officials who can prove that their actions were authorized by law, or who

could essentially prove their "innocence" before trial, would be entitled to qualified immunity. Qualified immunity, however, is designed to protect more than only those who can prove they are blameless – it protects officials whose actions, although mistaken, were reasonable. Hunter v. Bryant, 502 U.S. 224, 227 (1991) (officials who conclude reasonably, but mistakenly, that probable cause existed can raise qualified immunity defense); Malley v. Briggs, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."); United States v. Yakima Tribal Court, 806 F.2d 853, 859-60 (9th Cir. 1986) (mistake of fact or law not outside of scope of official's duty; only matters unrelated to job are outside scope).

For the purposes of qualified immunity analysis, the scope of duty inquiry should simply allow the Court to determine if an official's alleged actions were a part of his or her official job. See, e.g., Yakima Tribal Court, 806 F.2d at 859-60.[1] This inquiry should not extend to the merits of lawsuit, as the Community urges us to do here. Therefore, for the purposes of qualified immunity analysis, to determine if an official's action was within the scope of his or her duty, we will ask whether there is a reasonable connection between the alleged act and the type of duties that the official is normally responsible for. If there is a reasonable connection, we will proceed with the next step of the immunity analysis.

In this case, the Trial Court concluded Prescott and Johnson were entitled to qualified immunity on most of the first five counts in the Community's Complaint. A review of these counts shows that all the actions the Community alleges were illegal were actions taken by Prescott and Johnson in their capacity as LSI officers. Decisions about expenditures, compensation for employees, the release of information to the public, and

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[1] For example, in Yakima Tribal Court, 806 F.2d at 859-60 the Ninth Circuit states:

> If an employee of the United States acts completely outside his governmental authority, he has no immunity. An obvious example would be if a dispute occurs pertaining to the sale of an employee's personal house, his government employment provides him with no shield to liability. But that is different from the situation where an employee acting as a government agent, commits an act that is arguably a mistake of fact or law.... A simple mistake of fact or law does not necessarily mean that an officer of the government has exceeded the scope of his authority....
>
> Scope of authority turns on whether the government official was empowered to do what he did; i.e., whether, even if he acted erroneously, it was within the scope of his delegated power.

various dealings with the Business Committee and the Gaming Commission, are all actions that arguably fall within the scope of the positions held by Prescott and Johnson. This is particularly true in light of the disagreement among the parties as to the authority invested in the Executive Committee by Board Resolution No. 2-19-92-003. Although the Trial Court may have erred in not addressing this point, we conclude that the relevant counts of the Complaint only allege actions within the scope of Prescott and Johnson's positions, and that judicial economy counsels against a remand on this issue.

Count I

Count I alleges that in their former positions with LSI, Prescott and Johnson breached their fiduciary duty to the Community imposed by § 36 of the Corporation Ordinance. The Community alleges Prescott and Johnson breached this duty in 15 different ways. For the sake of clarity, the Trial Court treated each of these 15 factual allegations as subcounts A thorough O. The Trial Court had earlier granted Prescott and Johnson summary judgment on subcounts H and N, and the Community has not challenged those rulings in this appeal.

Subcounts A-F, I-L

In the decision presently on appeal, the Trial Court granted Prescott and Johnson summary judgment on qualified immunity grounds on subcounts A-F and I-L.[2] These subcounts deal with the creation and operation of the Executive Committee, and actions Prescott and Johnson took on behalf of LSI as officers and Executive Committee members. These actions allegedly involved the improper hiring and compensation of employees, the improper approval of various expenditures, and the improper public disclosure of certain financial information.

The Trial Court concluded that nothing in the Community's Constitution, the 1991 Corporation Ordinance, the LSI Articles, the IGRA, the Community's Gaming

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(Citations and quotations omitted).

[2] Disposition of subcount G will be addressed by our treatment of Count VIII below.

Ordinance, or the Community's Code of Ethics clearly prevented the creation or operation of the Executive Committee by Prescott and Johnson in the manner alleged. Under our earlier opinion, the Trial Court concluded that since the law was not clearly established at the time Prescott and Johnson acted, they were entitled to summary judgment on the grounds of qualified immunity. See Prescott and Johnson v. LSI et al, No. 017-97 & 018-97 (SMS(D)C Ct. App. April 17, 1998) at 13-14.

On appeal, the Community argues the Trial Court erred because it improperly framed its qualified immunity inquiry. Instead of asking if the law was clear regarding the creation and operation of the Executive Committee, the Community contends that the Trial Court should have asked if Prescott and Johnson clearly breached their fiduciary duty to the Community. We disagree.

Under the Community's approach, all a plaintiff would need to do to defeat a claim of qualified immunity is to allege that the defendant violated a generalized legal right, such as a breach of fiduciary duty under § 36 of the Corporation Ordinance. As the United States Supreme Court has recognized, an evaluation of a qualified immunity defense can depend a great deal on the level of generality at which the relevant legal rule is identified. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right... But if the test of "clearly established law" were applied at this level of generality ... [p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.... Such an approach, in sum, would destroy the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties.... It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Anderson, 483 U.S. at 639-640. In other words, it is not enough for the Community to allege after the fact that the actions of Prescott and Johnson constitute a breach of their fiduciary duty. Instead, the question is whether the law at the time Prescott and Johnson undertook the specific alleged actions was clear enough so that a reasonable officer would have understood those actions to constitute a breach of fiduciary duty. In analyzing whether Prescott and Johnson are entitled to qualified immunity, the Trial Court properly framed the question as whether Community law clearly prohibited the specific actions Prescott and Johnson took in creating and maintaining the Executive Committee in the manner alleged.[3]

We agree with the Trial Court that the law governing the conduct of Prescott, Johnson, and other Executive Committee members was far from clear during the time periods covered by this suit. Section 21.0 of the 1991 Corporation Ordinance provided that "the business and affairs of that corporation shall be managed by a board of directors...." But Section 4.017 permits the Board to "establish committees of the board of directors, elect or appoint persons to the committees, and define their duties and fix their compensation..." and Section 21.1 authorizes the Board to "establish committees having the authority of the board in the management of the business of the corporation only to the extent provided in the resolution." The Executive Committee was originally established by Board Resolution 10-23-91-28 and its authority increased by Board Resolution 2-19-92-003. Resolution 2-19-92-003 reads in pertinent part that the Executive Committee has "the authority to manage the business and affairs of the Corporation subject to the authority of the full Board of Directors . . . [and] the Executive Committee shall have the authority to make decisions up to $250,000."

This legal framework indicates that at the time Prescott and Johnson acted, the Board had apparently delegated substantial operational authority to the Executive Committee. However, the meaning of the phrases "subject to the authority of the board"

[3] In evaluating the qualified immunity defenses of Prescott and Johnson, the question confronting us today is limited to whether the Community law was sufficiently clear at the time the actions of Prescott and Johnson were alleged to have occurred. Most of the actions alleged in this case took place in the early 1990s. The Court notes that since that time, Community law, federal regulation of tribal gaming, and standards within the gaming industry have all evolved significantly. Nothing in this opinion should be construed to reflect an opinion as to the clarity of Community law at the present time. While we express no opinion on the matter, it is conceivable that the same actions alleged in this case would defeat a claim of qualified immunity if evaluated under the Community law as it stands today.

and "shall have the authority to make decisions up to $250,000" are far from clear. In addition, in this litigation the Community has taken the position that Resolution 2-19-92-003 cannot grant the authority it purports to convey because it conflicts with Section 8.6 of the Corporation Ordinance which provides that "officer [of the corporation] shall receive such salary or compensation as may be fixed by the Board of Directors."[4]

Given the uncertain status and legal authority of the Executive Council, we cannot say that the law governing the actions of Prescott and Johnson was clear when they acted. A reasonable officer in their position could have thought they had the authority to take the actions they did. We conclude that the Trial Court's decision granting summary judgment to Prescott and Johnson on the grounds of qualified immunity for Count I, subcounts A-F and I-L is not in error and is affirmed.

