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