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