## LIST OF SMSC TRIAL COURT OPINIONS

**Index Vol. 5**
**2004-2009**

STATE OF MINNESOTA
TRIBAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

In Re the Marriage of:

Clarence Wilbur Enyart,

Petitioner

and

Mary Ellen Enyart,

Respondent.

Court File No. 508-03

**MEMORANDUM OPINION AND GARNISHMENT ORDER**

This matter came on for hearing on May 14, 2004, at the Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community, Scott County, Prior Lake, Minnesota, on the parties' cross-motions for temporary relief. Gary A. Debele, Esq. appeared on behalf of Petitioner. Mark H. Gardner, Esq. appeared on behalf of Respondent.

THE COURT, based upon the testimony, files, and proceedings in this case, issues an Order as follows:

**MEMORANDUM OPINION**

On January 16, 2004, this Court issued an Order awarding temporary spousal maintenance to Respondent. The award consisted of $10,000 per month base maintenance, including $5454 for residential care and accommodations, $900 per month for Petitioner's PT Cruiser toward purchase of a handicap-accessible van, and $3646 for a live-in care provider. Respondent also was awarded $40,000 in back maintenance, equaling four months at the base rate of $10,000 per month. The amount due for the first twelve months was to be $13,333, with

the first payment due no later than Friday, January 30, 2004, and payments thereafter to be due on the 15th of each month.

At the May 14, 2004 hearing, counsel for Petitioner requested that the Court reduce its original award amount due to Petitioner's attenuated financial circumstances. The Court acknowledges Petitioner's limitations and modifies its Order awarding temporary maintenance in the superseding Garnishment Order set forth below.

Respondent, however, has made no spousal maintenance payment to date, stemming less from financial hardship than from his persistent denial of this Court's authority over him. The Respondent's open and notorious refusal to abide orders of the Court threatens the credibility and fundamental authority of the Court to bind parties to their promises and to Community law.

The enforcement, or "contempt power" of a court lies at the core of a sovereign's authority to make its own laws and to be governed by them. As the United States Supreme Court has observed, "Courts thus have embraced an inherent contempt authority as a power necessary to the exercise of all others." United Mine Workers of America v. Bagwell, 512 U.S. 821, 831 (1994) (quoting United States v. Hudson, 7 Cranch 32, 34, 3 L.Ed. 259 (1812) (internal quotations omitted). Courts may find parties in summary contempt for behavior actually observed by the Court:

> Longstanding precedent confirms the power of courts to find summary contempt and impose punishment. See, *e.g., Ex parte Terry*, 128 U.S. 289 (1888). In *Cooke v. United States*, 267 U.S. 517 (1925), the Court said:
> 'To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law.' *Id.*, at 534, 45 S.Ct., at 394.
>
> Pounders v. Watson, 521 U.S. 982, 987-988 (1997).

In this case, the Court is a witness to the Respondent's refusal to comply with the Court's temporary maintenance order. The Respondent's argument to justify his noncompliance is that the Community's Domestic Relations Ordinance provides for spousal maintenance awards without any enforcement provision comparable, for example, to the garnishment provisions for child support orders. While 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. Temporary maintenance awards are permissible under the Community's Rules of Procedure for Divorce, Chapter V, Section 3b(2) of the Domestic Relations Code. The Respondent does not deny the statutory provisions for temporary maintenance but openly defies the Court's enforcement authority.

To avoid a crisis of the Court's inherent, sovereign powers of enforcement, the Court must have the power to garnish per capita payments. The source of this power is not in the Domestic relations ordinance, but rather in Community Resolution 02-13-88-01, pursuant to which the Court was created, and Resolution 11-14-95-003, approving a Jurisdictional Amendment. Under the remedial powers inherent to the Court, the Court may enforce its orders by holding parties subject to its personal jurisdiction in contempt for failure to abide orders of the Court. To deny this Court's power to enforce its own orders against noncompliant parties is to cripple the Court and, ultimately, to emasculate the Community's sovereignty. *See, e.g.,* Campbell v. SMS(D)C, Nos. 33-93 and 34-93 (SMS(D)C Tr. Ct. Dec. 5, 1995) (recognizing broad remedial authority of Court as encompassing an order to Community to make per capita payments under Section II of the Court Ordinance); Smith v. SMS(D)C, No. 38-94 (SMS(D)C Tr. Ct. Feb. 7, 1994) (recognizing adoption of 8th Circuit test for entitlement to preliminary relief in Welch v. Crooks, Case No. 3-88, SMS(D)C Tr. Ct. Dec. 16, 1988).

The Petitioner in this case has been ordered to pay temporary spousal maintenance to Respondent pending the Court's final adjudication of their divorce, and the Petitioner refuses to comply with any such Order of this Court. Accordingly, this Court finds the Petitioner in contempt of Court, and issues a Garnishment Order to enforce the temporary spousal maintenance award as set forth below.

**GARNISHMENT ORDER**

Effective immediately upon service of this Order upon Petitioner Clarence Enyart, Petitioner's per capita monthly payments shall be garnished and conditionally withheld as follows:

1. $2,500 per month shall be garnished and paid to Respondent Mary Ellen Enyart.
2. Respondent's net per capita payments payable to Mr. Enyart after the date of service of this Order shall be withheld pending an Order of this Court releasing said payments, which shall issue upon proof provided by Petitioner to the Court that he has transferred title to his PT Cruiser to Respondent, or alternatively, that he has paid Respondent cash amounting to fair market value of the vehicle.

This Garnishment Order supersedes the Court's January 16, 2004 Order awarding temporary spousal maintenance.

IT IS SO ORDERED on June 10, 2004.

Robert Grey Eagle
Hon. Robert A. Grey Eagle

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

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Little Six, Inc., a corporation chartered Pursuant to the laws of the Shakopee Mdewakanton Sioux (Dakota) Community,

Plaintiff,

vs.

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

Defendant.

Court File No. 436-00

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MEMORANDUM OPINION AND ORDER

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On February 17, 2004, in a Memorandum Opinion and Order, the Court granted in part and denied in part the Plaintiff's motion for summary judgment, concluding *inter alia* that a trial was required on one issue presented by the Plaintiff's Complaint:

> The single issue that will be decided at trial will be the extent of the charges from the Kelly law firm that were directly connected to the proceedings and litigation surrounding "Shakopee Mdewakanton Sioux Community Gaming Commission File No. 94-0024" and any subsequent appeals.

That trial is scheduled to take place on August 23, and 24, 2004; and, following a scheduling conference on May 26, 2004, the Court entered a Scheduling Order to govern the proceedings up to the trial. In part, the Scheduling Order established a procedure to govern the possibility that the Plaintiff might seek to depose Steven Wolter, Esq.. The procedure specified by the Order was:

> By June 25, 2004, any motion with respect to the taking of a deposition of Steven Wolter, Esq. will be filed. Any such motion and its supporting materials will be served on Mr. Wolter as well as upon all parties, and Mr. Wolter shall have the right to file a response. All responses to such a motion shall be filed by July 7, 2004; and any reply to those responses shall be filed by July 12, 2004.

The Plaintiff did, in fact, file a motion to depose Mr. Wolter. The motion was dated June 25, 2004; but, through an oversight, the motion and its supporting materials were sent to the Court and to the parties by regular mail, and therefore were not filed or served until June 28, 2004. Upon receipt and filing of the motion papers, the Court Administrator advised Mr. Wolter and counsel for the Defendant that responsive materials could be filed by July 9; and the Court declined to extend the deadline for the filing of the Plaintiff's reply. Both the Defendant and Mr. Wolter filed responsive materials, objecting to Mr. Wolter's deposition, on July 9, and the Plaintiff filed a reply on July 12.

