LIST OF SMSC COURT OF APPEALS OPINIONS

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

COUNTY OF SCOTT STATE OF MINNESOTA

Shakopee Mdewakanton Sioux (Dakota) Gaming
Gaming Enterprise

Plaintiff,

v.

Leonard Prescott individually, and as current
And former officer and/or director of Little
Six, Inc.,

Defendant.

File No. CT. APP. 032-05

Memorandum Opinion and Order

This matter began in 2000 when the Gaming Enterprise (then Little Six, Inc.) filed a complaint seeking reimbursement of money it had agreed to forward to Mr. Prescott to hire legal counsel in conjunction with his hearing before the Gaming Commission. The Gaming Commission revoked Mr. Prescott's license, and that decision was upheld on appeal. The Enterprise now seeks reimbursement of amounts it forwarded to Mr. Prescott based on the indemnification agreement between the parties.

The matter came to trial in August, 2004, and the trial court issued an order requiring Mr. Prescott to repay $516,871.46 in indemnification related fees. The trial court also made an award of interest, and it awarded the Enterprise its attorney's fees for prosecuting this case.

Mr. Prescott appeals the decision of the trial court, arguing that the evidence does not support the amount of the indemnification award, that interest should not have been granted, and also disputing the award and amount of attorney's fees. We affirm.

The standard of review following a bench trial is whether the trial court's findings of facts were clearly erroneous and whether the trial court erred in its conclusions of law. Kostelnik v. LSI, 1 Shak. A.C. 92 (March 17, 1998). Thus, we must accept the lower court's findings of fact unless upon review we are left with the definite and firm conviction that a mistake has been committed. See, e.g., Sawyer v. Whitley, 112 S.Ct. 2514, 22, n.14 (1992); Anderson v. Bessemer, 470 U.S. 564, 73-4 (1985)

Here the trial court received testimony from the attorneys who provided Mr. Prescott with his legal counsel. Determining the amount the Enterprise paid on Mr. Prescott's behalf was not easy because the attorneys in question performed work related to Mr. Prescott's Gaming Commission case as well as providing other legal services to LSI and its other officers.

The trial court drew a dividing line between work done for Mr. Prescott and the work done for others by noting that in 1995, Mr. Prescott's attorneys claimed that work they performed from late April 1994 to December, 1994 was covered by their attorney client privilege with Mr. Prescott. In other words, Mr. Prescott's attorneys claimed in 1995 that all the work they billed LSI during that period was covered by Mr. Prescott's attorney client privilege. The trial court credited this contemporaneous description of the work performed on Mr. Prescott's behalf over the subsequent testimony that questioned whether all the work done during that period was solely for Mr. Prescott's benefit.

We cannot say on appeal that the trial court's determination is clearly erroneous. Mr. Prescott's arguments boil down to a request that we credit or evaluate the testimony differently than the trial court did. However, reweighing the evidence or credibility of witnesses is not our role on appeal. We affirm because the trial court's evaluation of the evidence seems reasonable to us and we are not left with the definite conviction that a mistake has been made.[1]

[1] Mr. Prescott also argues that since only part of the Gaming Commission's order was upheld, he should only have to indemnify part of this attorney's fees. We agree, however, with the Enterprise that such an argument attempts to split hairs too finely. Mr. Prescott's license was revoked, that decision was upheld on appeal, and his agreement to pay back any moneys forwarded should be honored under such circumstances.

Mr. Prescott next argues that an award of interest was in error. He claims that the parties never agreed that interest would be a component of his indemnification agreement with the Enterprise, and therefore, no interest is due. The trial court disagreed, concluding that Mr. Prescott promised to make the Enterprise whole in the event that he was required to repay the indemnification amounts. In order to be made whole, the trial court concluded that the Enterprise was due interest because it had been denied use of its funds for approximately 12 years. We agree and affirm that award of interest, as well as the method of calculating interest adopted by the trial court.

Lastly, Mr. Prescott argues that an award of attorney's fees to the Enterprise is not warranted in this case. The Enterprise requested its fees under Section 67 of the Community's Corporation Ordinance which states that "a prevailing party in any action shall be awarded costs and reasonable attorney's fees." The Enterprise filed a request for attorney's fees to which Mr. Prescott did not respond. The trial court, therefore, awarded the fees and took evidence as to the amount of fees owed.

Mr. Prescott argues that a general denial was sufficient to preserve a general objection to attorney's fees. Even assuming, without deciding, that Mr. Prescott is correct, he still failed to present the trial court with any timely written arguments in support of his position. The trial court was justified in awarding the fees.

Mr. Prescott also argues that the amount of fees requested was excessive. But in its October 26, 2005 order, the trial court worked through specific billing examples to explain why the fees were not excessive. Beyond disagreeing with the trial court's evaluation of the evidence, Mr. Prescott has not demonstrated how the trial court's review of the evidence was clearly erroneous.

Mr. Prescott also argues that since fees have not been awarded in other cases on a prevailing party theory, we should not award them here. But the Enterprise correctly points out that in this case we are confronted with a specific statutory provision that

justifies an award of attorney's fees on a prevailing party basis. We affirm both the award and amount of attorney's fees.

ORDER

It is Ordered: That the decision of the trial court is hereby **Affirmed.**

Date 8/8/06

Judge Henry M. Buffalo, Jr.

Date 8/9/06

Judge Robert A. Grey Eagle

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IN THE COURT OF APPEALS OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Wesley Eugene Brooks,
Appellant/Petitioner

vs.

Tara Lynn Corwin a/k/a Tara Lynn Corwin-Brooks,
Appellee/Respondent

Court App. No. 033-07

OPINION

This appeal involves two questions: first, whether the Trial Court improperly awarded certain assets to Respondent Corwin, and second, whether the Trial Court improperly ordered Appellant Brooks to pay a portion of Corwin's attorney fees as a sanction. Because this Court finds that the Trial Court's orders were proper, we affirm the Trial Court's Memorandum Decision, Findings of Fact, Conclusions of Law, and Judgment and Decree (the "Decision"), as amended (the "Amended Decision").

I.

Brooks first claims that the Trial Court incorrectly awarded Corwin a motorcycle and a pick-up truck, and that the Court erred by awarding Corwin the equity in a townhome Brooks purchased for her. Specifically, Brooks argues that, contrary to the Trial Court's findings, the vehicles and the money used for the townhome were not intended as gifts to Corwin.[1] We can only reverse the Trial Court's findings of fact if they are "clearly erroneous."[2]

A Trial Court finding is "clearly erroneous only if it is 'manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.'"[3] We will reverse only if we are "'left with the definite and firm conviction that a mistake has been made.'"[4] We have no such conviction in this case. The Trial Court—which was in a much better position than we are to judge credibility—heard testimony to support each of its findings,[5] and Brooks has given us no reason to doubt that testimony.

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[1] *See* Appellant's Brief at 16, 20.
[2] *Kostlenik v. Little Six, Inc.*, 1 Shak. A.C. 92, 96 (Mar. 17, 1998).
[3] *Fraser v. Fraser*, 702 N.W.2d 283, 287 (Minn. Ct. App. 2005).
[4] *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. Ct. App. 2000) (quoting *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (other citations omitted).
[5] *See* Original Decision, at 4 ("The Respondent testified that . . . the Petitioner gave the Respondent $100,000, in order that the Respondent could purchase a townhome in her own name . . . ."); 7 ("[T]he Respondent testified that the Petitioner intended . . . to give the other [motorcycle] to her as a Mother's Day present and as atonement for certain misbehavior."); and 7 ("The Respondent testified at trial that the Petitioner intended the truck to be a gift to the Respondent's father; and the Petitioner testified that he intended the truck to be available to the Respondent's father while he was living in Minnesota.").

II.

The second issue Mr. Brooks appealed was the Trial Court's award of $6,500 in attorney's fees to Ms. Corwin. The Trial Court awarded those fees "[b]ecause [Brooks] was in hiding during much of the time that these proceedings were pending, and because discovery and pre-trial procedures therefore were made substantially more difficult and less effective."[6] The Trial Court found that it had inherent authority to award attorney fees when one side had acted in bad faith.[7] But Brooks argues on appeal that the Trial Court lacked discretion to make a punitive award of fees, at least without following the procedures set forth in Rule 11 of the Federal Rules of Civil Procedure.[8]

As the U.S. Supreme Court has found,

> "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." These powers are "governed not by rule or statute but by the control necessarily vested in court to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[9]

Of necessity, then, this Court and the Trial Court also possess these powers.