Subcount M

On subcount M, the Trial Court concluded that Prescott was not entitled to qualified immunity and the matter should proceed to trial. Subcount M involves an allegation that Prescott breached his fiduciary duty to the Community by misrepresenting information in his application for a gaming license with the Community. The Trial Court reasoned that a reasonable official would have understood that making a misrepresentation to a Community regulatory board was a violation of his fiduciary duty to the Community, and that Prescott, therefore, should not be entitled to qualified immunity. The Trial Court then cited deposition testimony in the record as evidence of a factual dispute that warranted a trial on this subcount.

The parties seem to agree on the following facts. Prescott concedes that on his gaming license applications for the years 1991, 1992, and 1994 he stated that he had never had a felony conviction. Brief of Appellant Leonard Prescott at 2. He was, however, convicted of a felony in the State of Minnesota in 1971. Id. He completed his probation in 1972, and the charge was then reduced to a misdemeanor by operation of

[4] After oral argument in this case, counsel for the Community advanced a complicated theory that the copy of Board Resolution 2-19-92-003 that Community itself had submitted to the trial court was in fact not authentic. Among the numerous problems with this argument is that the Community failed to raise it in the Trial Court below, and the argument will not be considered here.

Minnesota state law. Id.; see Minn. Stat. §609.13, subd. 1(2). This conviction was later completely expunged in 1992. Id. We do not understand the Community to contest any of these above facts. Prescott also claims in his brief to have sought legal advice in determining how to answer the felony question on his 1994 application.

Even assuming, without deciding, that the Trial Court was correct that Prescott was not entitled to a defense of qualified immunity on this count, we nonetheless conclude summary judgment should be granted in his favor. There do not appear to be any disputed facts in the record on this subcount. Both sides agree that Prescott answered "no" to the question about previous felonies on his application. Given the facts, the question is whether his behavior violated § 36 of the Corporation Ordinance.

Based on this record, we cannot say that Prescott violated § 36 of the Corporation Ordinance. Section 36 requires officers to act in the best interest of the Community, to act in good faith, and to act as an ordinarily prudent person would under the circumstances. The facts do not positively reveal that Prescott failed to act in good faith, or as an ordinarily prudent person would have in the circumstances. Prescott may have held an incorrect view of the law or an incorrect view of his responsibility to disclose his earlier criminal problems in Minnesota.[5] But being possibly mistaken is not necessarily the same as failing to act in good faith, or as a reasonably prudent person. We therefore reverse the Trial Court's conclusion on subcount M and grant summary judgment in Prescott's favor on that subcount.[6]

Subcount O

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[5] In its brief the Community notes that the actual application form explains that a failure to answer a question truthfully may subject the applicant to criminal sanctions under 18 U.S.C. § 1001. As we noted in our earlier decision in this case, Prescott and Johhson v. LSI, No. 017-97, 018-97 (SMS(D)C Ct. App. April 17, 1998) at 6-7, this Court does not have criminal jurisdiction over Prescott and Johnson. If the Community believes the actions of Prescott and Johnson warrant criminal proceedings, the appropriate remedy is to seek such sanctions from the federal authorities.

[6] We note, however, that this analysis only pertains to our holding on subcount M of the Community's Complaint alleging that Prescott breached a fiduciary duty he owed to the Community. Nothing in this opinion should be construed as expressing disapproval of any of our conclusions in In re Leonard Prescott Appeal, No. 015-97 (SMS(D)C Ct. App. July 30, 1999). In that case we concluded that the Gaming Commission's decision to revoke Leonard Prescott's gaming license was not in error. That case and this case involve completely different legal standards and different factual records, and nothing in this opinion

On review, we conclude that Prescott and Johnson are entitled to a defense of qualified immunity on subcount O. The Trial Court reasoned that a reasonable officer would know that misrepresenting information to a government body is a violation of his fiduciary duty to the Community, so Prescott and Johnson were not entitled to a defense of qualified immunity. The Trial Court, however, defined the question too broadly. The question for qualified immunity purposes is not whether a reasonable officer would have known that misrepresentation is a breach of fiduciary duty; the question is whether the specific alleged actions of Prescott and Johnson violated their fiduciary duty to the Community.

The Community alleges in its complaint that Prescott and Johnson provided the Executive Committee and Board of Directors with information that was inaccurate, false, misleading, or incomplete. To support this allegation, the Community has submitted a deposition, that of Arlene Ross, one of the plaintiffs in this suit. The Trial Court concluded that there was a dispute of material fact on "two discrete issues" – whether Prescott and Johnson made false statements about their compensation and whether they made false statements about the proceedings to suspend their gaming lisences.

Ms. Ross claims in her deposition that Prescott and Johnson misrepresented the amount of total compensation they were receiving. Ms. Ross testified that in 1993 she asked Johnson, "is it true that they were making – that Bill [Johnson] himself was making $850,000? He said no." Ross Deposition, 11/28/98, Docket 80, Exhibit 18 at 151. Johnson claims he replied "I told her I did not get a salary of $800,000. 'Arlene, you've got to look at the numbers.'" Johnson Deposition, Exhibit 11, at 242. Johnson's salary in 1993 was under $300,000, but he concedes that he had substantial non-salary income for that year. Ms. Ross also stated in her deposition that in 1993 she said to Prescott, "Leonard, the rumor is that you making half a million dollars." Ross Deposition at 151. Prescott told Ross that the rumor was not true. Id. Prescott's salary in 1993 was under $250,000, but he also concedes he had substantial non-salary income for 1993 as well.

Given these facts, we cannot say that a reasonable officer would have understood Prescott and Johnson's responses to constitute a violation of their fiduciary duties. In

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should be interpreted as questioning or undermining this Court's conclusion in In re Leonard Prescott Appeal.

response to informal questions from an individual Board member about "how much they were making" Prescott and Johnson responded with answers based on their salary, without including other compensation received in the form of non-salary benefits. The record reveals that Ms. Ross was well aware of the distinction between salary and total compensation, Ross Deposition at 81, and that as an Executive Committee member and Board member, she presumably had access to the information for which she was asking. Since we cannot say that a reasonable officer would not have understood Prescott and Johnson's statements as a breach of their fiduciary duties, Prescott and Johnson are entitled to immunity on the allegations that they misrepresented information on their salaries.

The Community also claims that Prescott and Johnson misled the Board in their attempts to seek indemnification for legal fees in connection with the defense of their gaming license suspensions. Ms. Ross' deposition, however, fails to identify any specific misleading or inaccurate statements by Prescott and Johnson in this regard. See Ross Deposition at 101-114. In addition, the minutes of the meeting at which indemnification originally was approved show that neither Prescott or Johnson took part in the discussion of the indemnification issue, and that the other board members reviewed the factual findings of the Gaming Commission with legal counsel before deciding to indemnify Prescott and Johnson. Affidavit of Leonard Prescott in Support of Summary Judgment, Exhibit 30. Without any specific evidence of misleading or inaccurate statements on the indemnification issue, we cannot conclude that a reasonable official would have known that the actions of Prescott and Johnson breached their fiduciary duties. Prescott and Johnson, therefore, are entitled to qualified immunity on the indemnification issue, and are entitled to qualified immunity on subcount O.