In support of its motion, the Plaintiff attached a copy of the transcript of the deposition of Mr. Wolter's law partner, Douglas Kelley, taken under the sanction of this Court's Order of April 7, 2003. The Plaintiff argued that, in many instances during that deposition Mr. Kelley was unable to recall specific information that would illuminate the proper allocation of the Kelley firm's billings, between the Defendant and the Plaintiff, and that Mr. Wolter might be able to illuminate those uncertain areas since Mr. Wolter participated in a substantial portion of the work in question. In response, both the Defendant and Mr. Wolter assert that there is nothing in the transcript of Mr. Kelley's deposition suggesting that Mr. Wolter's memory would be better that Mr. Kelley's. In addition, the Defendant asserts that the Plaintiff's motion should be denied as a sanction because its motion was not timely filed, and Mr. Wolter asserts that if the motion is granted then the Plaintiff should compensate him for his testimony – citing cases where courts have required that testifying attorneys, called as "occurrence" witnesses, must be compensated

as, effectively, expert witnesses. The Plaintiff replies that the compressed time within which it was required to file its reply brief was sanction enough for its the untimely filing; that Mr. Wolter may have information relevant to the issues about which Mr. Kelley was unclear; and that equitable consideration should flow from the fact that, in the Plaintiff's view, the Kelley firm did not adequately segregate its billings between the Plaintiff and the Defendant, and therefore could be regarded as having in part created the problem that is before the Court.

The Court has reviewed the transcript of Mr. Kelley's deposition, and has concluded that it does not support any great hope that Mr. Wolter will have a better memory or a more detailed memory than Mr. Kelley. On the other hand, barring settlement of this dispute, at trial the Court and the parties will be obliged to wrestle with, and parse, the Kelley firm's billings, and any additional information that Mr. Wolter may possess may well be of value in that process. Therefore, the Court will grant the Plaintiff's motion. And since the Kelley firm received considerable remuneration for its work for the Plaintiff and the Defendant, and inasmuch as the lack of segregation in the Kelley firm's billings arguably has made the dispute between the parties more difficult to resolve, the Court would have denied Mr. Wolter's request for compensation – but for the fact of the untimely filing of the Plaintiff's motion. In view of that untimeliness, however, the Court is of the view that some sanction, beyond the compressed time in which the Plaintiff was obliged to file its reply, is appropriate; and the Court has concluded that the sanction should be the payment, to both Mr. Wolter and to the Defendant's counsel, of their standard hourly fees for the time taken in Mr. Wolter's deposition, but not for any time required to prepare for the deposition.

## ORDER

For the foregoing reasons, and based on all the files and pleadings herein, it is herewith ORDERED:

1. That the Plaintiff's motion to depose Steven Wolter, Esq., is granted; and
2. That the Plaintiff shall pay to Steven Wolter, and to counsel for the Defendant, their hourly fees for the time consumed by Mr. Wolter's deposition.

Dated: July 13, 2004

Judge John E. Jacobson

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT
STATE OF MINNESOTA

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Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise

Court File No. 436-00

Plaintiff,

vs.

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

Defendant.

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MEMORANDUM OPINION AND ORDER

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On February 14, 2005, Little Six, Inc. ("LSI") and the Shakopee Mdewakanton Sioux (Dakota) Community Gaming Enterprise ("the Gaming Enterprise") moved to substiute the Gaming Enterprise for LSI as the Plaintiff in this matter, pursuant to Rules 17(a) and 20 of the Rules of Civil Procedure of this Court. With their motion, LSI and the Gaming Enterprise filed an Affidavit of Jeffrey Rasumussen, legal counsel to the movants. Attached to Mr. Rasumussen's affidavit, and attested to by the affidavit, were copies of a resolution of LSI's Board of Directors (Resolution no. LSI 12-30-04-007) assigning LSI's claims in this matter to the Gaming Enterprise, and a resolution of the Board of Directors of the Gaming Enterprise (Resolution no. CGE 12-30-04-01) accepting the assigned claims and authorizing the continuation of this matter in the name of the Gaming Enterprise.

By a Clerk's Notice dated February 14, 2005, the Court gave the Defendant until March 16, 2005 to submit any materials responsive to the motion for substitution and, if responsive materials were submitted, gave the movants until March 30, 2005 to submit any reply. In the event, the Defendant elected not to submit any response to the motion.

The Court has reviewed the materials submitted by the movants, and has concluded that substitution of the Gaming Enterprise for LSI is appropriate. This Court's Rule 20 incorporates, with some exceptions not here pertinent, the provisions of Rule 25 of the Federal Rules of Civil Procedure ("the FRCP"); and Rule 25(c) of the FRCP permits the substitution of a new party in instances where the new party is the transferee of a previous party's interest in the proceeding. The materials filed by the movants indicate that the Gaming Enterprise was created as an arm and instrumentality of the government of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"), by Resolution No. 9-14-04-015 of the Community's General Council, and that thereafter the Business Council of the Community and the Board of Directors of LSI determined that LSI would be dissolved, after transferring all gaming operations, and all claims in this matter, to the Gaming Enterprise. Those decisions were implemented, effective 12:01 a.m. on January 1, 2005. Accordingly, it is clear that the Gaming Enterprise now is the proper party plaintiff in this matter.

ORDER

For the reasons set forth above, the motion to substitute the Shakopee Mdewakanton Sioux (Dakota) Community Gaming Enterprise for Little Six, Incorporated, as the Plaintiff in this matter, is GRANTED.

April 27, 2005

Judge John E. Jacobson

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY



COUNTY OF SCOTT



Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise

Court File No. 436-00

Plaintiff,

vs.

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

Defendant.

**MEMORANDUM OPINION AND ORDER**

## I. The History and Present Status of the Proceedings

In this matter, the Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise ("the Gaming Enterprise"), as successor and assignee of Little Six, Inc. ("LSI"), seeks reimbursement from the Defendant for payments, totaling $520,389.46, made by LSI to the Kelley Law Office ("the Kelley Office") in 1994. The Gaming Enterprise contends that the entirety of those payments went to pay for work done by the Kelley Office in defense of the tribal gaming license of the Defendant, Leonard Prescott, and that the entire amount of those payments should be reimbursed by Mr. Prescott, with interest, by virtue of a repayment commitment that Mr. Prescott executed on May 9, 1994. The

Gaming Enterprise also seeks both interest on the claimed amount, from 1994 forward, and its reasonable attorneys fees and costs incurred in this litigation.

These proceedings have a long history. LSI was a corporation chartered by the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community") to own and operate the Community's gaming facilities. In 1994, and for several years before 1994, Mr. Prescott was Chairman of the Board and Chief Executive Officer of LSI. Consequently, under section 11 of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §2710, in order to hold his offices within LSI Mr. Prescott was obliged to possess a valid gaming license issued by the Community's Gaming Commission ("the Gaming Commission").

In 1994, Mr. Prescott's suitability to continue to hold such a license became a subject of proceedings before the Gaming Commission; and as those proceedings began Mr. Prescott asked the Board of Directors of LSI to indemnify him in advance for the attorneys fees and expenses that he would incur. In making this request, Mr. Prescott agreed to repay LSI, under certain circumstances.