A court's power to control its proceedings includes the power to dismiss a lawsuit, and "'the less severe sanction' of an assessment of attorney's fees is undoubtedly within a court's inherent power as well."[10] Courts may exercise their inherent authority to assess attorney's fees for three reasons: to award fees to a party whose litigation efforts directly benefit others, as a sanction for "willful disobedience

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[6] Amended Decision at 4.
[7] *Id.* at 5.
[8] Appellant's Brief at 13.
[9] *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (reviewing courts' inherent authority to impose sanctions) (internal citations omitted).
[10] *Id.* at 45.

of a court order," and when a party has "acted vexatiously, wantonly, or for oppressive reasons."[11] "Bad faith in the conduct of the litigation, resulting in a fee award as a sanction for abuse of the judicial process, is the most familiar type of bad faith under which fees are awarded,"[12] and was the basis of Judge Jacobson's award in this case. He found that the case was "unusually difficult to litigate" for all parties involved because Brooks disappeared—to flee from law-enforcement officials—after filing the case, and was "unavailable to participate in discovery that could have served to make a factually tangled case less problematic."[13]

Because a "bad-faith fee award" is meant to be punitive to the bad-faith actor and not solely restorative to the other party, fees can be awarded whether the party to whom they are awarded is considered the "prevailing" party or not. In addition, the fees awarded need not be tied directly to the vexatious behavior. That is, a court need not make a finding that the specific fees awarded directly resulted from the bad-faith behavior. Thus, Brooks's suggestions that Ms. Corwin was not the "prevailing party," and that the fees awarded do not correlate directly to the discovery difficulties his disappearance caused are irrelevant.

Also beside the point is Brooks's suggestion that Judge Jacobson erred by failing to follow the procedures for imposing sanctions under Rule 11.[14] The U.S. Supreme Court has held—and we agree—that a court's inherent powers to control its courtroom and its cases are separate and apart from the power to award fees or

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[11] *Id.* at 45-56 (internal citations omitted).
[12] *Shimman v. Int'l Union of Operating Eng'rs*, 744 F.2d 1226, 1230 (6th Cir. 1984) (summarizing types of bad-faith awards).
[13] Amended Decision at 4.
[14] *See* Appellant's Brief at 13-14.

sanctions under particular rules and statutes, and they permit courts to sanction behavior that does not fall under particular rules and statutes.[15] Furthermore, while Rule 11 precludes the filing of frivolous, false, or harassing claims and pleadings, it does not cover the type of behavior that Judge Jacobson sanctioned in this case. So the Trial Court acted well within its inherent authority to control its cases by awarding a portion of Corwin's attorneys' fees to Brooks as a sanction for bad behavior that fell outside Rule 11's reach.

Having found that the Trial Court had authority, as a matter of law, to award attorneys' fees as a sanction, we review the Trial Court's factual findings with respect to why they were issued to determine whether they are clearly erroneous.[16] As noted, the Trial Court found that Brooks unreasonably prolonged the trial-court proceedings by being unavailable. Brooks does not dispute that he disappeared; he simply asserts that he wasn't gone very long.[17] He essentially concedes that he acted in bad faith by disappearing, but claims that his behavior was "not that bad." We disagree, and we are mindful of the fact that Brooks made these same arguments to the Trial Court when he moved to amend the Trial Court's findings and that, after careful consideration (and amendment of certain other findings), the Trial Court declined to amend its findings.[18] Viewing this matter in the light most favorable to the Trial

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[15] *Chambers*, 501 U.S. at 46 ("We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for [bad-faith conduct].")
[16] *See Kostlenik*, 1 Shak. A.C. 92, 96 (Mar. 17, 1998), and discussion, *supra* at 2.
[17] *See, e.g.*, Appellant's Brief at 2, 14.
[18] *See* Amended Decision at 1-2. *See also Vangsness*, 607 N.W.2d at 472 (considering trial court's response to a request for new findings in determining whether findings were clearly erroneous).

Court's findings, as we must,[19] we are not convinced that the Trial Court made a mistake of fact.

For the foregoing reasons, the Trial Court's Decision, as amended, is affirmed.

Dated: August 4, 2008

Henry M. Buffalo, Jr., Appellate Judge

Vanya S. Hogen, Appellate Judge

[19] *See Vangsness*, 607 N.W.2d at 472.

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

STATE OF MINNESOTA

In Re the Marriage of:

Alan Welch,

Appellant, App. Court File: 034-08

and

Mary M. Welch,

Appellee.

MEMORANDUM OPINION AND ORDER

Before Judge Henry M. Buffalo, Jr. Judges Vanya Hogen and John E. Jacobson took no part in this decision.

I. Introduction.

This appeal arises from the award of permanent spousal maintenance in a dissolution action before the Shakopee Mdewakanton Sioux (Dakota) Community Tribal Court ("Trial Court") under file number 590-07, dated August 18, 2008 (hereafter, the "Dissolution Order"). Alan Welch is a member of the Shakopee Mdewakanton Sioux (Dakota) Community (the "Community"), and receives *per capita* payments from the Community as his sole source of income. Mary M. Welch is not a Community member. Mr. Welch's *per capita* payments were the Welches' sole source of income for all of their nearly-10-year marriage and for much of their 20-year relationship. The sole issue on appeal is whether the Trial Court was legally authorized to award permanent spousal maintenance to Ms. Welch that would ultimately be paid from Mr. Welch's *per capita* income and that is based upon the standard of living the couple achieved only due to that *per capita* income. We affirm in part and reverse in part.

II. Background.

A. Dissolution Order.

The Welches began their relationship in approximately 1986 and began living together by 1988 or 1989. See Dissol. Order at Finding 19. Based upon Mr. Welch's *per capita* income, Mr.

Welch ceased working a wage-earning job sometime before 1994, while Ms. Welch stopped working outside the home in 1994. Id. at Finding 20. The Trial Court found that the couple made a joint decision that Ms. Welch would stop work based upon not just the receipt of Mr. Welch's *per capita* payments, but that Ms. Welch thereafter provided care for Mr. Welch's two children from a previous relationship. Id. On May 24, 1996, the Welches' child [redacted] was born and Ms. Welch also cared for him. Id. at Finding 13. He is now 12 years old. Id.

The Welches were married on October 23, 1998. Id. at Finding 7. Before and after that time, by all accounts, Mr. Welch's *per capita* payments allowed the Welches a "comfortable" lifestyle. Id. at Finding 24.

The Welches separated on August 26, 2007. Id. at Finding 7. Before trial, the Welches resolved all issues relating to their dissolution, including that Ms. Welch would have primary physical custody of [redacted] aside from the question of spousal maintenance and certain attorney's fees. Id. at Finding 11, 23. The Trial Court accepted the Welches' arrangements as in the best interests of the child. Id. at Finding 15. The Trial Court found that until [redacted] turns 18, "it is not reasonable to impute wages to the Respondent . . . ." Id. At that time, Ms. Welch will be 50. Id. at Finding 28.

Regarding spousal maintenance, the Trial Court found that Mr. Welch's income included gross monthly *per capita* payments of $76,000, with a net monthly payout of $46,160. Id. at Finding 16. Of this, there would be approximately $32,177 per month left over after taxes and expenses for Mr. Welch and [redacted] support. Id.

Ms. Welch has not been employed outside the home since 1994. Id. at Finding 25. She has a high-school education and previously worked at low- and minimum-wage jobs, but has no medical conditions that would "substantially interfere" with her ability to gain and maintain employment. Id. at Findings 25-26. At her present level of training, which qualifies her only for "entry-level work," the Trial Court found that she could make approximately $12.00 per hour upon entering the work force after [redacted] turns 18, or $2,080 per month, beginning in June 2014. Id. at Finding 37.

At the hearing, the vocational expert Mr. Welch had hired to evaluate Ms. Welch, Jan Lowe, offered testimony that Ms. Welch was best suited for semiskilled or unskilled types of jobs at this time. Transcript of Final Hrg. (July 16, 2008) ("T.") at 136 lns. 14-17. While Ms. Lowe had not specifically evaluated the potential for Ms. Welch to seek further education, and did not specifically recommend it, Ms. Lowe did state that it was her opinion that Ms. Welch could get a job now with her existing skills, which had not changed from before the marriage to present day. Id. at 138 lns. 14-16; 139 lns. 11-18. Ms. Lowe also testified that one option for Ms. Welch would be to start with part-time work now, while [redacted] was in school, and later "work longer hours and build into full-time" after [redacted] needed less care. Id. at 140 lns. 1-10. Ms. Lowe also testified that, should Ms. Welch begin work now, over the six years that [redacted] has until he turns 18, she could "possibly advance through work experience and on the job training," and improve her earning power more than if she began work only in six years. Id. at 141 lns. 8-21.

Both parties agreed that Mr. Welch should pay some spousal maintenance. Before trial, Mr. Welch voluntarily offered to pay Ms. Welch $5,000 per month as spousal maintenance for the full six years until [redacted] is 18. Appellant's Br. at 16. But Ms. Welch claimed the spousal maintenance should be permanent. See Trial Ct. Memo. Dec. ("Memo. Dec.") at 1. The Trial Court agreed and awarded permanent spousal maintenance in the approximate amount of $9,455 per month until [redacted] turns 18, at which time the amount will be reduced by the amount Ms. Welch could earn at her present level of education, to $7,375 per month. Id. at Concl. 6. The only circumstances in which the maintenance would cease include upon Ms. Welch's remarriage or Mr. Welch's death. Id. at Concl. 6. The Court reasoned that "given the Respondent's age and the limitations on her earning potential, there is no likelihood that she will be able to maintain a standard of living that is at all comparable with that which she presently has, unless she receives permanent maintenance in some amount." Dissolution Order at Finding 29.