Except for subcount G, which will be addressed by our treatment of Count VIII below, we have now disposed of every subcount in Count I. Prescott and Johnson were earlier granted summary judgment on subcounts G and N. Today, we affirm the Trial Court's decision to grant Prescott and Johnson summary judgment on subcounts A-F, I-M , and O.[7]

[7] The Community notes in its briefs that Count I is a general allegation of breach of fiduciary duty, and that the subcounts specified therein are not an exclusive list of the claims the Community holds against Prescott and Johnson. However, the Community originally filed its Complaint over five years ago, and this case has

Count II

We agree with the Trial Court's disposition of Count II. Count II alleges that Prescott and Johnson violated the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, by engaging in acts that prevented the Community from being the sole operator of gaming enterprises on the Reservation. This Count is premised on the same behaviors complained of in Count I. The Trial Court reasoned that the law under the IGRA was not clearly established such that a reasonable officer would have understood the alleged actions of Prescott and Johnson to violate the law. "The creation and operation of the Executive Committee, the appointment of corporate officers, and the nature of the oversight which the Board gave to LSI's operations were not clearly contrary to Community law, and did not clearly remove control of LSI from the Community." LSI et al v. Prescott and Johnson, No. 048-94 (SMS(D)C Tr. Ct. April 8, 1999) at 16. Upon review, we agree with the Trial Court. Under the same reasoning we used to grant summary judgment to Prescott and Johnson on the subcounts in Count I, we affirm the Trial Court's decision on Count II.

Counts III-V

We also agree with the Trial Court that Counts III through V are subject to a similar analysis. Count III alleges Prescott and Johnson engaged in a conspiracy to obtain Executive Committee approval for their actions. Count IV alleges that Prescott and Johnson converted corporate funds for their own use. Count V alleges Prescott and Johnson unjustly enriched themselves at the expense of the Community. Each Count is premised on the specific factual allegations in the subcounts of Count I and do not add any additional factual allegations.

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gone through two proceedings in the Trial Court, and now two sets of appeals. Counsel for the Community has done a thorough job of presenting the Community's case to date, and we assume that by now the Community would have raised any additional factual claims for breach of fiduciary duty, or for any of the other counts, if it was aware that such claims exist.

In our view, the Trial Court correctly analyzed the immunity question on these counts. We do not doubt that the Community common law prevents Community officials from engaging in conspiracy, conversion, or unjust enrichment. But as the Trial Court noted, the correct question is whether a reasonable official would have understood the specific acts allegedly taken by Prescott and Johnson constituted conspiracy, conversion, and unjust enrichment. Anderson, 483 U.S. at 639-40. Since these counts are premised on the same actions in Count I, we cannot say that Community law at the time clearly prohibited the acts complained of, and we affirm the Trial Court's decision to grant Prescott and Johnson qualified immunity for Counts III, IV, V.

Counts VI-VIII

The Trial Court engaged in a different inquiry on Counts VI, VII, and VIII. It granted summary judgment to Prescott and Johnson on these Counts, not on immunity grounds, but on the basis that there were no disputed facts in the record and each was entitled to judgment as a matter of law. This approach was consistent with Prescott and Johnson's earlier motions for summary judgement in the court below, and we will treat these issues as ripe for our consideration on appeal.

Count VI alleges that Prescott and Johnson committed fraud by making misrepresentations in or about June of 1993 to the General Council, through the Business Council, about compensation matters. Count VIII alleges that the same behavior by Prescott and Johnson constitutes negligent misrepresentation. The Trial Court concluded, and we agree, that there is no factual support in the record for these claims – there is simply no evidence that Prescott or Johnson made intentional or negligent misrepresentations to the General Council or Business Council about salaries. On appeal, the Community argues that Prescott and Johnson made misrepresentations by providing the Board of Directors with information about salaries, when what the Board really wanted was information about total compensation. Forgetting for the moment that the Community's Complaint does not allege that misrepresentations were made to the Board, we are not persuaded that this evidence is such that a reasonable jury could find for the Community on these counts. Matsushita Elec. Indus. Co, 475 U.S. at 587 (dispute of

material fact must be sufficient for a reasonable trier of fact to find for the non-moving party.) The decision of the Trial Court, therefore, is affirmed..

Count VIII claims that Johnson breached his written employment contract with the Community. The Trial Court concluded that since extensive discovery had failed to turn up any written employment agreement, and since there was no evidence of such an agreement in the record, the Community had failed to demonstrate there was an issue of material fact warranting a trial.

We begin by noting that we doubt this Court has jurisdiction to review the Trial Court's decision on Count VIII since the Community failed to appeal this part of the Trial Court's decision. The Community's Notice of Appeal individually mentions each count and subcount decided below, but does not mention a desire to appeal the Trial Court's decision on Count VIII. Failure to include an issue in a proper notice of appeal deprives this Court of jurisdiction to consider the claim. Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986) (court of appeals must satisfy itself that it has jurisdiction, even if parties concede jurisdiction); C&S Acquisitions Corp. v. Northwest Airlines, Inc., 153 F.3d 622 (8th Cir. 1998) (when notice of appeal mentions one count, but not another count, court of appeals only has jurisdiction to consider count mentioned).

We note, however, that both relevant parties have briefed this issue and no party has claimed prejudice from the omission of Count VIII from the Community's Notice of Appeal. We will therefore consider the issue as if it had been properly appealed.

We conclude that Johnson is entitled to qualified immunity on Count VIII and subcount G. None of the factual citations in the Community's brief clearly identify the existence of a written contract. Many of the cites are references to the Community's intent to enter into a contract, or the Community's intent to approve a contract, but still there is no contract. Even absent a written contract, the factual citations to the record do not specify the terms of an oral employment agreement nor do they give any indication that Johnson assented to specific terms of an oral contract, including the compensation limitations that are central to the Community's breach claim. Without solid evidence of an employment contract, a claim of breach would be impossible maintain, and without a contract, we cannot conclude that a reasonable official would have understood Johnson's

alleged actions to constitute a breach. To the extent that the Trial Court granted Johnson summary judgment on Count VII and subcount G, we affirm.

CONCLUSION

For the foregoing reasons, the Trial Court's decision in this matter is affirmed in part and reversed in part. The parties to this litigation are to bear their own costs and fees. Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994) (parties normally bear own costs and fees); Legal Services of Northern California v. Arnett, 114 F.3d 135, 141 (9th Cir. 1997) (even where statute provides attorney fees for prevailing party, prevailing defendant only awarded attorney fees if claim is frivolous, unreasonable, or groundless).

ORDER

The matter is remanded to the Trial Court solely for entry of judgment for Prescott and Johnson in accordance with this opinion.

Dated: 1/26/00

Henry M. Buffalo, Jr.
Judge

Robert A. Grey Eagle
Judge

IN THE COURT OF APPEALS
FOR THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

SCOTT COUNTY STATE OF MINNESOTA

In re: Trust Under Little Six, Inc. Retirement Plan.

CT. APP. 024-00

Court File No. 055-95

MEMORANDUM OPINION AND ORDER

INTRODUCTION

Respondents Leonard Prescott, F. William Johnson and Peter Riverso have filed a motion to dismiss Appellant Little Six Inc. (LSI)'s appeal for failure to file notice of the appeal within fifteen days after filing of the trial court's final order under Community Resolution Number 02-13-88-01 § VII (the Ordinance). Because a plain reading and equitable interpretation of the Community's Ordinance indicates a fifteen day *minimum* and thirty day maximum period in which to file, and Appellant has filed within the prescribed time period, Respondents' motion to dismiss the appeal is denied.