On February 17, 2004, I concluded that those circumstances had, in fact, occurred, and I therefore awarded summary judgment to LSI on that issue. The question before me today is: what amount does Mr. Prescott owe, as a result of his May 9, 1994 commitment?

The fact that this question must be decided now, nearly eleven years after Mr. Prescott made the commitment, is a reflection and a consequence of the extraordinary nature of the struggle over Mr. Prescott's license. The struggle produced no less than five reported decisions from this Court and our Court of Appeals: In re: Prescott Appeal,

1 Shak T.C. 190 (Dec. 8, 1994); In re: Prescott Appeal, 1 Shak A.C. 11 (Nov. 7, 1995); In re: Prescott Appeal, 3 Shak T.C. 19 (Feb. 20, 1997); In re: Prescott Appeal, 1 Shak A.C. 120 (Apr. 30, 1998); and In re: Prescott Appeal, 1 Shak A.C. 146 (July 30, 1999). The struggle ended – at least with respect to the gaming license – in 1999, when the last-cited decision of our Court of Appeals was handed down. That decision held that substantial evidence supported a determination by the Gaming Commission that Mr. Prescott was unsuitable for continued licensure.

But in another sense the struggle continues, because after that Court of Appeals decision was rendered, LSI asked Mr. Prescott to reimburse the amounts that LSI had paid to the Kelley Office on his behalf in 1994, and Mr. Prescott declined that request. LSI then commenced the present case.

Mr. Prescott responded by moving to dismiss LSI's complaint on *res judicata* and official immunity grounds. That motion was denied, Little Six, Inc. v. Prescott, 4 Shak. T.C. 73 (August 8, 2000), and Mr. Prescott sought and was granted a certification for an interlocutory appeal. On appeal, the dismissal motion's denial was affirmed in Prescott v. Little Six, Inc., 1 Shak. A.C. 190 (Oct. 26, 2001). Upon remand, the parties engaged in discovery, which produced its own conflicts. (See Little Six, Inc. v. Prescott, 4 Shak. T.C. 169 [April 7, 2003]). At the conclusion of discovery, LSI moved for summary judgment; and on February 17, 2004, I granted LSI's motion in part and denied it in part. Specifically, I granted the summary judgment on the issue of Mr. Prescott's liability to reimburse LSI for the fees and expenses that LSI had paid on his behalf; but I denied the motion with respect to the particular dollar amount of those fees and expenses, because Mr. Prescott had credibly argued that during the pertinent period the Kelley Office had

been performing services for LSI as well as for him, and that he should not be obliged to reimburse LSI's payments for LSI's own work.

A trial therefore was necessary to establish the dollar amounts paid by LSI to the Kelley Office for work done to defend Mr. Prescott's license. That trial took place on August 23 and 24, 2004. Thereafter, the parties filed post-trial briefs; and then, as a consequence of a filing difficulty, on February 4, 2005 the parties were obliged to re-file all exhibits that were received during that trial[1].

On February 14, 2005, LSI and the Gaming Enterprise jointly moved to substitute the Gaming Enterprise for LSI as the party plaintiff in the proceedings. Mr. Prescott did not file a response, and that motion was granted on April 27, 2005.

Today, I decide the amount that Mr. Prescott should reimburse LSI pursuant to his agreement. I also decide the plaintiff's claims for interest and for reasonable attorneys fees and expenses incurred in these proceedings.

## II. Factual Background

In 1994, there existed a very significant degree of tension between Mr. Prescott and other members of the LSI Board of Directors, on the one hand, and the officers of the Shakopee Mdewakanton Sioux (Dakota) Community, on the other hand. The General Council of the Community had changed the manner in which persons could become members of the Community. Mr. Prescott and other members of the LSI Board strongly objected to that change, and the LSI Board had authorized the Kelley Office to represent LSI in challenges to that change. (See e.g., Exhibit 42) Also, in response to claims made

[1] Citations to exhibits herein are to the exhibit numbers given the cited documents in the trial record. Citations to the transcript are to page numbers, as "T. [page]".

in local media stories to the effect that LSI was a poorly performing business entity, Mr. Prescott had released to the public certain financial information, to the extreme consternation of the Community's officers; and members of the Community's General Council questioned the business practices of LSI and certain expenditures that LSI had made, allegedly for the benefit of Mr. Prescott. LSI engaged the Kelley Office, pursuant to several retainer letters, to perform legal work for LSI on these matters, as well. (T. 13-14 and 252-253, and Exhibits 38 - 42).

On May 5, 1994, the Gaming Commission issued temporary emergency suspensions of the gaming licenses of Mr. Prescott and of Mr. F. William Johnson. (Mr. Johnson was at that time was the Chief Executive Officer of LSI). In response, Mr. Prescott engaged the Kelley Office to assist him in protecting his license, and he sought indemnification from LSI for the cost of that assistance. (T. 26-30). Therefore, on May 9, 2004, the Kelley Office prepared another retainer letter, addressed to Ms. Allene Ross, a member of the Board of LSI. That letter said, in pertinent part –

> Dear Allene:
>
> This letter will confirm that Little Six Inc. (the "Corporation") has retained the law firm of Douglas A. Kelley, P.A., to represent its officers and/or directors, including but not limited to Leonard Prescott and F. William Johnson[2], in any and all proceedings before the Shakopee Mdewakanton Sioux Community Gaming Commission (the "Commission") and any court of competent jurisdiction arising from the Commission's suspension, threatened suspension or other action affecting such individual's gaming licenses. Because Article 14 of the Corporation's Articles of Incorporation requires indemnification of officers and directors for expenses incurred in connection with the defense of any action, civil or criminal, to which they are made parties by reason of being an officer or director, and to ensure adequate legal representation of such officers and

[2] As noted above, at this time Mr. Johnson was the subject of a licensing inquiry similar to that involving Mr. Prescott; but Mr. Johnson subsequently resigned his position shortly thereafter, and no licensing proceedings against him went forward. (T. 53-54).

directors, the Corporation wishes to retain this firm. The following sets forth the terms of our representation.

1. This law firm agrees to represent the Corporation's officers and directors, including but not limited to Mr. Prescott and Mr. Johnson, in all phases of legal representation arising from any challenge to their gaming license. This representation may include, but is not limited to appearances before and preparation of submissions to the Commission, challenges to the Commission's authority before any court of competent jurisdiction, legal research, factual investigation, witness preparation, retention of expert witnesses, attendance at any and all required hearings and other proceedings, and any necessary appeals to any court of competent jurisdiction including the Shakopee Mdewakanton Sioux Community Tribal Court.

....

(Exhibit 6).

Ms. Ross countersigned this retainer letter on May 9, 2004. (Id.)

Also on May 9, 2004, Mr. Prescott addressed to LSI's Board of Directors the letter upon which the Gaming Enterprise, as successor to LSI, makes its claim here. Mr. Prescott's letter, again drafted by the Kelley Office (T. 46-47, and Exhibit 15, p. 13), said:

May 9, 1994

Board of Directors
Little Six, Inc.
2400 Mystic Lake Blvd.
Prior Lake, MN 55372

Re: Shakopee Mdewakanton Sioux Community Gaming Commission File No. 94-0024

Dear Board Members:

As an Officer and Director of Little Six, Inc. (the "Corporation"), I hereby request advance indemnification of all expenses, including reasonable attorneys' fees, costs and disbursements, incurred in connection with defense of the above referenced proceeding to which I have been made a party by reason of my position as an officer or director of the Corporation.