In awarding permanent maintenance, the Trial Court evaluated multiple factors both during and before the parties' marriage. The Trial Court considered the entire duration of the 20-year relationship, not just the 10-year marriage; that "Petitioner lived with the Petitioner for virtually her entire adult life"; that Ms. Welch had "very considerable responsibilities" for construction, remodeling, upgrading, and maintenance of the parties' residences; and that she had the responsibility for care of Mr. Welch's children, in addition to [redacted] both before and during the marriage. Memo. Dec. at 5.

Additionally, the Trial Court considered Ms. Welch's projected earning power and age:

> [U]nless permanent maintenance is awarded there is not the smallest chance, not the least hope, that the Respondent could maintain anything like the standard of living she has enjoyed during her relationship with the Respondent. If the Petitioner's proposal for maintenance lasting six years were to be accepted, the Respondent, at the end of that six-year period, at the age of fifty, would find herself earning less than thirty thousand dollars per year, with only the most minimal Social Security payments available when she reached retirement age.

Id. at 6. The Trial Court did not provide for revisiting the maintenance award at any point in the future. The award included no life insurance on the maintenance amount, nor any amounts for vocational rehabilitation for Ms. Welch.

B. Spousal maintenance award.

As for the specific maintenance amount, the Trial Court largely accepted Ms. Welch's current budget, but eliminated line items for various debts and for monthly rent based upon the equalizer payment she received in the settlement. See Dissol. Order at 13. Additionally, the Court deducted $690 from the budget "in line items attributable to the parties' son," based upon the child support award, but still left $200 in the budget for "Clothing ([redacted]." Id. The Trial Court then *sua sponte* added to the budget "$550 monthly medical insurance payments and $200 for monthly dental insurance payments." Id. at 13-14. The Trial Court drew these numbers directly from Ms. Welch's "projected" monthly budget for Ms. Welch, which it otherwise had rejected as speculative, and stated simply that "the court finds those projections to be

reasonable." Id. This brought the monthly budget to $7,005. Id. Furthermore, the Trial Court assumed a 28% bracket for federal income tax and 7.8% for Minnesota income tax, based upon Ms. Welch's current bracket, and therefore added in the additional amount of $2,450. Id. at 14.

Various items that the Court accepted in Ms. Welch's current budget were solely supported by testimony from Ms. Welch rather than by receipts, invoices, or other documentary evidence. The entire budget upon which the Trial Court based its ultimate award is duplicated here, including the Trial Court's additions, for ease of analysis:

Source	Expense	Amount
Ms. Welch's claimed current monthly budget	Rent, mortgage or contract	$1,700.00
	Home or renter's insurance	25.00
	Electricity	80.00
	Gas	110.00
	Telephone (local, long distance & cell phones)	180.00
	Cable TV	88.00
	Computer on-line charge	45.00
	Home repairs	100.00
	Appliance repair or replacement	25.00
	Groceries	800.00
	Household supplies, soap, etc.	100.00
	Meals eaten out	300.00
	Automobile gas and oil	650.00
	Automobile repairs	100.00
	Automobile License (annual $480.00)	40.00
	Automobile Insurance	200.00
	Personal items and incidentals	200.00
	Grooming-hair cuts, hair care	100.00
	Clothing	200.00
	Laundry and drycleaning	50.00
	Medical (unreimbursed expenses)	200.00
	Clothing (for [redacted]	200.00
	Newspapers and magazines	50.00
	Entertainment and recreation	1,000.00
	Gifts (b-day, x-mas, etc.)	200.00
	Horse rent/medical/hay	850.00
	Housekeeper	500.00
	Vet for dog/dog food	150.00
Projected monthly budget (added by Trial Court)	Medical insurance	550.00
	Dental insurance	200.00
	Subtotal	***$7,005.00***
Trial Court tax estimate	State (7.8%) and Federal (28%) taxes	2,450.00
	TOTAL AWARD	**$9,455.00**

See generally, id. at 10-14. Ms. Welch testified at trial that her "current budget" reflected her "modified lifestyle" after she and Mr. Welch separated. See T. at 114 lns. 9-14.

Ms. Welch claimed $1,700 in rent in her budget and testified to that amount at trial. See T. at 114 lns. 15-19. In fact, the only check stubs she provided in evidence reflect a $1,625 payment for rent. See, e.g., Ex. 18a at Check 3004 (3/3/08): $1,625 to Charlene Jason for rent; Check 3075 (6/5/08): $1,625 to Charlene Jason for rent. Additionally, Ms. Welch admitted that at least part of the $180 monthly cell phone charges in her budget was attributable to a cellphone for her adult son by another father, Josie. See T. at 116 lns. 2-6; 208 lns. 8-17. As for the $100 in "home maintenance" and $25 for "appliance repair" at her rented townhome, Ms. Welch testified that while she was responsible for certain damages, she had not yet paid any amount to fix them and did not submit (and had not obtained) any estimates. T. at 116 lns. 24-25; 117 lns. 1-20. Nevertheless, she stated that she believed the total $125 was accurate. Id. at 117 lns. 17-20.

At the hearing, Ms. Welch similarly supported her claims regarding other costs with testimony alone, including $800 for groceries for [redacted] and her (down from $1,000 a month in her original budget due to the deduction of her adult son's food costs); $300 for eating out each month; $100 for household supplies; $100 per month in car repairs; $200 in personal items and incidentals; $100 in hair care; $200 in clothing; $50 in dry cleaning; $150 for dog care; $200 per month for gifts; $50 for newspapers and magazines; and other items. See generally, id. at 116-125. This is despite the fact that the record includes check registers that would presumably support some of these typical expenses, but these were not analyzed at the hearing.

Regarding the $650 for gas and oil, Ms. Welch's budget originally included $500 monthly for gas and oil for her 2007 Chevrolet Suburban, but at trial testified that "[i]t's more like 6 or 7, I'd say 650 in gas. . . . my truck costs $130 to fill my tank in my truck." Id. at 119 lns. 3-7. She also acknowledged that she had considered getting another vehicle with better gas mileage, but that this could mean a new car payment. Id. at lns. 12-18.

Regarding the $200 for "automobile insurance," Ms. Welch acknowledged that was an "approximation" of the total insurance for the camper, her truck, and the boat. Id. at 120 ln. 2-12.

Regarding the $200 for "unreimbursed medical expenses," Ms. Welch testified only that it was for "[i]f I have any expenses over what my insurance will cover." Id. at 121 lns. 23-25; 122 lns. 1-3. But she also acknowledged that she did not yet know what her medical insurance would cost, nor what the deductible or exclusions might be, as discussed below.

Regarding the $1,000 for "entertainment and recreation," Ms. Welch testified that it included "going out or trips," including with the motorhome she was awarded in the settlement, but offered no support for the cost. Id. at 122 ln. 25; 123 lns. 1-6. But in the rejected, projected budget this number was actually *lower*, including only $833 per month. See Ex. 17 at Proj. Budget page 3; T. at 165 lns. 19-23; compare Dissol. Order at 12 (Trial Court incorrectly listed projected "$1,800" for entertainment and recreation). On cross-examination, Ms. Welch agreed that her current budget with the $1,000 mostly for travel was "generous," based on past travel costs. See T. at 208 lns. 4-7.

Regarding her housekeeping expense, Ms. Welch gave the following testimony on cross-examination:

Q: So for your three-bedroom townhouse you have a housekeeper who comes in. How often does she come in to clean house?
A: Like once every two months.
Q: And how much are you paying her?
A: I pay her like 75 bucks a time, and then she does the extra. When I go to Brainerd and stuff she watches my dogs and is there for [redacted] and stuff too when I do go to do the horses. And a lot of times when I go it's for the day. I'll leave a Saturday morning or, and come back, be back by 6.
Q: So the housekeeper also cleans your house for you; correct?
A: Mm-hmm.
Q: And let me ask you this, is that a necessity to have your – you do not work, but you have a housekeeper for your three-bedroom townhouse?
A: Yup. She's been with me for a long time, so I just kept her.
Q: Do you do that as a necessity in your budget?
A: I guess not, but she does, like I said, other things for me also.

Id. at 198 lns. 14-25, 199 lns. 1-11.

Regarding the $850 per month to maintain her two horses at the ranch of a friend in the Brainerd area, Ms. Welch acknowledged that this was actually not the entire amount it cost per year to care for them. See id. at 109 lns. 12-25, 110 lns. 1-15 (agreeing that there it "probably" costs $2,400 more per year to care for them, including all costs). Ms. Welch also testified that she visits "up there maybe once every two weeks," which means driving for about two hours from her home in Prior Lake. Id. at 110 lns. 22-23; 194 ln. 25; 195 ln. 1.