I. FINDINGS OF FACT

On March 29, 2000, a final Memorandum, Opinion & Order was filed in the above captioned matter, Court File 055-95. Fourteen days later, on April 12, 2000, Appellant served notice of its appeal on all other parties, through their counsel. At that time, Appellant placed the original Notice of Appeal in the U.S. Mail for filing with this Court. Due to a clerical error, the original Notice of Appeal was sent for filing to the Court's former address, 810 Lumber Exchange Building, Ten South Fifth Street, Minneapolis, Minnesota, 55402. The original Notice was then returned to LSI's counsel on April 18, 2000, marked "ADDRESSEE UNKNOWN,

RETURN TO SENDER." Prior to that date, neither LSI nor its counsel were aware of the misaddressed notice. LSI promptly filed the Notice of Appeal upon return receipt on April 18, 2000, twenty days after the final Memorandum, Opinion & Order was filed.

On April 26, 2000, Respondents filed a Notice of Motion and Motion to Dismiss LSI's Appeal, along with a certificate of service. Respondents argue that the Ordinance requires appellants to file notice of their appeal within fifteen days after a final order is entered, and Appellant's filing twenty days after entry of the final order was untimely and, therefore, precludes appellate review. Appellant counters by citing the plain language of the Ordinance, which imposes a fifteen-day *minimum* period for filing, not maximum, so that the filing of the notice of appeal twenty days after entry of the final judgment was, in fact, timely. Alternatively, Appellant argues that it should not be denied appellate review when the failure to file within fifteen days was due to excusable neglect for which LSI should not be prejudiced by dismissing its appeal.

II. ANALYSIS

The Community's Ordinance concerning the time period in which to file notice of an appeal is ambiguous because it appears to confuse the duties of a party to file a timely notice of appeal with the duty of the Court to certify the matter for appeal within a reasonable time period without prejudice to the parties. The Ordinance, promulgated in Resolution Number 02-13-88-01 § VII, reads:

> Appeals Cases shall be heard by one Judge, under assignment procedures which shall be determined by the Court. Upon the motion; of any party, a matter may be certified for appeal to a three Judge panel of the full Court by any Judge of the Court. Motions for appeal shall be filed with the clerk of Court and served upon all parties *not less than* 15 calendar days after the date of entry of a final order for judgment. If the motion for certification is not granted *within 30 days*, no further appeal shall be available.

(emphasis added) The ambiguity of the Ordinance arises from its imposition upon the parties of a fifteen day *minimum* period for filing, and imposition upon the Court of a 30 day *maximum* period for certification of appeal. The Ordinance is confusing because practitioners looking for a maximum time period in which to file can find none. Although it has been the general practice of practitioners before this Court to observe a self-imposed fifteen-day deadline for lack of any clear limitation from the Ordinance, it would be unjust and prejudicial to Appellant to enforce custom over the plain language of the Ordinance.

The thirty-day limitation for certification of appeal also is misguiding because it prejudices the filing party for any failure of the Court to certify a matter for appeal within thirty days of filing of the final Order for Judgment. As written, the Ordinance's limitation on the Court would result in unavailability of appellate review if a matter is not certified timely due to judicial or clerical oversight or delay not attributable to the parties. In short, the Ordinance purports to punish parties for mistakes by the Court. This Court, therefore, interprets the thirty-day maximum period as a limitation on the parties for filing a notice of appeal, and will not enforce the Ordinance as a limitation on the Court for certification of the matter for appeal.

In this case, Appellant served notices of the appeal on all parties fourteen days after entry of the final Order for Judgment and filed the notice of appeal with the Court twenty days after entry of the final Order for Judgment.[1] Because Appellant's service and filing of notices of appeal occurred within thirty days of entry of the Order for Judgment, Appellant's service and

[1] Because the Court finds that Appellant's filing of its notice of appeal was timely, Appellant's alternative argument that its failure to file within fifteen days constituted excusable neglect need not be considered. The Court notes, however, that such a clerical error ordinarily would be considered excusable under principles of equity and would not justify dismissal of the appeal unless it were shown to be prejudicial to the opposing party.

filing of notices of appeal were timely, and Respondent's Motion to Dismiss LSI's Appeal is denied.

IT IS SO ORDERED.

Dated: 9/13/00

Hon. Henry M. Buffalo, Jr.

Hon. Robert Grey Eagle

TOTAL P.05

IN THE COURT OF APPEALS OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Robert Famularo,

Appellant-Plaintiff,

v.

Ct. App. No. 026-00

Little Six, Inc. d/b/a Mystic Lake Casino,

Appellee-Defendant

MEMORANDUM OPINION AND ORDER

I. FACTUAL BACKGROUND

Appellant originally filed this suit claiming that Little Six, Inc. (LSI) owed him compensation for an injury that he allegedly sustained at Mystic Lake Casino.

Prior to trial, LSI filed a motion for summary judgment. On October 20, 2000, Judge Robert A. Grey Eagle granted LSI's motion and dismissed Appellant's claims. Judge Grey Eagle did so by issuing a Memorandum Opinion and a separate Order Granting Defendant's Motion for Summary Judgment. As is her usual practice, the Clerk of Court immediately delivered a Clerk's Notice to each party informing them that the Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment had been issued on October 20, 2000, and attaching copies of the both the Order and Opinion.

On November 9, 2000 Appellant filed a Motion for Amended Findings of Fact, Conclusions of Law, or for a New Hearing. On November 28, 2000, the trial court issued an order denying Appellant's motion because it was untimely and because it sought relief not applicable to this case.

On December 14, 2000, Appellant filed a Motion for Certification for Appeal and Notice of Appeal. To support his request for an order certifying the appeal, Appellant argued in his Notice of Appeal that no appealable order has been filed in this case, and that the trial court's November 28, 2000 order was in error to the extent it concluded that Plaintiff's Motion for a New Trial was untimely.

The Court of Appeals held a scheduling conference with the parties on December 21, 2000. As a result of that conference, in a Scheduling Order, issued December 22, 2000, the Court invited briefing on whether this appeal was timely filed. Therefore, presently pending before this Court is Appellant's "Motion to Reverse the 10/20/00 Order of the Trial Court, to Vacate the 11/28/00 Order of the Tribal Court and to Certify Plaintiff's Appeal for Decision on the Merits" and Appellee's "Motion to Dismiss Plaintiff's Appeal."

II. LEGAL DISCUSSION

The issue presently before the Court is whether this appeal should be dismissed because it was not filed in a timely fashion. Under tribal law, a party has 30 days after the entry of an appealable order to file a Notice of Appeal with this Court. See SMS(D)C Ordinance 02-12-88-01 § 7; In re: Trust Under Little Six, Inc. Retirement Plan, No. 024-00 (SMS(D)C Ct. App. Sept.13, 2000). In this case, the trial court entered an appealable order on October 20, 2000 when it granted LSI's Motion for Summary Judgment. Appellant did not file his Notice of Appeal until December 14, 2000, which is more than 30 days after October 20, 2000. Therefore, on the face of the Notice of Appeal, it appears Appellant has filed too late for this Court to assume jurisdiction.

Appellant argues, however, that the trial court did not properly file its October 20, 2000 judgment, and therefore, the time for filing a Notice of Appeal has not yet begun to run. Appellant's argument is based on the claim that the trial court's October 20, 2000 order and opinion did not comply with Rule 28 of the SMS(D)C Civil Rules of

Procedure. Under Rule 28 of the SMS(D)C Rules of Civil Procedure findings and judgments of the trial court are to conform with the requirements of Federal Rules of Civil Procedure 52, 54, 55, 58, 59, 60, 61, and 62. Rule 58 of the Federal Rule of Civil Procedure states in relevant part:

> . . . upon a decision by the court . . . that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court . . . Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). . . .

Rule 79(a) of the Federal Rules of Civil Procedure provides that the clerk shall keep a regular docket with entries identifying all papers, appearance, orders, verdicts and judgments.