In connection with this request for indemnification, I certify that all times I (i) acted in good faith, (ii) with the care of an ordinarily prudent person under the circumstances and (iii) in a manner I reasonably believed to be in the best interests of the Corporation.

I agree to repay the Corporation all amounts advanced in connection with any part the [sic] defense of the above proceeding for which I am finally adjudged to be liable for negligence, fraud or misconduct in the performance of my duties to the Corporation.

Sincerely,
[signed]
Leonard Prescott

(Exhibit 7).

In response to Mr. Prescott's letter, the Board of Directors of LSI approved a "Written Action of the Board of Directors Taken in Lieu of a Meeting" – still on May 9, 2004 – the operative language of which was as follows:

NOW, THEREFORE, BE IT RESOLVED, that the non-interested directors of the Board of Directors hereby determine that the Company is required to indemnify Messrs. Prescott and Johnson with respect to expenses incurred in connection with the defense of the [Gaming] Commission's purported suspension of the Licenses [of Mr. Prescott and Mr. Johnson], and that in order to fulfill this indemnification obligation in such a manner as to ensure adequate legal representation of Messrs. Prescott and Johnson, the officers of the Company are hereby authorized an directed to enter into a retainer letter with and issue a $100,000 retainer to the law firm of Douglas A. Kelley, P.A. for the representation of Messrs. Prescott and Johnson before the Commission or any court of competent jurisdiction in connection with the purported suspension of the Licenses;

FURTHER RESOLVED, that Douglas A. Kelley, P.A. is hereby authorized to withdraw funds from the retainer in payment of the legal services authorized by these resolutions, in such amounts and at such times as these expenses are incurred;

FURTHER RESOLVED, that the Company's officers are hereby authorized and directed to pay any fees of Douglas A. Kelley, P.A., or any other fees incurred with respect to these matters, which exceed the amount of the retainer, at such time and in such amounts as submitted to the Company following depletion of the retainer; and

FURTHER RESOLVED, that Messrs. Prescott and Johnson shall reimburse the Company in the event that the non-interested directors find that a final determination has been made thereafter that Messrs. Prescott and Johnson are liable for negligence, fraud or misconduct in the performance of their duties to the Company, which determination shall not be established solely by a permanent suspension of the Licenses and which amount shall be determined by the non-interested directors.

(Exhibit 8).

Following the approval of this Written Action, the LSI Board provided a $100,000.00 retainer to the Kelley Office, and the Kelley Office deposited that amount in its lawyer's trust account[3].

These actions by Mr. Prescott, the Kelley Office, and the LSI Board of Directors were taken after the Kelley Office had sought and received certain advice from the law firm of Lindquist & Vennum concerning the scope of and procedures for corporate indemnification of Mr. Prescott. The Lindquist & Vennum firm advised the Kelley Office that LSI's indemnification of Mr. Prescott, and of any other officers and directors of the corporation who might be subject to Gaming Commission's procedures, was appropriate if, *inter alia*, in advance LSI had received "...a written undertaking by them to repay all amounts advanced, if its ultimately determined that they are not entitled to indemnification under Article 14 [of LSI's Articles of Incorporation]". (Exhibit 5[4]).

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[3] Oddly, the retainer arrangements described in the Kelley Office's retainer letter (Exhibit 6), and the retainer arrangements described in the Board's Written Action (Exhibit 8) are not the same (see e.g., T. 334 – 338); and actually the manner in which the Kelley Office's bills were submitted to LSI, and in which the balance of the retainer periodically was drawn down and replenished, do not appear to have strictly followed the processes contemplated by either document. (See e.g., T. 49 – 52 and Exhibits 16, 17, 19, 20, 22, 25, 26, 28, 29, 30, and 32).

[4] The date of the letter that is Exhibit 5 was May 11, 1994. However, it appears from the testimony received at trial that at least the substance of the letter's advice had been given prior to May 9, 1994. (T. 29).

The Gaming Commission's subsequent inquiry into Mr. Prescott's suitability for licensure was very wide-ranging. (See generally, Transcript of Gaming Commission hearings in File No. 94-0024[5]). The Gaming Commission looked not only at Mr. Prescott's professional and personal history, but also at the manner in which LSI had conducted its gaming activities and performed its corporate functions during Mr. Prescott's tenure with the corporation. For example, the Gaming Commission's hearings focused a considerable degree of attention on a document that has come to be known as "The Winston Report" – a report, prepared at the request of the Gaming Commission by a certified public accountant named Mervin Winston, that broadly examined and criticized the corporate and business operations of LSI and its gaming enterprise. (T. 116-117, 255-257, Gaming Commission Transcript 16 – 54).

It appears from the record that after May 9, 1994 the nature of the Kelley Office's work did not radically change, though the work level increased. Mr. Prescott and the LSI Board had been at odds with the Community's Gaming Commission, Business Council, and General Council with respect to a number of issues for a considerable period before May, 1994, and the Kelley Office had been employed in efforts to defend the Board's positions and to attack positions of the Gaming Commission, the Business Council, and the General Council, on a variety of issues; and after May 9, 1994, that situation continued.

By way of example, for a number of months before the Gaming Commission began its hearings, Mr. Winston had been gathering material for his report, and as Mr.

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[5] The transcript of the Gaming Commission's hearings was introduced by joint stipulation at the end of trial (T. 342), and was not given an identifying Exhibit number. Citations to that Transcript will be to "Gaming Commission transcript, at [page].

Winston had proceeded the LSI Board had grown concerned about the effect that his activities and reports might have on the corporation and on the Board. (T. 253-254). Consequently, during the period before May, 1994, the Board had asked the Kelley Office to undertake the creation and implementation of a strategy to protect the corporation and the Board from the possible effects of Mr. Winston's inquiries, and the Kelley Office initiated a background investigation of Mr. Winston, with the notion of gathering ammunition that might have been of value in attacking Mr. Winston's credibility; and those efforts continued after May 9, 1994. (T. 252- 260).

Similarly, during the period before May, 1994, the Kelley Office on behalf of the Board had sought to engage federal authorities to reverse the policies of the Business Council and the General Council, had filed litigation for the same purposes (T. 21), and had engaged an investigator (a Mr. Ron Urbanski) to *inter alia* examine the personal history of the Community's Chairman (see e.g., Exhibit 15); and similar activities continued after May 9, 1994. (See, e.g. Exhibit 18).

At trial, testimony provided by the Kelley Office indicated that in May, 1994, members of the LSI Board believed it likely that they, like Mr. Prescott and Mr. Johnson, would find their gaming licenses challenged by the Gaming Commission – hence the breadth of the authorization in the Kelley Office's May 9, 1994 retainer letter. (T. 44).

For detailed explanation of the Kelley Office's work, a voluminous documentary record pertaining to the services of the firm, and to the payments that were made by LSI to the firm, was admitted into evidence at trial. That record includes all of the itemized billings and summary billings that the Kelley Office sent LSI during the pertinent period. Neither LSI nor Mr. Prescott offered any testimony from an actual client concerning

these services and payments, however: Mr. Prescott did not testify, nor did any other past or present officer of LSI. The only witnesses that discussed the Kelley Office's work, the reasons for the work, and the persons or entities for whom the work was performed, were two attorneys from the Kelley Office – Mr. Douglas Kelley, and Mr. Steven Wolter.