Regarding the $550 for medical insurance, Ms. Welch testified that this figure was a direct quote from Blue Cross Blue Shield, but that she did not know what type of coverage it included, but that it was "pretty much the same plan" as she currently has. Id. at 162 ln. 25, 163 lns. 1-14.

Regarding dental insurance, Ms. Welch testified that she had not actually looked into the cost, agreed that it "may be a little less than 200 a month," and admitted that she was relying on what a friend told her she paid for her dental coverage. Id. at 163 lns. 21-25, 164 lns. 1-5.

On cross, Ms. Welch testified about the scenario if she used her settlement to buy a home, pay off her credit card and attorney's fee debt, and also accounting for the $1,750 she would receive in child support. Opposing counsel asked:

Q: [S]o that drops you down to about 5000 for your unmet needs under that current budget. Do you agree?
A: No, because I, you know, I need more extra money and stuff when we go on trips and stuff.

Q: Well, you've already got a trip entry in your budget for that. You've already got entertainment and expenses. That's already in that budget.
A: Okay.
Q: So would you agree, then, we're down to about 5000?
A: I don't think I can live off $5000 right now a month.
Q: Even with all those other bills being taken care of and no house payment?
A: Well, maybe.

Id. at 192 lns. 14-25; 193 lns. 1-6.

Regarding her ability to work again, on cross-examination, Ms. Welch agreed with the vocational expert who testified at the hearing that certain medical conditions did not limit her employment situation. Id. at 19 lns. 1-6. Ms. Welch also agreed that she was open to further training to become more employable, but that she had not yet given it much though given her childcare duties and the divorce. Id. at lns. 7-24. She also admitted that she was unaware of the extent of childcare options for Kyle through the Community. Id. at 197 lns. 9-16.

III. Discussion and Order.

On appeal, Mr. Welch states that there are no factual disputes and that he accepts the findings of fact made by the Trial Court. The "only issue that Mr. Welch is challenging on appeal is the legality of the trial court's decision to fund a permanent award of spousal maintenance for the rest of Ms. Welch's life out of Mr. Welch's per capita payments." App. Br. at 6. But Mr. Welch also states that he "certainly dispute[s] whether Ms. Welch in fact needs the permanent maintenance that the Tribal Court awarded and in the amount awarded." Id. at 14. Therefore, we view the issues on appeal as twofold: first, whether funding a spousal maintenance award out of *per capita* income is justified, and second, whether the Trial Court abused its discretion in awarding permanent spousal maintenance at the level it did and based on the record.

A. Standard of Review.

This is an appeal of right under SMSC Rule of Civil Procedure 31. The standard of review of the Trial Court's legal conclusions is *de novo*. See Kostelnik v. LSI, 1 Shak. A.C. 92, 96 (March 17, 1998). The standard of review of the Trial Court's findings of facts is clear error. Id. Thus, we must accept the Trial Court's findings of fact unless upon review we are left with "the definite and firm conviction that a mistake has been committed." Anderson v. Bessemer City, 470 U.S. 564, 573 (1985), citing United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). Findings of fact may be set aside where they are clearly erroneous, "and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6). The standard of review on appeal from a trial court's determination of a maintenance award in a dissolution action is whether the trial court abused the discretion accorded to it, but the analysis is highly fact-specific. See, e.g., Chamberlain v. Chamberlain, 615 N.W.2d 405, 409 (Minn. Ct. App. 2000); Coffel v. Coffel, 400 N.W.2d 371, 374 (Minn. Ct. App. 1987) (citations omitted).

B. Analysis.

1. Tribal law regarding spousal maintenance awards to be paid out of *per capita* income.

Mr. Welch argues that spousal maintenance cannot be paid out of *per capita* income. See App.'s Br. at 9-11. Given the paucity of precedent on this point, Mr. Welch argues that we should infer that the General Council intended to exclude *per capita* payments from income that can be used to pay spousal maintenance. Mr. Welch's argument centers upon other provisions of the Domestic Relations Code that expressly exclude *per capita* payments as "marital property":

> Per capita payments from the Shakopee Mdewakanton Sioux (Dakota) Community to its eligible members are the separate property of the person to whom they are issued. Per capita payments shall not be awarded pursuant to the hardship exception of Subsection (b) of this Section 5.

See id. at 8-9. Mr. Welch goes on to suggest the adoption of certain Minnesota rules regarding what he argues is an analogous classification of pension benefits. See id. at 11, citing Krushchel v. Kruschel, 419 N.W.2d 119 (Minn. Ct. App. 1988) (stating that pension benefits must be treated as either property or income, but not both, for purposes of determining maintenance).

It is unquestioned that the Trial Court has the authority and broad discretion to award spousal maintenance under the Community's Domestic Relations Code, which states:

> If no valid antenuptial agreement or settlement stipulation to the contrary exists between the spouses, maintenance may be awarded in cases the tribal court deems appropriate. The tribal court shall consider the length of the marriage; contributions, financial and non-financial, of both spouses; the standard of living to which each spouse has become accustomed to; the financial needs of both spouses; and any other factor the court finds appropriate. The tribal court shall not consider misconduct of either spouse when making its determination.

Dom. Rel. Code, Ch. III, § 6(a). This is true even though the Code contains no language authorizing that maintenance payments be made from *per capita* income, even while it expressly authorizes deduction of *per capita* payments to pay child support. See id. at § 8(b)(2). Nevertheless, the official forms provided in the Code for obtaining deduction judgments do contemplate satisfaction of maintenance obligations from *per capita* income, as does some language under the child support enforcement provisions: ". . . any judgment for the support of a child *or spouse* shall take priority over other deduction judgments, and shall be completely satisfied before any other judgment shall be satisfied . . . ." Id. at § 8(b)(14)(a) (emphasis added). And the Code contains no prohibition on using *per capita* income to satisfy spousal maintenance obligations.

Based on the plain language of the Code, we do not believe that there is a need to investigate legislative intent at all. There is simply no limitation regarding the source of income that can be

used to fund spousal maintenance payments, and where the meaning of a provision is plain on its face, we do not go further. See Welch v. SMS(D)C, 2 Shak. T.C. 1 (Dec. 23, 1994).

Mr. Welch's suggested analogy to a pension, which might be awarded to one or the other party in a property settlement, is inapposite. We disagree that merely by the fact of making a permanent maintenance award, "the Court has in effect eviscerated the non-marital property protection that the Community has accorded a tribal member[']s future per capita payments." App.'s Br. at 16. The Trial Court properly held that "property division parses a thing to which both parties have obtained legal ownership." Memo. Dec. at 3. Under no circumstances could Ms. Welch obtain "ownership" of Mr. Welch's right to receive *per capita* payments, and so other measures are necessary to equalize the parties. This includes a potential award of spousal maintenance, regardless of whether Mr. Welch's income derives from *per capita* payments or something else.

Furthermore, the Trial Court has at least once already addressed the question of whether temporary or permanent spousal maintenance is authorized by the Code. In an unpublished Memorandum and Opinion in Enyart v. Enyart, Trial Court File No. 508-03 (June 10, 2004), at page 3, the Trial Court ruled that "[w]hile it is true that, under Community law, per capita payments may not be assigned to non-members, the Court may award spousal maintenance under the Community's Domestic Relations Code, Chapter III, Section 6a." The Trial Court there agreed that such payments, and even garnishment as a contempt measure for unpaid obligations, were authorized to be made from *per capita* income. Id.

This is also the most practical interpretation. Most Community members rely exclusively on *per capita* income. If the Code did not allow payment of spousal maintenance from *per capita* income, there would likely be no source of income from which a Community member could satisfy an award, which could work a serious injustice against those seeking recourse in the Trial Court.

As Mr. Welch himself suggested, we agree that it is properly left to the General Council to make changes to the spousal maintenance provisions to limit (or even preclude) the use of *per capita* income. For example, where the Council intended to limit the use of a Community member's income for child support, it used express language to do so and imposed a schedule and caps with strict guidelines to apply to upward departures. See Dom. Rel. Code, Ch. III, § 7(a) (2001) (child support schedule and factors); see also Cannon v. Prescott, 4 Shak. T.C. 144, 149-50 (Nov. 25, 2002) (interpreting child support schedule and denying increase solely based upon increased *per capita* income); Wright v. Prescott, 4 Shak. T.C. 153, 159-60 (Nov. 25, 2002) (same). But under the Code as currently drafted, we hold that the Trial Court has authority under the Code to award spousal maintenance to be paid from *per capita* income.