Specifically, Appellant argues that since the clerk failed to file a separate document evincing a judgment as required by Rule 58, a final judgment has not been entered and his time to appeal has not begun to run. Federal courts have noted that the "sole purpose" of the "separate document" rule under Rule 58 is to make clear when a litigant's time to file an appeal begins to run.[1] See, e.g., Banker's Trust v. Mallis, 435 U.S. 381, 384 (1977).

In this case, Appellant has not explained how it was not clear that his time for appeal had begun to run. Judge Grey Eagle issued a separate "Order Granting Defendant's Motion for Summary Judgment" and a "Memorandum Opinion" on October 20, 2000. Both of these documents made it clear that Appellant's claims were dismissed with prejudice. In the corner of each document was a date stamp indicating that both the Order and Opinion had each been filed in the SMS(D)C Court on October 20, 2000. In addition, the Clerk sent to each party a separate Clerk's Notice specifically stating that Judge Grey Eagle's Order and Opinion had issued on October 20, 2000. In addition, the Order and Opinion were duly noted as having been entered on October 20, 2000 in the Clerk's regularly kept docket for this case. All of these indications provided Appellant

[1] The Court notes that while the SMS(D)C Rules of Civil Procedure incorporate various Federal Rules of Civil Procedure, this Court is not bound by decisions made by federal courts interpreting federal rules. This Court's responsibility is to interpret the tribal law of the SMS(D)C. If the tribal law passed by the General Council incorporates parts of federal law, this Court is free to adopt its own interpretations of both

with notice that a judgment had entered against him on October 20, 2000, and that he should determine immediately if his time to appeal or to file post-judgment motions had begun to run.

The Court would like to stress that Appellant does not claim that what has happened in this case is any different from the hundreds of other judgments that this Court has handled to date. Whenever this Court issues an order that affects the rights of a party under the Court's procedure, the Clerk sends a separate document to each party entitled a Clerk's Notice. These separate notices issue for precisely the same reasons underlying the separate document rule in federal courts – namely to notify the parties of any court action which may affect their rights under the rules. Once a Clerk's Notice issues, it is up to an individual party and their counsel to determine the legal effect of the order referenced in the Clerk's Notice. In this case, the Clerk's Notice specifically stated that an Order granting LSI's motion for summary judgment had issued on October 20, 2000. Since Appellant cannot fairly claim that he did not have notice of Judge Grey Eagle's Order, or its possible affect on his claims, there has been no violation of Rule 28 in this case.

Judgment, therefore, was entered on October 20, 2000. Under Rule 28, Appellant had 10 days from that date to file his motion for a new trial or his motion to amend the trial court findings. See SMS(D)C Rule of Civil Procedure 28 (incorporating Rules 52 and 58 of the Federal Civil Rules). In the alternative, Appellant had 30 days from October 20, 2000 to file a Notice of Appeal. See SMS(D)C Ordinance 02-12-88-01 § 7; In re: Trust Under Little Six, Inc. Retirement Plan, No. 024-00 (SMS(D)C Ct. App. Sept. 13, 2000).

In this case, Appellant did neither. On November 9, 2000 Appellant filed a Motion for Amended Findings of Fact, Conclusions of Law, or for a New Hearing. His request for a new trial or to amend the trial court's findings, therefore, was filed more than 10 days after judgment was entered on October 20, 2000.[2]

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the tribal and federal law in order to make the best decision possible in the context of this Community's history, traditions, rules, and procedure.

[2] The rules governing the computation of time in the SMS(D)C Court are found at Rule 7 of the SMS(D)C Rules of Civil Procedure. The SMS(D)C Rules of Civil Procedure do not incorporate Rule 6 of

Since his request for a new trial or to amend the trial court's findings was not timely, Appellant cannot argue that under the federal rules, his time for filing a Notice of Appeal should be tolled. See, e.g., Fed. R. App. Proc. 4(a)(4) (requiring that motions under Rule 52 or Rule 59 be timely filed in order to toll the time for filing a notice of appeal). Similarly, since Appellant's post judgment motions were untimely, the trial court could not have properly exercised jurisdiction to hear those motions, therefore, the trial court's November 28, 2000 order is not an order from which an appeal may be taken. See, e.g., Sanders v. Clemco Indus., 862 F.2d 161, 168-69 (8th Cir. 1988); Spinar v. South Dakota Bd. of Regents, 796 F.2d 1060, 1062 (8th Cir. 1986).

The question then becomes whether Appellant filed his notice of appeal within 30 days of October 20, 2000. Appellant did not file his Notice of Appeal until December 14, 2000, which is more than 30 days after October 20, 2000. Therefore, his Notice of Appeal was not filed in a timely manner, and this Court lacks jurisdiction to hear any appeal based on that notice.

ORDER

Appellant's appeal is dismissed.

Dated:

Henry M. Buffalo, Jr.
Judge

John E. Jacobson
Judge

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the Federal Rules of Civil Procedure. Therefore, Appellant's argument under Rule 6 of the federal rules is misplaced.

Under Rules 7 and 28 of the SMS(D)C Court, Appellant's ten days to file post judgment motions expired on October 30, 2000. Even factoring in the three day rule for service by mail provided by Rule 7(d), the latest Appeallant's ten days could have expired was November 2, 2000. Since Appellant did not file his post judgment motions until November 9, 2000, his motions were untimely.

IN THE COURT OF APPEALS FOR THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In re: Trust Under Little Six, Inc. Retirement Plans	
Robert Burns, John Somers, Plaintiff-Interpleaders,	
v.	Ct. App. No. 024-00
Little Six Inc., Defendant-Intevenor,	
v.	
Leonard Prescott, F. William Johnson, and Peter Riverso, Defendant-Intervenors.	

MEMORANDUM OPINION AND ORDER

INTRODUCTION

In this appeal, we must decide if the Court has subject matter jurisdiction over a dispute involving a trust funded to support employee benefit programs at Little Six, Inc. Plaintiffs are trustees of the trust, and Defendant-Intervenor Little Six, Inc. (LSI) and Defendant-Intervenor Prescott, Johnson, and Riverso (the Claimants) hold conflicting claims to the trust assets. The Claimants assert that the trust and associated benefit plans

were properly created under Community law and that they are each due benefits under the plans. LSI claims the trust and the plans were not validly created and that the trust is revocable and its funds should be returned to LSI. The trustees of the trust filed a petition, and then an Interpleader Complaint, seeking this Court's guidance about how they should proceed in the face of these conflicting claims. The Interpleader Complaint also requests other relief not necessarily associated with the dispute between LSI and the Claimaints, namely for this Court to approve the trustees' accounting of the trust funds and to approve other actions undertaken by the trustees.

The Trial Court first addressed whether it had jurisdiction to hear this matter. After briefing and an evidentiary hearing, the Trial Court concluded that the benefit plans and trust were properly created under Community law, and that these plans are governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1500. The Trial Court then held that under ERISA, this Court lacks subject matter jurisdiction over this dispute, and the Interpleader Complaint was therefore dismissed.

On appeal, LSI argues the Trial Court erred. Specifically, LSI argues that ERISA does not apply to Tribes, and that even if it did the trust and plans at issue here are not subject to ERISA. LSI urges this Court to accept jurisdiction over this dispute and order that the trust funds be returned to LSI.

Because we conclude that the trust and plans at issue here were never properly adopted by LSI under Community law, an ERISA plan was never created, and this Court may entertain this dispute. Since the trust document signed by Prescott and Johnson provides that the trust will remain revocable in the absence of LSI Board approval, we conclude that the trustees may return the trust funds to LSI without fear of liability. We therefore dismiss the claims presented by the Claimants, and remand for the Trial Court to entertain the other requests for relief from the trustees.