Mr. Kelley and Mr. Wolter were examined in detail with respect to the nature of the work that they and others in the Kelley Office did during the period in question. (Trial transcript, pp 5 – 238 [testimony of Douglas Kelley], and pp 249 – 342 [testimony of Steven Wolter]). Each was asked to address each day's billing from the Kelley Office for the months in question; and although each testified that his memory was affected and diminished by the time that had elapsed between performing the services and providing the testimony, each indicated that he had a grasp of at least the broad outlines of the work that the billings reflected.

The testimony of both Mr. Kelley and Mr. Wolter can be summarized by saying that, on a daily basis from at least April, 1994 through June, 1994, attorneys and staff of the Kelley Office, and other persons engaged by the Kelley Office to assist by way of investigation, public relations, and/or accounting or professional services, sometimes were performing work only or largely for Mr. Prescott, sometimes were performing work only or largely for LSI, and very often were performing work that, in Mr. Kelley's words, was "mixed". (See e.g., Transcript 106 – 108).

Some specific examples will give a flavor for this testimony. When Mr. Kelley was examined by Steven Olson, counsel for LSI, these exchanges occurred:

> Q. Looking at the entry for your time for 5/2 of '94, what does it appear that you were doing on that day?
> A. Well, it looks as though we are drafting pleadings to a possible removal proceeding. It looks like we are attending a meeting at the Decathalon Club;

it looks like I'm meeting with John Lee with regard to the sexual harassment charges; meeting with Steve Wolter with regard to finances and so forth.

Q. And, again, the services which you were performing on that date were in anticipation of some action being taken by the Gaming Commission against Mr. Prescott?

A. Yes, but I would think that some of these would intermix services, that I would not – if your talking the subject here, that I would not allocate to Mr. Prescott.

(T. 90).

Or again –

Q. Looking at 5/3 for your entry, your time entry, what were you involved with there?

A. Well, it looks as though one part of it is clearly related to the Gaming Commission because we were drafting a letter to them. I don't know what the phone conversation with Lenore was about. "Review audio tape of Channel 4 Dimension Report." As I recall, that was kind of a broad-based attack by Tom Gasperolli of Channel 4 that would have included charges pertinent to Leonard and also to the corporation generally, and then we met – had a phone conversation with Joe Plumer, I don't recall exactly what that was about, and then Steve and I and John met about that.

(T. 92)

Or again –

Q. And then looking at your entry for 5/4, what does it appear you were doing that day?

A. Well, first of all, it appears as though I must have reviewed a memo by Steve on possible avenues of removal. You haven't asked me, but I'm presuming what the purpose of this is are some of these chargeable to Leonard or not, and I would suspect that would be with regard to the defense. "Meet with Steve Wolter and John Lee re: laundry list of accusations," that would be mixed, because I think there were allegations against the corporation and allegations against Leonard personally. "Challenge to the Gaming Commission Ordinance;" "Letter to the United States Attorney's Office," that would be corporate. "Review Mona, Meyer and McGrath op-ed, letter to employees," I think that would be Corporate; "Phone conversation with Dennis McGrath re: the same," I think that would be Corporate. The Dimension video, as I mentioned before, I think would be mixed. The revenues for Hinckley and Mille Lacs and Mystic Lake's would be mixed. "Review memo re: removal of Leonard Prescott and Bill Johnson," I think that would be chargeable to Leonard.

Q. Do you have any way to conclude at this point in time how much of the work, this five hours that you spent, would be allocated to Leonard's defense and how much to the corporation's defense?
A. I can't.

(T. 93-95).

Mr. Kelley candidly explained his difficulty, as follows:

THE WITNESS: Just so – Your Honor, so you understand, when I'm saying some of these things were mixed, some of them were attacks against the corporation generally that they were not managing their money appropriately overall, they didn't have adequate controls, that kind of stuff, and then some of these things were specific to Leonard very directly, and so that's why it is kind of hard for us to sort them out.

(T. 95-96).

Mr. Wolter, in his testimony, attempted a more specific breakdown of the firm's billings:

BY MS. CHARLSON:

Q. Mr. Wolter, you have what has been marked as Exhibit D before you. Do you recognize Exhibit D?
A. Yes.
Q. What is it?
A. Exhibit D is a schedule that was prepared by staff in our office that went through these bills that I took my yellow highlighter and pencil to and just transcribed by date, by billing person, by hour, by billing rate and then ultimately the amount of the fee charged for each of the services that I designated to be attributable to Mr. Prescott's indemnification, and this, again, is for that period of time that is evidenced by the bills which I believe you have offered as Exhibit C. It is May 27, '94 through June 27th.
Q. So just for an example, to make sure I'm reading this chart in Exhibit D properly, can I have you turn in Exhibit C to Page 12 of the first subsection of bills? It is Bate stamp LS 200093.
A. I have it.
Q. And that date at the top of the page is 5/11/94, the first entry, RMH?
A. Correct.
Q. Do we have the same thing?
A. Yes.
Q. Looking at that, you have drawn a line through 8.5 hours, and below that, in a circle in pencil is 6.5 hours. How do you interpret that?

A. Well, that pertains to the billing entry for RMH, which is Rodney M. Haggard, our chief investigator, and if you look at the actual bill, 200093, he had an eight-an-a-half hour charge for that particular day and then has a fairly detailed breakdown of the services he provided, and because the things I highlighted in yellow pertain to a meeting with Mr. Prescott about background information, meeting with Mr. Kelley and me about expungement and meeting with John Lee about sexual harassment and paternity issues, I allocated six-and-a-half of that eight-and-a-half hours to Mr. Prescott. As I testified in deposition, this was my best good faith effort. As I told Mr. Olson, there is more art than science at play here, but I came up with six-and-a-half of that eight-and-a-half hours.

(T. 269-271).

But a problem for all of this testimony derives from the manner in which the Kelley Office dealt with certain requests made by LSI in late 1994 and 1995. Mr. Prescott's licensing hearings before the Gaming Commission ended on June 22, 1994 (T. 301), and his gaming license was revoked by the Gaming Commission on July 1, 1994. As a consequence, Mr. Prescott's tenure with LSI ended. Then, in September, 1997, LSI terminated its relationship with the Kelley Office; retained the firm of Bluedog, Olson and Small, P.A., as its new counsel; formally requested that the Kelley Office transfer to the Bluedog office all of LSI's files in the Kelley' Office's possession; and, by Resolution No. 9-29-94-002 (Exhibit 34), terminated its indemnification of Mr. Prescott's and Mr. Johnson's efforts to protect their gaming licenses. LSI also requested that the Kelley Office provide a detailed explanation of the billings that had been submitted to LSI. (T. 62- 63)

But the Kelley Office continued thereafter to represent Mr. Prescott in his efforts to overturn the Gaming Commission's decision. And, indeed, the Kelley Office continued to represent Mr. Prescott in matters relating to his tenure with LSI up to and through the date of the trial in this matter. (T. 268). Therefore, in considering how to

respond to LSI's various requests in late 1994, the Kelley Office retained Mr. Michael J. Hoover, a former director of the Minnesota Lawyer's Professional Responsibility Board, as independent counsel to assist the Kelley Office in meeting its ethical obligations. (T. 63-64, and 280). Through Mr. Hoover, the Kelley Office then turned over a considerable amount of material to LSI's new counsel. (See Exhibits 38 – 44).