2. Community law regarding spousal maintenance criteria and duration.

Again, Mr. Welch stated that he did not challenge the Trial Court's factfinding and focused his appeal on the Trial Court's "legal analysis of the nature of the per capita payment and whether it could be used as a source of funding for this permanent and extensive spousal maintenance award." App. Br. at 14. Nevertheless, Mr. Welch argued in detail regarding the duration and

amount awarded, stating plainly that "Mr. Welch will be giving up nearly $3,000,000 of his future potential per capita payments as a result of this decision." Id. at 16. Therefore, he preserved the question of whether the Trial Court committed clear error in making this award.

a. Permanent versus temporary spousal maintenance.

Looking exclusively at the duration of the award, while we cannot say that the Trial Court committed any error in awarding maintenance through the time of [redacted] 18th birthday, the Trial Court unjustifiably closed further consideration of the appropriateness of a permanent award both as a matter of law and on the facts in the record. The interest of all parties and the Trial Court in finality does not overcome the public policy issues that underlie a permanent spousal maintenance award, which include relative certainty regarding the recipient's inability to earn sufficient income. No such certainty is possible here. Therefore, the Trial Court erred in awarding permanent maintenance after [redacted] turns 18 where it also found that Ms. Welch *will* be able to work after that time, she has no medical conditions that would foreseeably prevent her from doing so, and she has herself indicated that she could seek further education.

This is, however, a matter of first impression before this Court. And the Code is silent regarding the factors the Trial Court should consider regarding the length of a spousal maintenance award, stating only that "maintenance may be awarded in cases the Tribal Court deems appropriate." Dom. Rel. Code, Ch. III, § 6(a). Therefore, we are entitled to look at other sources of law to inform our review.

Under Minnesota Statute Section 518.552 subdivision 1(a), a factor that Minnesota courts consider in determining whether to award temporary or permanent maintenance is whether a spouse "lacks sufficient property, including marital property apportioned to the spouse, to provide for reasonable needs of the spouse considering the standard of living established during the marriage, especially, but not limited to, a period of training or education, . . ." A Minnesota court must set the duration of the award by considering, amongst other factors, the financial resources of the party seeking maintenance, "the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, and the probability, given the party's age and skills, of completing education or training and becoming fully or partially self-supporting." Minn. Stat. § 518.552 subd. 1(a). Nevertheless, a temporary award is not "favored" over a permanent award where the factors justify one. The solution in the statute is "[w]here there is some uncertainty as to the necessity of a permanent award, the court shall order a permanent award leaving its order open for later modification." Id.

We hold that, as a matter of law, uncertainty as to the necessity of a permanent award is present where the Trial Court finds that there is no present reason why the recipient will not be able to earn income in the future and there is no showing that the recipient cannot also seek retraining or to improve her earning power on the job over time. This is in keeping with Minnesota's approach and we adopt it as our own. See, e.g., Napier v. Napier, 374 N.W.2d 512, 516 (Minn. Ct. App. 1985) (converting trial court award of "permanent" maintenance to temporary, even though trial court had properly retained jurisdiction and scheduled review hearing after ten years, and recipient was a healthy 42-year-old mother who had been out of work force for 20 years). Absent *current* impediments that permanently limit a recipient's ability to work and improve

earning power, such as age, medical conditions, or other limitations, it is speculative to project that the recipient will never be able to improve earning power, especially where there has been uncontroverted vocational expert testimony to the contrary, as here. There is no justification for making a permanent maintenance award now rather than simply awarding temporary maintenance and revisiting the question closer to the relevant time, especially given the testimony of the vocational expert in this matter. Assuming Ms. Welch is still in good health and able to work, there should also be an evaluation of the applicability of rehabilitative maintenance in order to give Ms. Welch an effective opportunity to become independent. Only if such measures prove unworkable should permanent maintenance be considered.

We believe this approach is also fairer to Ms. Welch in the long run. There is nothing in the maintenance award that would prevent payments from immediately and irrevocably ceasing, should Mr. Welch die or the *per capita* payments stop for any reason. The award does not provide for life insurance to cover the spousal maintenance. Ms. Welch, and her son [redacted] would potentially be left with whatever income Ms. Welch could presently earn, in those circumstances.[1] We think that result is more unconscionable than encouraging Ms. Welch to improve her earning power as soon as possible. Regardless of the apparent agreement between the parties regarding the necessity of some spousal maintenance until [redacted] turns 18, there is nothing preventing Ms. Welch from seeking at least part-time employment now.

We are mindful of the broad discretion that is granted to the Trial Court in awarding spousal maintenance. But we view this as an error of law and as a matter of fundamental fairness. Therefore, we remand with instructions to the Trial Court to amend its order to convert its award of spousal maintenance to a temporary one, with a termination date of [redacted] 18th birthday, but to expressly retain jurisdiction over spousal maintenance. Before the date when the temporary maintenance terminates, Ms. Welch may return to the Trial Court to seek an extension of temporary maintenance, to renew her application for permanent maintenance, or to ask for a period of rehabilitative maintenance while she prepares to reenter the workforce full-time.

b. Spousal maintenance amount.

Regarding the amount of the award, as recounted above, the Trial Court purported to apply the Code's spousal maintenance factors. These factors require the Trial Court to consider "the length of the marriage; contributions, financial and non-financial, of both spouses; the standard of living to which each spouse has become accustomed to; the financial needs of both spouses; and any other factor the court finds appropriate." Dom. Rel. Code, Ch. III, § 6(a). The Trial Court accepted Ms. Welch's alleged, current budget, even as it rejected a higher, "projected" budget as too speculative. Nevertheless, accepting most of Ms. Welch's current budget has resulted in an award that is not only very high, but out of line with our previous spousal maintenance awards. It reflects undue emphasis on the factor of the parties' standard of living during the marriage, which was made possible only due to the receipt of *per capita* income. Moreover, the record of the hearing reflects evidentiary errors underlying the Trial Court's acceptance of many of the line items in the budget. Therefore, we hold that the Trial Court

[1] It should be noted that [redacted] as a minor Community member, has a *per capita* trust fund that might be accessible in these circumstances for his care.

abused its discretion and also committed errors of law. We are forced to remand for a full rehearing on the question of spousal maintenance.

i. *Per capita* income as discrete factor to be considered in setting spousal maintenance.

As a threshold matter, *per capita* payments are somewhat unique as "income" in that neither the member *nor* the nonmember spouse is responsible for "generating" the income—it comes to the member by virtue of membership in the Community alone. In that sense, *per capita* income resembles an inheritance. But there are also unique uncertainties inherent in *per capita* income, including that state or federal law changes regarding Indian gaming, downturns in the economy (including the present one), and other factors totally outside the control of a Community member affect *per capita* income, and could even eliminate it altogether. Based upon these singular features, we rule that the unique character of *per capita* income is a proper factor for the Trial Court to consider in evaluating a request for spousal maintenance, including the fact that the nonmember seeking spousal maintenance cannot be considered to have assisted in generating it. The Trial Court should consider the fact that it is due to the *per capita* income alone that a nonmember enjoyed a very high standard of living during marriage in evaluating a spousal maintenance request. We leave the proper application of this factor to the Trial Court, in the first instance.

ii. Errors in the acceptance of Ms. Welch's budget.

We make no value judgment regarding Ms. Welch's expenses, but rather, must determine whether they can fairly be considered Mr. Welch's ongoing responsibility as part of her "financial needs." Mr. Welch does not directly challenge any of the specific factfinding that underlies the amount of the award, only the total amount, which is in part based on the monthly payment and in part associated with the permanent duration. But we are charged with a full review of the record in this matter. We hold that the Trial Court made errors of law in admitting certain evidence to support Ms. Welch's award and that it abused its discretion in accepting a wide portion of Ms. Welch's budget under Community law.

First, the Trial Court is charged with following certain of the Minnesota and Federal Rules of Civil Procedure. See SMSC R. Civ. P. 27 (incorporating the Minnesota Rules of Evidence); 28 (adopting Fed. R. Civ. P. 52 and others). It is fundamental that hearsay, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the trust of the matter asserted," is inadmissible. Minn. R. Evid. 801(c). This includes where a declarant offers oral testimony that consists of her recollection of the contents of documents produced by others that she once reviewed, including receipts, invoices, estimates, and the like. The same goes for estimates transmitted by telephone—these should be reduced to writing, or an explanation must be given for the inability to do so. Such documents and other evidence were the purported basis of Ms. Welch's current budget, regarding which she testified at trial. These writings were, presumably, available at the time of trial—and they are the only reliable evidence of their contents. But most were never presented to the Trial Court. While certain writings appear in the record, there are significant gaps both in their explanation and authentication at

trial, as discussed above. This is a separate consideration from the Trial Court's evaluation of the "credibility" of Ms. Welch as a witness.