FACTUAL BACKGROUND

LSI is a corporation chartered under the laws of the Shakopee Mdewakanton Sioux (Dakota) Community (the Community) and it is wholly owned by the Community. See Article of Incorporation of Little Six, Inc. § 4. Leonard Prescott, William Johnson, and Peter Riverso served as officers, directors and/or managers of LSI from its inception

in 1991 until late 1994-early 1995. It was during this time period that the benefit plans and trust at issue in this suit came into being.

We agree with the Trial Court that this dispute involves five different plans and a related trust. The evidence shows that from 1992 until January, 1995, LSI administered and either paid actual cash benefits, or credited cash amounts to deferred accounts, for various LSI employees under at least five different benefit plans. See, e.g., In re Trust under LSI Retirement Plans, No. 055-95 (SMS(D)C Tr. Ct. March 29, 2000) at 9; LSI Trial Ex. 19-21, 54; Claimants' Trial Ex. 1039-1047, 1094-95, 1101, 1105-06, 1115-1119. The five plans are:

- The LSI Life Insurance Plan
- The LSI Executive 457 Plan (457 Plan)
- The LSI Separation Pay Plan
- The LSI Supplemental Retirement Plan (SERP)
- The Retention Plan (sometimes referred to as SERP II)

These plans included more beneficiaries than just Prescott, Johnson, and Riverso. See, e.g., Original Trust Petition.

In the hearing below, Prescott, Johnson, and Riverso presented evidence that the plans were created as a bona fide effort to retain qualified high level employees, particularly in light of the restrictions placed on the ability of a tribal corporation to offer standard employee benefit programs, such as stock options or 401K plans. Transcript of 10/5/99-10/7/99 Hearing (Tr.) at 632, 247, 732. LSI, on the other hand, argued that these plans were initiated and executed by Prescott and Johnson in an attempt to covertly compensate themselves with little scrutiny from others within LSI or the Community. See Appellant LSI's Reply Brief, at 6-7; Post Hearing Brief of LSI at 4-5.

To secure funding for at least some of these plans, a trust was established. LSI Trial Ex. 5. On March 25, 1993, on behalf of LSI, Prescott and Johnson signed a trust instrument naming Burns and Somers as trustees. LSI Ex. 5. Section (d) of the preamble to the trust document makes it clear that the parties to the trust contemplated that it would be associated with the employee benefit plans involved in this case. Id. In addition, the trust instrument states that the trust will only become irrevocable if it is approved by the LSI Board of Directors. LSI Ex. 5 at 1(b).

Prescott, Johnson, and Riverso all left LSI by early 1995. By that time, a new Board of Directors had been slated and the new Board passed a resolution on January 14, 1995 specifically stating that it had never adopted or approved any of the benefit plans involved in this dispute. LSI Trial Ex. 26. The Board also noted it had never formally adopted the trust used to secure funding for these plans, and the Board specifically directed the trustees to return the trust funds to the Community. LSI Trial Ex. 26. This resolution did acknowledge that LSI had incurred liabilities under the 457 Plan and SERP I for the period between 1/1/93 and 12/31/94, and that LSI would authorize payments for these periods under the terms of the plans. Id. However, the resolution stated that no additional amounts would be credited to participants in these plans after December 31, 1994. Id. The resolution also unilaterally terminated the Life Insurance Plan. Id.

Since the request from LSI to return the trust assets conflicted with the actions of the trustees to date, and since the trustees were aware that the beneficiaries held conflicting claims to the trust funds, the trustees filed a petition in this Court for an order approving their actions, and requesting guidance on how to proceed in the future.

Almost contemporaneously, Prescott and Johnson filed a complaint in federal district court alleging that the trust and benefit plans were subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1500, and that under that federal statute they were entitled to relief. The United States District Court did not rule on the merits of Prescott and Johnson's claims, but instead ruled that they must first exhaust their tribal remedies before proceeding in federal court. Prescott v. Little Six, 897 F.Supp. 1217 (D. Minn. 1995). Specifically, the District Court concluded that this Court should have the first opportunity to determine if it had jurisdiction to consider Prescott and Johnson's claims, and it dismissed Prescott and Johnson's claims pending exhaustion of tribal court remedies. Id. at 1224.

In an order dated June 19, 1999, the Trial Court allowed Prescott and Johnson to intervene in this action. The Trial Court also denied Prescott and Johnson's motion to dismiss on various grounds, and ordered the trustees to restyle their petition as a Interpleader Complaint under Rule 18 of the SMS(D)C Rules of Civil Procedure. To address the remaining question of subject matter jurisdiction, the Trial Court ordered an evidentiary hearing to be held on whether the trust supporting the benefit plans was

approved by LSI or the Community. The Trial Court framed the issue in the following manner: if the trust and benefit plans were properly formed under Community law, it seemed the ERISA would apply and the federal courts would have exclusive jurisdiction; if the trust and benefit plans were not properly formed, Community law provided the Court with a jurisdictional basis to address the claims of the parties.

At the hearing, ten witnesses testified over the course of three days, and the parties have submitted numerous tangible exhibits and documents. After the hearing, the parties submitted briefs. The Trial Court concluded that although there was no evidence that the LSI Board ever formally adopted the trust and the plans, there was sufficient evidence of other actions by LSI to find that its had adopted the trust and benefit plans at issue here. Because we agree with LSI that there is no evidence in the record that the LSI Board adopted these plans or the trust in conformance with Community law, we reverse.

LEGAL DISCUSSION

In their Interpleader Complaint the trustees have asked for an order approving their actions to date, and giving them guidance on how to resolve the conflicting claims to the trust. We agree with the Trial Court that the best way to analyze the issues presented by the trustees' request is begin by determining whether an ERISA plan exists.

Since we conclude that an ERISA plan was not formed as to these particular Claimants, we need not address whether ERISA applies to Indian tribes. We note, however, that our research to date, and the argument of each party, has not identified one case in any jurisdiction that exempts Indian tribes from ERISA's broad reach.[1]

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[1] Curiously, LSI urges us to follow the reasoning of an Eighth Circuit case not dealing with ERISA, rather than the Seventh or Ninth Circuit cases relied on by the Trial Court, both of which directly address the applicability of ERISA to Indian tribes. Opening Brief of Appellant LSI, at 8-16. In arguing that this Court should stay away from the Seventh and Ninth Circuit cases that hurts its argument, LSI states "where the legal principle upon which the jurisdiction of this Court is predicated have been subject to a decision of the 8th Circuit (as the circuit in which this Court is located), that decision would be considered to control the reach of this Court's jurisdiction." Opening Brief of Appellant LSI. While we do not reach the applicability of ERISA in this case, we do want to be clear on one point. Contrary to LSI"s argument, nothing in the Community's Constitution, the jurisdictional ordinances of this Court, the SMS(D)C Court Rules, or this Court's common law, delegate jurisdictional questions, or the resolution of any factual or legal issues, to the determination of the Eighth Circuit, or the courts of any other sovereign. While we have consistently encouraged litigants to refer us to authority from other jurisdictions for guidance in resolving novel legal issues, there is nothing in this Community's law that makes the decisions of any other jurisdiction binding on this Court.

An ERISA plan does not exist as to these Claimants because, the trust and benefit plans were not properly adopted by LSI. LSI argues that there is no evidence in the record that LSI formally approved these plans or the trust, that the LSI Board could not have approved these plans and trust without a conflict of interest, and LSI maintains that Prescott and Johnson did not have the authority to enter into the trust agreement because § 8.6 of the LSI Articles of Incorporation reserves the right to set officer compensation exclusively to the LSI Board of Directors.[2] See Opening Brief of Appellant LSI, at 23-24; Reply Brief of Appellant LSI, at 2-7; LSI Post Hearing Brief at 17.