The significance of that activity for the present proceedings lies in the fact that Mr. Hoover asserted to LSI's new legal counsel that the last bill sent by Kelley Office to LSI for corporate services – that is, for any legal services other than those provided to Mr. Prescott under his indemnification agreement – was dated May 6, 1994. (Exhibits 38, 39, 40, 41, 42, and 44); and the last work covered by the May 6, 1994 billing was done on April 26, 1994. (Exhibits 13 and 14).

The work that the Kelley Office did beginning on April 27, 1994 was, in fact, billed to LSI, with a series of invoices that began on May 19, 1994 and continued for months thereafter. (Exhibits 15, 17, 18, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 45, 46, and 47). And many of those subsequent billings were captioned "General Corporate Matters", or "Corporate Matters", or "General Corporate and Board of Director Matters", although the Kelley Office began to generate billings captioned "Indemnification" only with work dating after June 27, 1994. But the fact remains that, in 1995, Mr. Hoover informed LSI that no work was done by the Kelley Office after April 26, 1994 that was not protected by a lawyer-client privilege running to Mr. Prescott (a privilege that Mr. Prescott declined to waive). (Exhibit 44).

At trial, Mr. Wolter testified about the Kelley Office's position with respect to these matters, as follows:

Q. Are you familiar with Mr. Hoover?
A. I am.
Q. How are you familiar with him?
A. Mike Hoover was a former director of the Lawyer's Professional Responsibility Board years ago. We engaged Mr. Hoover at some point along this continuum. We used him from time to time in terms of questions about ethics or questions about the Lawyers Professional Responsibility Rules, and specifically in this case, we engaged Mr. Hoover when Mr. Olson, I believe it was, told us that we were being terminated by LSI and began demanding that we return certain – or turn over certain files, and the concern was at that time Mr. Olson was the chief lawyer for the [Gaming] Commission which had issued its final findings on or about July 3rd of '94. We were appealing from those findings, and we thought that it was very unfair if we were to be required to turn over everything that might show where we have been and where we were going in response to LSI's demands, so we engaged Mr. Hoover, and we told him everything he needed to give us informed advice about the issue, and we followed his advice in responding to requests from Mr. Olson and LSI.

(T. 279-280).

The exhibits in the record indicate that the amounts billed by the Kelley Office and the amounts paid by LSI during the period in question were as follows:

- On May 20, 1994, LSI paid $106,591.61[6].
- On May 20, 1994, LSI paid $64,561.07. (Exhibit 15).
- On June 3, 1994, LSI paid $95,868.21. (Exhibits, 17, 18 and 19).
- On June 15, 1994, LSI paid $151,554.10. (Exhibit 23).
- On July 15, 1994, LSI paid $101,814.47. (Exhibits 24 and 25).

The July 15, 1994 payment is the last payment tendered by LSI to the Kelley Office that is reflected in the record. But the record indicates that thereafter, on November 4, 1994,

[6] A portion of this payment apparently related to the bills of May 6, 1994, mentioned by Mr. Hoover's letters [see Exhibit E]; and two bills, totaling $3,518.00, apparently were sent by the Kelley Office to LSI on May 6, 1994. Each of the two contained itemizations dated May 3, 1994. One of the May 6, 1994 bills [Exhibit 38] totaled $3,030.50, and stated that it was for Key Personnel Background Investigations; the other [Exhibits 13 and 14] totaled $487.50, and stated that it was for matters relating to the new members issue.

the Kelley Office withdrew $50, 252.06 from its lawyers trust account – apparently from monies previously remitted by LSI, in one or more of the foregoing payments – to pay bills of August 4, 1994 and November 4, 1994. (Exhibits 27, 28, 29, and 30).

From this, it appears that for services rendered from April 27, 1994 (the last date on which, according to Mr. Hoover, the Kelley Office performed work that was not protected by Mr. Prescott's attorney-client privilege) through December, 1994, when the last of LSI's payments was drawn by the Kelley Office from its trust account LSI paid to the Kelley Office a total of $516,871.46 (that is, a total of $520,389.46 in payments, minus $3,518.00 represented by the two May 6, 1994 billings[7]).

## III. Discussion.

### A. The Scope of Mr. Prescott's Principal Repayment Liability.

Mr. Prescott argues that the testimony of Mr. Kelley and of Mr. Wolter – the only testimony adduced at trial concerning the scope of the Kelley Office's work – unambiguously affirmed that the Kelley Office was working for LSI and its Board of Directors, as well as for Mr. Prescott, from April, 1994 through December, 1994. And, Mr. Prescott asserts, payment for work done on behalf of LSI, or on behalf of its Board of Directors, should not be his financial responsibility. That argument follows from the opinion that I rendered on February 17, 1994, when I ruled that summary judgment could not be awarded to LSI on the issue of damages:

[7] In its written argument, LSI has made reference to a conclusion, by the Kelley Office in 1995, that $513,797.85 was billed to Mr. Prescott. (Plaintiff's Post-Trial Brief, at 3). But despite considerable effort, the Court has been unable, from the record before it, to locate a reference to that amount, or to calculate how it was derived.

> The May 9th, 1994 letter states that Prescott agreed to "repay the Corporation all amounts advanced in connection with any part [sic] the defense of the above proceeding. . ." The letter clearly states at the top that the subject of the letter is "Shakopee Mdewakanton Sioux Community Gaming Commission File No. 94-0024." There is no other proceeding referenced above, and that file number is in fact the file number of the proceeding against Prescott. The phrase "the above proceeding" and the reference to a very specific proceeding, make it clear that neither party intended that Prescott would be liable for general corporate work the Kelly firm did for LSI or for other directors, but instead that both parties intended for Prescott to be responsible only for the fees and costs advanced to him in connection with the litigation involved in "Shakopee Mdewakanton Sioux Community Gaming Commission File No. 94-0024". And even a cursory review of the billing record upon which LSI bases its approximately $515,000 figure makes it clear that there is a factual dispute over whether that figure includes more than just money used by Prescott in Shakopee Mdewakanton Sioux Community Gaming Commission File No. 94-0024.

Mr. Prescott also argues that he should not be obliged to repay to LSI any fees or expenses incurred for work done by the Kelley Office on his behalf that did not strictly relate to his 1971 felony conviction, or to his failure to disclose that conviction on certain forms that he filed with the State of Minnesota. In making this argument, he points to the final paragraph of his May 9, 1994 indemnification which is worded as follows:

> I agree to repay the Corporation all amounts advanced in connection with any part the [sic] defense of the above proceeding for which I am finally adjudged to be liable for negligence, fraud or misconduct in the performance of my duties to the Corporation.
>
> (Exhibit 7, [emphasis added]).

Mr. Prescott notes that it was his 1971 conviction, and his failure to disclose that conviction before it was expunged, that the Court of Appeals in 1999 cited in upholding the Gaming Commission's revocation of his gaming license. In re: Prescott Appeal, 1 Shak A.C. 146, at 151 - 153 (July 30, 1999). That conviction, he argues, was the only "part [of] the defense of [the Gaming Commission's] proceeding for which [Mr. Prescott

was] finally adjudged to be liable for negligence...". Therefore, his argument goes, any work that the Kelley Office did on his behalf relating to any of the other matters that were explored by the Gaming Commission in 1994 should not be the subject of the repayment obligation.