We note that Mr. Welch's counsel did not make significant evidentiary objections at trial and has waived his right to appeal these matters. But as a matter of our inherent authority, we are entitled to review any legal issues, including regarding the admission of evidence, *de novo*. We are also mindful that Ms. Welch's counsel had a role in this deficient presentation of evidence. Regardless of the cause, we are not satisfied as to the reliability of the evidence on which the award was based. It is a plain error of law to admit hearsay testimony derived from earlier review of a document, as opposed to the document itself, where there has been no showing that the document is unavailable. The Trial Court, and counsel, must revisit the amounts allocable to rent, home maintenance, appliance repairs, gas, "unreimbursed medical costs," medical and dental insurance, and other unsupported costs, as discussed above.

Second, what are commonly considered luxury items cannot be considered to serve to meet "financial needs," even if a party has become accustomed to them over time. Their inclusion in a spousal maintenance award must be expressly justified. Where such an inclusion is not expressly justified, it indicates that, rather than balancing all the spousal maintenance factors, a court may have elevated the factor of maintaining a current, very high standard of living above all other factors of reasonableness. The Code does not provide for such emphasis, just as other jurisdictions do not. See, e.g., Erlandson v. Erlandson, 318 N.W.2d 36, 39 (Minn. 1983) (holding that no single Minnesota statutory spousal maintenance factor is dispositive). Here, as elsewhere, "[t]he basic consideration in awarding spousal maintenance and determining the amount is the *financial need* of the spouse receiving maintenance and the ability to meet that need, balanced against the financial condition of the spouse providing the maintenance." Coffel, 400 N.W.2d at 374 (citations omitted) (emphasis added).

The most relevant decision of the Trial Court, Enyart, reflects recognition that the Trial Court neither need accept a speculative budget, nor ignore the demonstrated, current, reasonable needs of the recipient in order to maintain a the recipient's previous, very high standard of living. In Enyart, the Trial Court considered the current living arrangements of the recipient, including that by now living with her adult children, she had no significant household expenses. See Enyart, Findings of Fact, Concl. of Law, Order for Judgment and Judgment and Decree at 4 ¶ 13(b) (Dec. 13, 2004). Costs she sought that were associated with projected assisted living or nursing home care remained speculative and unsupportable. Id. Moreover, she herself agreed that she was meeting her expenses with based upon the $2,500 she was receiving in temporary maintenance. Id. The Trial Court's decision to award her $2,500 per month on a permanent basis reflected not an attempt to duplicate the parties' very high standard of living (including extensive debts demonstrating an *inflated* standard of living, to some extent), but an attempt to meet the recipient's current, reasonable expenses. Id.

We emphasize the Trial Court's ability to evaluate what constitutes a "reasonable expense." This is not the same as an expense that will perpetually ensure a very high standard of living long after a divorce becomes final, especially where the recipient has the capacity to work or seek further education to improve her earning power. Under this standard, we question whether the Trial Court should ever make a blanket allowance for what are indisputably luxury items. For

example, here, the budget that the Trial Court approved included $1,000 a month for "entertainment and recreation," along with $300 a month for meals eaten out; $200 for clothing for [redacted] where a clothing allowance is assumed to be covered by child support; $500 for a housekeeper for a 3-bedroom townhome; and $850 per month for the care of Ms. Welch's 2 horses, which are boarded in Brainerd far from her home in Prior Lake, and which amount is acknowledged not even to cover the full cost of their care. These items *alone* account for $2,850 of the $7,005 total pre-tax award, or well more than a third. Deducting this from the pre-tax award of $7,005 leaves $4,155. Applying the 35% tax rate the Trial Court assumed, Ms. Welch would be entitled to an additional $1,454, bringing the hypothetical total to just $5,609.00 per month. We note that this amount is relatively close to the $5,000 per month that Mr. Welch voluntarily offered to pay in temporary maintenance through the time of [redacted] 18th birthday. A more searching analysis of Ms. Welch's claimed expenses is demanded under the rules of evidence and the laws of the Community.

ORDER

It is Ordered: that the decision of the Trial Court is reversed in part, affirmed in part, and is remanded for rehearing in line with this opinion.

Date: 4/15/09

Judge Henry M. Buffalo, Jr.

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

Shakopee Mdewakanton Sioux (Dakota) Community, by and through its Business Council,
Appellant/Defendant,

vs.

Estate of John Lee Feezor,
Appellee/Plaintiff.

App. Court File: 036-10

Opinion and Order on Motion for Reconsideration

Before BUFFALO, HOGEN, and MASON MOORE, Appellate Judges

In a decision filed May 26, 2011, this Court reversed a grant of summary judgment in favor of the Estate of John Lee Feezor in this dispute over a recoupment payment. We concluded that because the legislative history underlying Section 4.11 of the Community's Consolidated Land Management Ordinance, which governs recoupment, could provide guidance concerning the General Council's intent as to how that provision is to be applied, the Community should be afforded an opportunity, on limited remand, to submit that history to the trial court for its consideration.[1]

The Community has now filed a motion for "modification and reconsideration," raising two points. First, it contends the inquiry on remand should be modified to ensure that the trial court consider whether the legislative history

[1] Opinion and Order at 7-8.

reflects an intent that recoupment payments be primarily intended to reflect the value of the affected member's residence. Second, the Community seeks reconsideration of our conclusion that it waived any argument that the Estate's appraisal was legally deficient. For the following reasons, we deny the motion.

I

Our rules of procedure do not include specific provisions for motions to "reconsider" decisions of this Court. Nonetheless, we believe this Court has the inherent authority to address such motions, and that we should look for guidance in exercising that authority to Federal Rule of Appellate Procedure 40, the analogous rule applicable to motions for rehearing in the federal appellate courts. In that regard, Fed. R. App. P. 40(a) delineates the contours of rehearing motions on appeal, directing that a petition for rehearing "shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." The Rule's plain language makes clear its limited scope: "The purpose of a petition for rehearing . . . is to direct the court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably brought about a different result."[2] Consequently, "[i]t should go without saying that a petition for rehearing should not be filed simply to reargue matters already argued unsuccessfully in the original appeal

[2] *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985, 990 (8th Cir. 2010)(quoting *N.L.R.B. v. Brown & Root, Inc.*, 206 F.2d 73, 74 (8th Cir, 1953)).

proceeding."[3] We conclude the same considerations should apply with respect to requests for reconsideration or rehearing of decisions by this Court.

II

Evaluated against this backdrop, we conclude the Community's motion must be denied.

A

In its reconsideration request, the Community first asks that this Court's opinion be modified to direct the trial court to consider whether the legislative history related to the recoupment provision in the Consolidated Land Management Ordinance (the "Ordinance") evidences the intent that recoupment payments be primarily focused on the affected member's residence, as opposed to other appurtenant structures. We believe that the current procedural posture of this case renders this request moot.

While the present motion was pending, the Community presented what it believed to be the relevant legislative history to the trial court. After reviewing that history and briefing by the parties, the trial court issued a Memorandum Opinion and Order on July 26, 2011, in which it addressed, *inter alia*, the specific question that is the subject of the Community's pending motion before this Court, *i.e.* whether the legislative history suggests the General Council intended that recoupment payments be primarily focused on the member's residence rather than other structures.[4] Whether the trial court correctly answered that inquiry is not before us. But because

[3] 16A C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3986.1 (4th ed. 2008).

[4] Memorandum Opinion & Order at 5-7 (July 26, 2011).

it did address the very question the motion for reconsideration was designed to ensure was addressed on remand, that motion is now moot.[5]

B

The Community also seeks reconsideration of our conclusion that it waived any argument that the Estate's appraisal was legally deficient. The Community asserts that its "primary objection all along is that the Estate's appraisal was legally deficient."[6] While this may be true, it is not evident from the record. The Community did not properly raise this objection in the summary-judgment proceedings before the trial court, and therefore waived it on appeal.

In its answer, the Community admitted that the Estate submitted a professional appraisal,[7] which is all the Estate was required to do under Community law to obtain recoupment.[8] The Community reiterated this admission in its summary-judgment brief.[9] And it submitted no evidence at all in support of its motion for summary judgment or in defense of the Estate's summary-judgment motion. It was only in its appellate briefing that the Community began to articulate a theory—with no evidence or expert testimony to back it up—that there was some legal deficiency with the Estate's appraisal.

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[5] *See generally Little Six, Inc. v. Smith*, 1 Shak. A.C. 130, 134 (May 28, 1998).
[6] Motion for Modification and Reconsideration at 3.
[7] Answer at ¶ 4 ("Defendant admits that in conjunction with the Recoupment application, the Plaintiff submitted a professional appraisal . . ..").
[8] Consolidated Land Management Ordinance at § 4.11.
[9] Community's Brief in Support of Motion for Summary Judgment at 2 ("Plaintiff was required to submit an application and a professional appraisal with the Business Council, which she did.").