Indeed, there is no evidence in the record that the LSI Board ever expressly approved the trust or the associated plans. In fact, there is evidence that suggests that at least some of the former LSI Board members do not ever recall approving or discussing the trust or plans. See, e.g., Transcript of 10/5/99-10/7/99 Hearing (Tr.) at 33-38, 369-370. We also note that we have not been able to find any reference to the trust in any of the minutes or notes from LSI Board meetings in the record below (although there are some ambiguous references to some of the plans in question here).

To be fair, this is hardly an easy case. LSI concedes in its brief that there is support in the record for at least some of the Trial Court's conclusions. For example, LSI does not argue on appeal that these plans and the trust never existed in some form, or that there were no references in various corporate records to some of the plans. See Appellant's Little Six, Inc.'s Opening Brief, at 26. And we certainly do not dispute the Trial Court's conclusion that the time period in question was a turbulent one in which records may have been lost or never created. However, at the end of the day, we simply cannot impute to LSI liability on these plans without some evidence that LSI formally intended to adopt or approve the trust or plan documents in accordance with its Articles of Incorporation. To do so would be to ignore the carefully crafted body of corporate law laid out in this Community's Corporation Ordinance and in LSI's Articles of Incorporation.

Claimants argue that formal approval of the trust and plans is not required. They cite to federal ERISA cases that show that federal courts generally look to the totality of

[2] Section 8.6 of the LSI Articles of Incorporation states, "The officers [of LSI] shall receive such salary or compensation as may be fixed by the Board of Directors." LSI Ex. 4.

the circumstances when deciding if an ERISA plan exists. See, e.g., Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982). We understand these cases to be based on the principle that an employer should not be able to entice employees with promises of future benefits, and then later claim the benefit plans were ineffective because of a formalistic technicality. See generally Donovan, 688 F.2d at 1370; Bennett v. Gill & Duffus Co., 1987 U.S. Dist. Lexis 12037, at 12-14; 29 U.S.C. § 1001 (purpose of ERISA is to protect employees and their dependents). However, we agree with LSI that the facts in this case are different than those federal cases. Here, the Claimant's reliance was not induced by their employer – instead, it was the Claimants themselves who sought to establish these plans for themselves. For example, in Bennett, the question was whether an employer had created a plan by informally distributing some severance benefits to certain workers. Bennett, at 12-14. In contrast, in this case it was Claimants themselves who acted as both the employer and employee. If there was anyone who was responsible for insuring that these plans were formally approved, it should have been the Claimants. The principles underlying those federal cases simply do not extend to protect the Claimants under the particular facts of this case.

The Claimants also argue that LSI ratified these plans and the trust by not renouncing them earlier. The new LSI Board, however, did not take office until 1994, and arguably did not receive reports concerning the existence of the plans and trust until May or June of 1994. Given the testimony below concerning the state of LSI record keeping and business practices, it was not unreasonable, under these specific facts, for the Board to take action with respect to the plans until six months later in January 1995. That six month period is not a timeframe during which Claimants can claim reliance. We conclude, therefore, that LSI failed to ratify these plans or the trust.

The text of the trust instrument, and the testimony below from trustee Burns, indicate that even after Prescott and Johnson signed the trust documents, the trust would only become irrecovable upon approval by the LSI Board. See LSI Trial Ex. 5 at § 1(b). Evidence of that approval is simply missing from the record, and we cannot expect the trustees to treat the trust as irrevocable in the absence of formal Board approval. We would not want to place the trustees in this case, or in future cases, in a position where they would have to make distinctions between whether LSI has formally approved a trust

document, informally ratified it, informally rejected it through inaction, or formally rejected it. Imputing approval of the trust and plans to LSI based on the conflicting evidence in the record below would create precedent in this Court which would make it more difficult for outside professionals hired as trustees for Community resources to do their jobs. We believe the more prudent route is to hold that in the absence of Board approval in conformance with the LSI Articles of Incorporation, there is no evidence LSI approved the trust or the plans, and the trust is therefore revocable.

Since the trustees' original interpleader complaint requests relief broader than the issues presented in this appeal, we remand this case with very specific instructions. Because these plans were never formally approved by LSI, there is no ERISA plan created that affects the rights of the Claimants. Because the trust was never formally approved by the LSI Board, the trust, by its terms, is revocable, and LSI, as grantor of the trust, is able to revoke the trust. The trust agreement itself states that "Plan participants and their beneficiaries shall have not a preferred claim on, or any beneficial ownership interest in, any assets of the Trust." LSI Trial Ex. 5, at § 1(d). Claimants, therefore, are dismissed from this action because they no longer have an interest in this litigation as articulated in their original motion to intervene or in their answer.

On remand, the trustees are free to present their accounting, consistent with this opinion, to the Trial Court. If necessary, the Trial Court is obviously free to take additional evidence on any of the remaining questions under the trustees' original interpleader complaint.

ORDER

For the foregoing reasons, the Trial Court is reversed, the Claimants are dismissed from this action, and the case is remanded to the Trial Court in order to conduct further proceedings consistent with this opinion.

Dated: October 26, 2001

Judge Henry M. Buffalo Jr.

Judge Robert A. Grey Eagle

IN THE COURT OF APPEALS OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Leonard Prescott, Appellant-Defendant, v. Little Six, Inc. d/b/a Mystic Lake Casino, Appellee-Plaintiff	)	Ct. App. No. 027-01

MEMORANDUM OPINION AND ORDER

FACTUAL BACKGROUND

In this case, Little Six, Inc. (LSI) initiated an action against Leonard Prescott (Prescott) claiming that he breached an agreement to pay back certain sums of money. At various different times, Prescott has served as this Community's Chairman, the President of LSI, and the Chairman of the Board of LSI.

In 1994, the SMS(D)C Gaming Commission initiated an investigation into some of the actions Prescott undertook when he served as an officer of LSI. At the beginning of that investigation, the LSI Board decided to provide Prescott with funds to hire a lawyer in order to defend himself. LSI alleges that when it forwarded the money to Prescott, it had an agreement with him that if he was found guilty of misconduct he was to reimburse LSI for the forwarded funds.

The Commission concluded that some of Prescott's actions justified revoking his gaming license, and on appeal this Court ultimately allowed that decision to stand. See

In re Leonard Prescott Appeal from 7/1/94 Gaming Commission Final Order, No. 015-97 (SMS(D)C Ct. App. July 30, 1999). The Community alleges that after this Court's decision in 1999, it made a demand upon Prescott to return the money forwarded to him for attorney's fees. Although Prescott does not appear to have answered in this case, the Court will assume that Prescott has failed to repay the money that LSI claims he owes.

LSI then filed this action claiming Prescott violated their agreement to give the money back. LSI has based this action on breach of contract and unjust enrichment.

Prescott filed a motion to dismiss, arguing that any claims related to the money forwarded in 1994 were settled by the litigation in an earlier case, LSI v. Prescott and Johnson, No. 020-99, 021-99, 022-99 (SMS(D)C Ct. App. Feb. 1, 2000). For the sake of clarity, we adopt the terms used by the Trial Court – we will refer to the Complaint in this case as the 2000 Complaint, and the complaint in the earlier LSI v. Prescott litigation as the 1994 Complaint.

The 1994 Complaint was filed by LSI against Prescott and others for money damages related to a number of different legal and factual theories. Ultimately, this Court concluded that either summary judgment or the doctrine of qualified immunity shielded Prescott from liability on all of those claims. Prescott now argues in his motion to dismiss that the claims made in the 2000 Complaint are barred by the doctrine of res judicata based on the litigation resulting from the 1994 Complaint. In the alternative, Prescott claims that the doctrine of qualified immunity shields him from liability in this case, as it did in the litigation based on the 1994 Complaint.