The Plaintiff, on the other hand, asserts that all payments made by LSI to the Kelley Office, from the May 20, 1994 payment onward, were made on behalf of Mr. Prescott and must be repaid. In support of this argument, the Plaintiff first notes that the May 9, 1994 Written Action of LSI's Board of Directors speaks thusly with respect to Mr. Prescott's repayment obligation:

> ...
> FURTHER RESOVED, that Messrs. Prescott and Johnson shall reimburse the Company in the event that the non-interested directors find that a final determination has been made thereafter that Messrs. Prescott and Johnson are liable for negligence, fraud or misconduct in the performance of their duties to the Company, which determination shall not be established solely by a permanent suspension of the Licenses and which amount shall be determined by the non-interested directors.
> ...

(Exhibit 8).

From this provision, the Plaintiffs argue that on September 29, 1994, when the LSI Board of Directors rescinded its earlier approval of Mr. Prescott's indemnification and demanded repayment of all amounts that had then been paid to the Kelley Office, the non-interested directors thereby (1) found that a final determination had been made that Mr. Prescott was guilty of negligence, fraud or misconduct, and (2) determined that $520,389.46 – that is, all amounts that had been paid to the Kelley Office from May 20, 1994 onward – should be refunded by Mr. Prescott. (Exhibits 34 and 35; Plaintiff's Post-Trial Brief, at 3).

As to Mr. Prescott's assertion that from late April, 1994 through December, 1994 the Kelley Office was working for LSI and for other directors of the corporation at the same time it was working for Mr. Prescott, the Plaintiffs place heavy weight on the representations that Mr. Hoover made in 1995 on behalf of the Kelley Office to the effect that, after April 26, 1994, there was no work product generated by the Kelley Office that was not protected by an attorney-client privilege running to Mr. Prescott.

The Plaintiffs also point out that the Kelley Office used monies held in the firm's trust account to pay "General Corporate" bills that the firm had sent to LSI:

> ...On November 4, 1994, the Kelley Law Office removed $79,000 from the indemnification retainer account, to pay its August and September, 1994 "General Corporate" bills and to pay for its November, 1994 "Indemnification" bill. (Ex. 47). The only authorization which the Kelley Law Office received regarding the funds given to it in trust was the May 9, 1994 Written Action of the Board of Directors, which only authorized payment of indemnification expenses from the retainer.
>
> The Kelley Law Office could lawfully withdraw from the indemnification account the full amount billed to "General Corporate Matters", detailed in exhibits 27 and 29, only if every single one of its tasks billed as "General Corporate" work in the August and September 1994 bills was for Defendant. ...
>
> (Plaintiff's Post-Trial Brief, at 11).

I have considered all of these arguments, and have reviewed in detail the testimony elicited at trial and the exhibits submitted by the parties, including the transcript of the Gaming Commission's hearings concerning Mr. Prescott's license; and I have concluded that all of the amounts paid to the Kelley Office for work done from April 27, 1994 through December, 1994 must qualify as "expenses, including reasonable attorneys' fees, costs and disbursements, incurred in connection with defense of [Shakopee Mdewakanton Sioux Community Gaming Commission File No. 94-0024]", as

described in Mr. Prescott's May 9, 1994 letter. I also have concluded that to interpret Mr. Prescott's indemnification as being limited only to the fees and expenses that somehow related to his 1971 conviction and his failure to disclose that conviction would be both illogical and inconsistent with the history of the parties' understanding.

I do not doubt that both the Board of Directors of LSI and the Kelley Office attorneys were of the view, during the spring and summer of 1994, that the work that the Kelley Office was doing would help protect and defend not only Mr. Prescott but also the other members of the Board. At least until the middle of the summer of 1994, it appears that the LSI Board and Mr. Prescott had a communal interest in defending LSI's businesses, vindicating the Board's actions, and extricating Mr. Prescott from his travail, and I entirely accept Mr. Kelley's and Mr. Wolter's testimony that all members of the LSI Board were concerned that they, too, soon would be subjected to the Gaming Commission's attention. And clearly, for the brief period before he resigned, Mr. Johnson also was an intended and perhaps an actual beneficiary of the Kelley Office's work.

But it was Mr. Prescott alone who, from beginning to end, was the actual and only subject of the Gaming Commission's proceedings; and the Gaming Commission's inquiry into his suitability was extremely wide-ranging. Having reviewed the transcript of the Gaming Commission's proceedings, and having considered the Kelley Office's billings, I do not see anything that the Kelley Office did that was not, in some significant way, designed to serve Mr. Prescott's defense – be it the response to the Winston Report, the engagement of investigators to review the background of Mr. Prescott's adversaries, the engagement of Ernst & Young to provide expert accounting and financial evidence,

or the engagement of a public relations firm to assist in defending against what were perceived as media attacks against LSI and Mr. Prescott. The fact that some of these efforts may well also have served others as well as Mr. Prescott, and no doubt were perceived both by the LSI Board and the Kelley Office to be serving others as well as Mr. Prescott does not negate the fact that the direct beneficiary of these efforts was Mr. Prescott, who actually stood in the dock.

As I have noted, at least some of the Kelley Office's work during the period in question was a continuation of the type of work that was being done prior to April 27, 1994. For example, work appears to have continued on the challenges to the Community's new adoption ordinance, and on responding to earlier and ongoing media criticism of Mr. Prescott and LSI. (See e.g., Exhibit 15). So, if LSI and Mr. Prescott and the Kelley Office had agreed at the time that this ongoing work was attributable to the Kelley Office's representation of LSI, it would be impossible to fault that agreement.

But that is not what happened. Instead, in 1995 the Kelley Office took the position, through Mr. Hoover, that no work product produced by the Kelley Office's, after the period covered by the firm's May 6, 1994 billing, was not protected from LSI's viewing by a the attorney-client relationship between the firm and Mr. Prescott. Neither the Kelley Office's witnesses, nor Mr. Prescott in his argument, has offered a response or an explanation that negates the effect of that contemporaneous assertion of privilege; so I agree with the Plaintiff that the position taken by Mr. Prescott and the Kelley Office in 1995 must control my conclusions here.

I find further support for my conclusion in the decision of the Kelley Office to utilize trust account monies – monies that had been committed solely to Mr. Prescott's

indemnification – to pay bills for work that the firm had earlier labeled "General Corporate" work. Mr. Prescott did not then, and does not now, distance himself from the firm's decision. So those circumstances, too, powerfully substantiate the conclusion that the label affixed to the Kelley Office's billings, from April 27, 1994 onward, does not affect the conclusion that the firm's work was being done to further Mr. Prescott's battle to save, and ultimately to recover, his gaming license.