So in the end, the Community's request to reconsider this issue is a challenge to our application of a well-settled principle: arguments not adequately presented to the trial court, and made for the first time on appeal, will not be considered.[10] Indeed, the Community admits as much on reply, contending that the Court should permit the Community to raise this new issue because it involves a pure question of law, because the interest of "substantial justice" is at stake, because proper resolution is beyond doubt, and because it constitutes a significant question of general impact or great public concern.[11]

We do not find these arguments compelling. First, whether the appraisal was deficient is *not* purely a question of law. The law, *i.e.* the Ordinance, only requires that an applicant for recoupment obtain a "professional appraisal." And as noted, the Community admits the Estate obtained one. The Estate's appraisal is, therefore, *legally sufficient*. The Community's attack on the appraisal goes to its merits, not its sufficiency. And an attack on the merits of an appraisal involves presenting facts regarding the process used to reach the appraised value, and, likely, expert testimony regarding why the process was inappropriate and why another process should have been used.

Second, it is not at all clear that "substantial justice" favors the Community's position. As the Community has admitted, the Estate followed the letter of the law, and, pending further proceedings,[12] appears entitled to judgment.[13] Neither is the

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[10] *See generally Little Six, Inc. v. Prescott*, 1 Shak. A.C. 157, 165 (Feb. 1, 2000).
[11] Community's Reply Brief at 3-4.
[12] We note that the Community has filed a Notice of Appeal from the Trial Court's July 26, 2011 ruling.

matter beyond doubt—and least not in the Community's favor. As we noted in our original opinion, based on the plain language of the Ordinance, unless the legislative history were to reveal that the General Council meant something other than what it said, the Estate proved its recoupment claim for $850,000.

Finally, although we have acknowledged that interpretation of Section 4.11 of the Ordinance is a question of "substantial importance" to the Community, we do not believe its importance outweighs the administration of justice that requiring litigants to raise issues before the trial court protects.[14] This case involves the Community paying more (and we are mindful that a substantial sum is at issue) than it thinks it should to this particular estate. If the Community believes that application of the Ordinance as written will have a "general impact," it is, of course, free to amend the Ordinance.

III

We have carefully considered the Community's motion for reconsideration. For the reasons discussed above, the motion is denied.

IT IS SO ORDERED.

Dated: August 18, 2011

Judge Vanya S. Hogen, for the Court

[13] The Community's assertion that the Estate is committing a fraud on the Community by relying on the appraisal is not well taken. No facts in the record support this allegation. Rather, the facts show that the Estate obtained an appraisal from the very appraiser the Community recommended to it, and that the Community admitted before the trial court that the Estate had obtained a "professional appraisal" and properly applied for recoupment. *See* notes 7 & 9, *infra.*

[14] We note also that the Circuit Courts of Appeal invoke this exception rarely, and usually only in cases where other of the exceptions have also been met, e.g. where failure to decide the issue would cause a miscarriage of justice. *See, e.g., Green v. Los Angeles City. Superintendent of Sch.*, 883 F.2d 1472, 1477 (9th Cir. 1989) .

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

Shakopee Mdewakanton Sioux (Dakota) Community, by and through its Business Council,

Appellant/Defendant,

App. Court File: 038-11

v.

Estate of John Lee Feezor,

Appellee/Plaintiff.

Opinion and Order

Before BUFFALO, HOGEN, and MASON MOORE, Appellate Judges

This matter returns to this Court after remand. We deny the Community's motion to file new evidence and affirm the trial court's grant of summary judgment to the Estate of John Feezor in the amount of $850,000.

I.

A.

The Community's Consolidated Land Management Ordinance (the "Ordinance") contains a rather simple procedure for the estate of a deceased Community member to follow to recoup the value of the decedent's Reservation home and other improvements from the Community. An estate representative must file an application and a professional appraisal of the improvements with the Community's Business Council, and if the appraised value is

below $850,000, the Community must pay the estate the appraised value of the property.[1] If the appraised value exceeds $850,000, the Community must pay the estate $850;000.[2]

In this case, it has been undisputed from the start that the Estate of John Feezor did precisely what was required of it under the Ordinance; it obtained a professional appraisal (from the appraiser recommended to it by the Community) and timely submitted an application for recoupment to the Business Council. The Estate's professional appraisal valued the improvements on Mr. Feezor's Community land assignment at more than $850,000, so under the terms of the Ordinance, the Business Council was required to pay the Estate $850,000 for the value of the improvements.[3] But instead of following the Ordinance, the Business Council got its own appraisal, which apparently valued the improvements at less than $850,000, and then informed the Estate that it would only pay the amount of the Business Council's appraisal.[4] The Estate brought this action to compel the Community to pay the amount required by the Ordinance, $850,000.

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[1] Ordinance at § 4.11.
[2] *Id.*
[3] *Id.* ("When the appraised value exceeds the maximum allowed for recoupment, the Business Council shall provide payment that equals the current amount of funding available to enrolled Community members for mortgage and home improvement loans that is authorized at the date of recoupment.").
[4] We use the term "apparently" because the Community did not submit its appraisal to the trial court and that appraisal is not part of the record. A letter from one of the Community's lawyers to counsel for the Estate references an appraisal by S. Peters and Associates and says that it valued the property at $658,000. *See* Exhibit 13 to Affidavit of Kevin Wetherille (Feb. 12, 2010) ("Wetherille Affidavit").

B.

The parties brought cross-motions for summary judgment. The Estate argued that under the plain language of the Ordinance, the Business Council lacked discretion to challenge the Estate's professional appraisal or to obtain its own appraisal. In opposition to the Estate's summary-judgment motion and in support of its own, the Community provided no evidence of any kind.[5] Instead, it argued that although the Ordinance didn't say so on its face, the General Council intended to give discretion to the Business Council to reject appraisals it deemed unreasonable or unreliable.[6]

The Community's counsel also suggested at the summary-judgment hearing that the General Council "deliberations" regarding the Ordinance indicated the General Council's view that recoupment was only supposed to be for the "home," and not other improvements.[7]

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[5] A party moving for or defending against summary judgment may not simply rest on the pleadings; it must support its position with affidavits or documentary evidence. *See, e.g. Feezor v. Shakopee Mdewakanton Sioux Community*, 3 Shak. T.C. 155, 166 (May 19, 1999). Although the Community's summary-judgment brief referred to an appraisal the Community had received, the Community did not submit the appraisal to the trial court or submit an affidavit verifying that an appraisal had been obtained or what its conclusions were. *See generally* Community's Brief in Support of Motion for Summary Judgment at 4. By contrast, the Estate submitted an affidavit with 16 exhibits in support of its cross motion for summary judgment. Among the exhibits were the Estate's application for recoupment, its appraisal, its appraiser's qualifications, and correspondence demonstrating that the Community had recommended the appraiser that the Estate hired. *See* Wetherille Affidavit.

[6] *See* Community's Brief in Support of Motion for Summary Judgment at 4.

[7] *See* Transcript of March 4, 2010 Summary Judgment Hearing at 5 ("And the General Council sat through the deliberations that the General Council made on this and they knew what the purpose of this [recoupment provision] was. And it was for the home, that's how the transcript reads."). We took this representation to mean that the deliberations took place when the General Council was actually considering enactment of the Ordinance. As will be discussed *infra*, however, counsel was referring to statements made at a General Council meeting more than a year and a half after the Ordinance was passed.

But the Community did not submit the transcripts of those deliberations—i.e. the legislative history of the Ordinance—for the trial court's review.

Finding the Ordinance clear, the facts undisputed, and the legislative history missing, the trial court granted summary judgment to the Estate and ordered the Community to pay the Estate $850,000.

C.

The Community then took its first appeal. This Court agreed with the trial court that the Ordinance was unambiguous and that in light of the undisputed facts, it appeared that the Estate was entitled to summary judgment. But because the General Council has directed that "the laws of the Community should first and foremost function in the best interests of the Community as a whole, and should protect the interests of the Community before the interests [of] any individual member, and before the interests of all other parties,"[8] we reversed the grant of summary judgment and remanded the matter to the trial court so that the court could receive the legislative history into the record and determine whether it supported the Community's position.[9]

In our opinion, we noted that the Community had not challenged the validity or the methodology of the Estate's appraisal, and rejected the Community's argument, new on appeal, that the Estate's appraisal was "legally deficient."[10] The Community moved this Court to reconsider its conclusion that the Community had waived any argument that the

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[8] General Council Resolution 11-14-95-004, Jurisdictional Amendment, at 2.
[9] *Shakopee Mdewakanton Sioux Community v. Estate of Feezor*, No. 036-10, Slip. Op. at 7-8 (May 26, 2011) ("*Feezor I*").
[10] *Id.* at 3.

Estate's appraisal was legally deficient.[11] This Court, in as plain language as we could muster, denied the Community's motion:

> The Community asserts that its "primary objection all along is that the Estate's appraisal was legally deficient." While this may be true, it is not evident from the record. The Community did not properly raise this objection in the summary-judgment proceedings before the trial court, and therefore waived it on appeal.
>
> In its answer, the Community admitted that the Estate submitted a professional appraisal, which is all the Estate was required to do under Community law to obtain recoupment. The Community reiterated this admission in its summary-judgment brief. And it submitted no evidence at all in support of its motion for summary judgment or in defense of the Estate's summary-judgment motion. It was only in its appellate briefing that the Community began to articulate a theory—with no evidence or expert testimony to back it up—that there was some legal deficiency with the Estate's appraisal.[12]

Apparently we were not plain enough, however, because the Community pressed on with its belated attempt to challenge the sufficiency of the Estate's appraisal.

