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.
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> 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

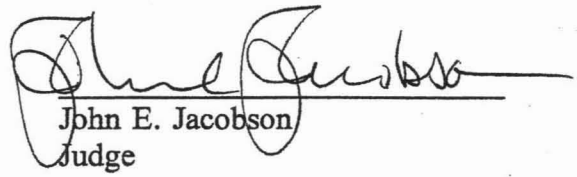
Robert A. Grey Eagle
Judge

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