Because we agree with the Trial Court that LSI could not have brought its present claims for breach of contract and unjust enrichment earlier, we conclude that the 2000 Complaint is not barred by res judicata. And because we agree that even if Prescott was acting within the scope of his duty, a reasonable officer would have known that not paying back money he owed violated the law, we affirm the Trial Court's decision on qualified immunity as well.[1]

LEGAL DISCUSSION

[1] Since the Trial Court deferred ruling on Prescott's motion for attorney's fees, that issue is not presently before this Court at this time.

We review a decision on a motion to dismiss de novo, assuming all the facts alleged in the complaint as true and viewing the allegations in the light most favorable to the plaintiff. Clifford Crooks, Sr. v. SMS(D)C, No. 016-97 (SMS(D)C Ct. App. Jan. 30, 1998).

A. Res Judicata

As noted by the Trial Court, res judicata can take one of two forms: (1) claim preclusion, which bars the same claim between two parties where a final judgment has been issued on the merits in an earlier case by a court of competent jurisdiction, and (2) issue preclusion, which prevents the relitigation of a specific legal or factual issue decided between two related parties in an earlier case. See, e.g., W.A. Lang Co. v. Anderberg-Lund Printing, 109 F.3d 1343, 1346 (8th Cir. 1997).

1. Claim Preclusion

To demonstrate that claim preclusion bars this suit, Prescott must show that the 1994 Complaint was (1) between the same parties, (2) brought in a court of competent jurisdiction, (3) based on the same cause of action as the 2000 Complaint, and (4) resulted in a judgement on the merits. Lang, 109 F.3d at 1346. The parties do not seriously dispute that the 1994 Complaint and the 2000 Complaint involve the same parties or that this Court is a court of competent jurisdiction.

The main issue seems to be whether each complaint involves the same cause of action. Whether two cases involve the same cause of action is determined by analyzing whether they stem from the same nucleus of operative facts. United States v. Gurley, 43 F.3d 1188,. 1195-96 (8th Cir. 1994). Another way to analyze this same question is to ask whether the cause of action alleged in the second action could have been raised in the first action. Gurley, at 1196-97; Myers v. Price, 463 N.W.2d 773, 776-77 (Minn. Ct. App. 1990).

Here the elements of the 2000 Complaint could not have been pled until after this Court's 1999 decision upholding the Gaming Commission's finding of misconduct. In re Leonard Prescott, supra. It was not until after that decision that LSI could allege in good faith that an appropriate tribunal had found Prescott guilty of misconduct. If LSI had

tried to add its present breach of contract and unjust enrichment claims in the 1994 Complaint, those claims would have likely been dismissed or stayed on ripeness grounds because a series of complex appeals concerning Prescott's licensing dispute were still pending.

Prescott argues the trial court erred by focusing on the different theories of recovery in the two complaints, rather than the facts of the two cases. It strikes the Court, however, that the facts underlying the 1994 Complaint are simply different than the facts alleged in the 2000 Complaint. The 1994 Complaint involved a claim that in 1994 Prescott induced LSI to forward funds through misrepresentations and deceit. The 2000 Complaint, on the other hand, involves allegations that in 1999 Prescott refused to honor an earlier agreement concerning the forwarded funds. While both complaints deal with the same funds, the factual contexts of the claims are entirely different, and the claims in the 2000 Complaint did not ripen until five years later. These differences make the factual predicates underlying each complaint separate in "time, space, origin, [and] motivation," such that they do not constitute the same nucleus of operative facts. Gurley, 43 F.3d at 1195-96.

Prescott argues that since LSI's other claims in its 1994 Complaint were ripe in 1994, there is no reason the breach of contract claim was not ripe either. Brief of Appellant Leonard Prescott at 19. However, as explained above, although the two claims involved the same funds, the factual allegations concerning those funds are separated by significant amounts of time, space, origin, and motivation. The allegations in the 1994 Complaint involve actions by Prescott that had been completed by the time the complaint was filed in 1994. The actions alleged in the 2000 Complaint were not completed until 1999. The two claims simply involve different facts.

Prescott also argues that since the Gaming Commission's findings did not impose monetary damages upon him, he was never found "liable" for misconduct such that he was ever obligated to return the funds. Brief of Leonard Prescott, at 21. We are not persuaded. First, Prescott's argument is based on an extremely narrow reading of the Complaint and our precedent. Such a reading is inappropriate given the standard of review here that requires viewing the Complaint in a light most favorable to LSI. Second, "liable" does not mean strictly responsible for monetary damages, but includes

any kind of legal responsibility. See Ballentine's Law Dictionary, 3rd Ed. We are satisfied that the Gaming Commission's findings, and our affirmance of those findings, constitute a finding of misconduct sufficient to withstand Prescott's motion to dismiss.

Since we agree with the Trial Court that the two complaints involve different causes of action, we do not decide whether a decision based on official or sovereign immunity is a decision on the merits for the purpose of res judicata. Contrary to LSI's assertion in its brief, there are no cases in the SMS(D)C Court system that consider whether a decision based on an immunity doctrine is "on the merits" for the purposes of res judicata. Since such a decision is not necessary to our conclusion today, we will not reach that issue.

2. Issue preclusion

As the Trial Court noted, issue preclusion bars a subsequent suit, or a part of a subsequent suit, when the issue in question is identical in both suits, the earlier judgment was on the merits, the estopped party was a party or in privity with a party in the earlier litigation, and the estopped party was given a full and fair opportunity to be heard. See Willems v. Commissioner of Public Safety, 333 N.W.2d 619, 621 (Minn. 1983). Issue preclusion "operates only as to matters actually litigated, determined by, and essential to a previous judgment." Roseberg v. Steen, 363 N.W.2d 102, 105 (Minn.App.1985).

Here, the issues are clearly not the same. A breach of fiduciary duty claim under the 1994 Complaint is not the same as a breach of contract claim in the 2000 Complaint, and as discussed above, the facts underlying each claim are not the same. In addition, it is not clear how LSI could have had a fair opportunity to litigate its breach of contract and unjust enrichment claims in 1994, when those claims did not ripen until 1999. We therefore affirm the Trial Court's decision that issue preclusion does not bar this suit.

B. Official Immunity

We agree with the Trial Court that even assuming that Prescott was acting within the scope of his duty, he should have known that failing to pay back money he owed was a violation of Community law.

Prescott argues that since he was granted qualified immunity on the breach of fiduciary duty claim in the 1994 Complaint, he is entitled to such protection here. Brief of Appellant Leonard Prescott, at 25. There are at least two responses to this argument. First, when LSI allegedly demanded its money back in December 1999, this Court's February 1, 2000 decision on the 1994 Complaint had not been issued, so any indecision Prescott had regarding his legal responsibilities was not a result of our decision on the 1994 Complaint. Second, our earlier decision granted Prescott immunity because we could not say that any specific representation attributed to him clearly violated Community law. Contrary to Prescott's arguments, that is a completely separate question from whether a refusal to honor a contractual agreement is a clear violation of law. See Reply Brief of Appellant Leonard Prescott at 6-7. If we assume all the facts alleged in LSI's 2000 Complaint are true, when LSI asked for its money back in December of 1999, more than four months after this Court upheld the Gaming Commission's findings, a reasonable official in Prescott's position would have realized that a refusal to return the money was a violation of LSI's rights. Therefore, we affirm the Trial Court's decision on official immunity.

ORDER

The Trial Court's decision in this matter is affirmed in all respects. Appellant's motion to dismiss is denied. The matter is remanded for further proceedings in the Trial Court consistent with this opinion.

Dated: 10/26/01

Henry M. Buffalo, Jr.
Judge

Robert A. Grey Eagle
Judge