D.

On remand, the Community submitted the admittedly "sparse" legislative history regarding the relevant section of the Ordinance—three pages of transcripts from General Council meetings. Notably, none of the "legislative history" regarding Section 4.11 was from the date the Ordinance was passed, i.e. the date of the General Council deliberations to which we believed the Community's counsel referred at oral argument. Instead, the

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[11] The Community also asked this Court to revise its opinion and expand the breadth of the legislative history to be examined. By the time briefing on the Community's motion was complete, however, the trial court had already considered all the legislative history the Community submitted to it, so that portion of the Community's request was moot.

[12] *Shakopee Mdewakanton Sioux Community v. Estate of Feezor*, No. 036-10, Slip. Op. at 4 (Aug. 18, 2011) ("*Feezor II*") (internal citations omitted).

Community focused on language from a meeting more than 18 months after the Ordinance's passage.

The Community argued that a statement at a General Council meeting in January 2004 indicated an intent to limit recoupment to "houses," which was significant, according to the Community, because the Estate's appraisal included Mr. Feezor's house, a garage, and "a large outbuilding," which cost Mr. Feezor more than $1 million to build.[13] But as the trial court noted, the rest of the post-enactment statements regarding the recoupment provisions explicitly stated that recoupment was to be for all improvements to Community land assignments. In answer to a question from another Community member during a discussion about recoupment, the Tribal Chairman stated that recoupment would be for "the house, the improvements, fences, garages, whatever."[14]

The Community's other tack on what was supposed to be a very limited remand to consider the legislative history was to submit a new appraisal it obtained from the Office of the Special Trustee for American Indians (the "OST Appraisal"). Following this Court's order to conduct that limited remand, the trial court granted the Estate's motion to strike the new appraisal from the record. And, finding that the "legislative history" evinced no intent by the General Council for Section 4.11 to mean anything other than what it said, the trial court granted summary judgment to the Estate in the amount of $850,000.

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[13] *Estate of Feezor v. Shakopee Mdewakanton Sioux Community*, No. 645-09, Slip. Op. at 5 (Jul. 26, 2011) ("Second Trial Court Opinion").
[14] *Id.* at 6 (quoting transcript from July 3, 2002 General Council meeting).

E.

The Community then took the present appeal. The Community challenges both the trial court's decision to strike the belated OST Appraisal and the trial court's reading of the legislative history. And once again, the Community pressed its untimely attack on the Estate's appraisal. We address each of these issues in turn.

II.

We review the trial court's decision to strike the OST Appraisal for abuse of discretion.[15] The trial court struck the appraisal because the record in the trial court's summary-judgment proceedings had closed more than a year earlier, noting that "[w]hen it made and briefed its [summary-judgment] motion, the Defendant had full opportunity to put into the record all the materials that it thought the Court should consider; and the Court did consider those materials."[16] The trial court also took note of the limited scope of this Court's remand: "we reverse the grant of summary judgment and remand this matter for the *limited purpose* of reconsidering the General Council's intent based on an evaluation of the pertinent part of the legislative history should it be made part of the record."[17] The trial court's order followed this Court's remand instructions precisely, and Judge Jacobson did not abuse his discretion in granting the Estate's motion to strike the OST appraisal.

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[15] *See, e.g., Brannon v. Luco Mop Co.*, 521 F.3d 843, 847 (8th Cir. 2008).
[16] Second Trial Court Opinion at 4. As the Estate pointed out, if the Community had desired additional time to obtain a new appraisal, it could have submitted a Rule 56(f) affidavit. *See* Estate's Brief at 6.
[17] *Feezor I* at 7-8 (emphasis added).

The Community suggests that this case presents "extraordinary circumstances" that would have allowed the trial court to accept evidence outside the scope of the remand.[18] Those circumstances, however, appear to be just that the Community didn't know it could get an appraisal from the OST until after summary-judgment briefing was complete. But those are not extraordinary circumstances.[19] Even if the Community didn't know that it could obtain an appraisal from the Office of Special Trustee, it knew it could obtain an appraisal elsewhere (and apparently did, although it didn't bother to submit that appraisal to the court). We find this extraordinary-circumstances argument particularly unpersuasive given that the plain language of the Ordinance doesn't even contemplate consideration of a second appraisal.

III.

The Community also contends that the trial court misread the legislative history.[20] We start by noting that relying on post-enactment statements to show a legislative body's intent is inherently suspect.

> Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation. Real (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law. But post-enactment legislative history by definition could have had no effect on the [legislative body's] vote.[21]

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[18] Community's Brief at 2-3.

[19] *Cf. U.S. v. Buckley*, 251 F.3d 668 (7th Cir. 2001) (on which the Community relies, describing extraordinary circumstances that would permit a trial-court judge to go beyond a remand order as "extraordinary unforeseen events").

[20] We review this question of law *de novo*.

[21] *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1082 (2011) (internal citations and quotations omitted).

Likewise, statements made at General Council meetings after the Ordinance was passed cannot shed light on what the General Council had in mind when it *enacted* the Ordinance. Had this Court been aware that there was no true (contemporaneous) legislative history regarding the recoupment section of the Ordinance, it may well not have granted the limited remand. But because the General Council apparently did not discuss the recoupment provision on the date it enacted the Ordinance, this post-enactment legislative "history" is all that is available in this case to give the Court any idea of what the General Council intended the recoupment provision to mean. [22]

According to the Community, the General Council did not "contemplate a million dollar monstrosity of an outbuilding" when it permitted recoupment for improvements.[23] For this proposition, rather than relying on the statements it relied on below, the Community points to a statement by its counsel at a General Council meeting that improvements would be valued at an approximation of "fair market value" because "[o]bviously Community property has no real value because it's on the reservation."[24] The Community then contends that "fair market value" was not accurately measured by the Estate's appraisal.

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[22] Because we find that the General Council discussions reviewed by the trial court support the plain-language meaning of the Ordinance, we review them here. But in our view, General Council meeting transcripts of meetings held after those at which the ordinance or resolution at issue (or relevant part thereof) was enacted or amended do not constitute "legislative history" and could not provide a basis for interpreting an enactment to mean something other than what it says on its face.

[23] Community's Brief at 7.

[24] Second Trial Court Opinion at 6 (quoting July 3, 2002 General Council meeting).

This is another newly minted argument by the Community that was not hinted at in the summary-judgment proceedings. We granted a limited remand because the Community argued that the General Council deliberations on the Ordinance demonstrated some intent by the General Council to limit recoupment to "houses" and not outbuildings. And we agree with the trial court that the General Council transcripts actually reflects the opposite proposition given the Tribal Chairman's statement that recoupment would be for "the house, the improvements, fences, garages, whatever."[25] We did not intend by this remand to give the Community the opportunity to come up with other arguments that it failed to raise in the summary-judgment proceedings.[26]

IV.

In its brief, the Community raised entirely new arguments about the merits of the Estate's appraisal, claiming that it was based on an improper appraisal method.[27] But the time to have made those arguments (which, so far as we can tell, are completely unrelated to the OST appraisal that the Community asserts constitutes an "extraordinary circumstance" and are based on caselaw that is not new) was in support of its motion for summary judgment.

We affirm the trial court's order granting summary judgment to the Estate in the amount of $850,000. And we deny the Community's motion for relief to file new evidence.

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[25] *Id.*

[26] In any event, we discern no intent in the post-enactment General Council transcripts to exclude "million dollar monstrosity[ies]" from the definition of "improvements" in the Ordinance, and no intent to restrict appraisals to any particular method.

[27] Community's Brief at 4-7.

Furthermore, we will not grant any request for reconsideration based on any challenge to the Estate's appraisal that was not directly and explicitly raised in the initial summary-judgment proceedings, and if the Community files such a request and it does not cite to the specific pages of the unstricken trial-court record that support its contention that the argument is not new, the Court will grant the $2,500 sanctions against the Community's counsel that the Estate requested in its response to the Community's motion for relief to file new evidence.

It is time for this case to come to an end; the Estate did what the law required it to do. If the Community believes that the trial court or this Court has misinterpreted the Ordinance, the General Council is certainly free to amend it so that in future cases, it is clear whether "million dollar monstrosities" are to be valued, what appraisal method is required, and whether the Business Council has discretion to challenge professional appraisals submitted with recoupment applications.

SO ORDERED.

Dated: April 5, 2011

Judge Henry M. Buffalo, Jr.

Judge Vanya S. Hogen

Pro Tem Judge Terry Mason Moore

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