I also reject Mr. Prescott's argument that, regardless of what amount of the Kelley Office's work was attributable to him, still his repayment obligation under his indemnification agreement must be limited to the amounts the Kelley Office was paid for work that related to Mr. Prescott's felony conviction. Again, Mr. Prescott bases his argument on the one phrase, in the letter that the Kelley Office drafted for him: "I agree to repay the Corporation all amounts advanced in connection with any part [sic] the defense of the above proceeding for which I am finally adjudged to be liable for negligence [etc.]". (Exhibit 7). But that language, which apparently suffers from at least one typographical error or omission, surely is not unambiguous; so it is appropriate to consider its context. There is no testimony in the record either from Mr. Prescott or from any other person that was on the LSI Board of Directors on May 9, 1994. But Mr. Kelley testified it was his office's intent, in dealing with the advance indemnification issue, to implement the advice that his office had sought and received from the Lindquist and Vennum firm. (T. 35). And the Lindquist and Vennum firm's counsel was that LSI's directors and officers could receive advance indemnification, under LSI's Articles of Incorporation and under the Community's Corporation Ordinance, provided that, *inter alia* they executed, in advance, "a written undertaking...to repay all amounts advanced if

it is ultimately determined that they are not entitled to indemnification under Article 14". (Exhibit 5). The Lindquist & Vennum firm noted that if such an undertaking were not received, the other "non-interested" members of LSI's Board might themselves be liable to repay the advanced amounts to the corporation, in the event that the "interested" director or officer were ultimately determined to have engaged in negligence, fraud or misconduct in the performance of their duties. From this, I conclude that the understanding of the parties, on May 9, 1994, was that if Mr. Prescott ultimately did not prevail in any aspect of the defense of his licensing proceeding because he was found to have committed negligence, fraud or misconduct, he would repay all amounts that had been advanced for his defense by LSI.

As I have noted above, I find those amounts to have totaled $516,871.46. I therefore conclude that that amount is Mr. Prescott's principal repayment liability.

**B. Interest Owing on the Prinipal Repayment Liability.**

As Mr. Prescott notes in his Closing Argument Brief, the parties were silent on the subject of whether Mr. Prescott would be obliged to pay interest in any amount, in the event of he were obliged to repay LSI's advances. His May 9, 1994 letter did not discuss the subject, nor did the May 9, 1994 Written Action of LSI's Board of Directors Taken in Lieu of a Meeting – nor, for that matter, did the Lindquist & Vennum advice to the Kelley Office. (Exhibits 7, 8, and 5). Mr. Prescott contends that this silence means that the parties formed no agreement on the subject, and absent such an agreement interest should not be owing. The Plaintiff, on the other hand, asserts that advanced indemnification is, by definition, "essentially a decision to advance credit", citing Advanced Mining Systems v. Fricke, 623 A.2d 82 (De. Ch. 1992); and inasmuch as Mr.

Prescott essentially had the use of LSI's money from the time it was paid to the Kelley Office, interest must be owing from that date.

The Plaintiff asserts that such interest should be calculated based on the amount that LSI would have received if LSI had deposited the advanced monies in a secure fund. Plaintiff presented testimony of Mr. Kyle Kossol, the Vice-President for Finance and Systems, who calculated the amounts of interest that would have accrued on the principal paid by LSI, compounded on a monthly basis, if those amounts had been invested as LSI's other funds had been invested, in "money market funds". (T. 243-249). In response, Mr. Prescott has argued that, if interest in fact is owing, it should be post-judgment interest only, calculated as interest on federal court judgments is calculated, pursuant to 29 U.S.C. §1961.

On these issues, I agree with the Plaintiff that interest must be paid on the amounts advanced by LSI. The notion that underlay Mr. Prescott's undertaking was that he would make LSI whole, if he ultimately were found to have committed negligence, fraud or misconduct. By necessity, LSI cannot be made whole unless the advanced amounts are repaid with interest. And as to the rate of interest, I also agree with the Plaintiff's proposition that the rate of interest must be reasonable. But I agree with Mr. Prescott that the provisions of 28 U.S.C. §1961 establish what reasonable interest is here. Mr. Prescott correctly notes that in the absence of applicable Community law on a subject, this Court often has looked to federal law for guidance – though, absent clear Congressional directive, such law is not controlling. There is no applicable positive Community law on the interest rates applicable to judgment, and I believe that adopting the floating rate established by 28 U.S.C. §1961 – which has the advantages of both being

easily ascertainable and being grounded in the most basic economic realities – is clearly appropriate. And in this case, I believe that adopting the rate both for pre-judgment and post-judgment interest (taking today's date as the date of judgment) also is appropriate. Under federal law, which I look to here, the award of post-judgment interest is mandatory (except in instances that have no applicability to this case), but the award of pre-judgment interest is a matter left to the sound discretion of the courts. Florence Nightengale Nursing Service, Inc v. Blue Cross Blue Shield, 41 F.2d 1476 (11th Cir. 1995). Here, pre-judgment interest clearly is appropriate, because the Plaintiff could not be made whole absent an award of pre-judgment interest; but I see no reason – and the Plaintiff has suggested none – to award a greater or different interest rate for the pre-judgment period than for the post-judgment period. Accordingly, interest on the award of $516,871.46 shall be computed according to the provisions of 28 U.S.C §1961[8].

**C. Attorneys fees.**

The Plaintiff seeks its reasonable attorneys fees, pursuant to the provisions of section 67 of the Community's Corporation Ordinance, as amended by Resolution No. 7-27-94-001. The Plaintiff points out that that section says that in an action brought under the Corporation Ordinance, "A prevailing party in any action shall be awarded costs and reasonable attorneys fees." Mr. Prescott has not responded to the Plaintiff's claim. Accordingly, the Plaintiff shall have until June 10, 2005 to submit an itemized claim for reasonable attorneys' fees and costs; Mr. Prescott shall have thirty days; Mr. Prescott

[8] The method of calculating interest under 28 U.S.C. §1961 was changed by Congress in 2000. For the purposes of this case, the method that the statute mandated before the change shall be applied for the period from July 1, 1994, when the Gaming Commission revoked Mr. Prescott's license to December 21, 2000, when the statute was amended; and the method presently mandated by the statute shall be applied for the period after December 21, 2000.

shall have until July 11, 2005 to respond; and the Plaintiff shall have until July 25, 2005 to reply.

**ORDER**

For the foregoing reasons, and based on all of the pleadings and materials filed herein, it is ORDERED:

1. That the Defendant shall pay to the Plaintiff the sum of $516,871.46, as reimbursement for attorneys fees and expenses advanced in 1994 by the Plaintiff to the Defendant;
2. That the Defendant shall pay interest to the Plaintiff on the principal sum of the judgment herein at the rates specified by 28 U.S.C. §1961, for the period from July 1, 1994, such interest to be calculated as more fully described in footnote 7 of this Memorandum Opinion and Order;
3. The Plaintiff may submit, to the Court and the Defendant, an itemized statement of its reasonable attorneys fees and costs not later than June 10, 2005; the Defendant may submit a response not later than July 11, 2005; and the Plaintiff may submit a reply not later than July 25, 2005.

May 11, 2005

Judge John E. Jacobson

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

---

Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise

Plaintiff,

vs.

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

Defendant.

Court File No. 436-00



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**SUPPLEMENTAL MEMORANDUM OPINION AND ORDER**

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On May 11, 2005, the Court entered an Order in this matter that determined the Defendant's liability under a May 9, 1994 agreement with Little Six, Inc. ("LSI"). The Court's May 11, 2005 Order also established a schedule pursuant to which the Plaintiff is permitted to seek, and the Defendant is permitted to contest, an award of the Plaintiff's reasonable attorneys' fees and expenses, pursuant to section 67 of the Shakopee Mdewakanton Sioux (Dakota) Community's Corporation Ordinance, as amended.

By telephone inquiry with the Clerk of Court today, the Defendant's counsel inquired whether, in the Court's view, the May 11, 2005 Order is a final order in this matter that now is appealable to the Shakopee Mdewakanton Sioux (Dakota) Community Court of Appeals.

Obviously, the existence of ambiguity on that question is not in the interest of any party. Therefore, I herewith supplement the May 11, 2005 Order, as follows:

**ORDER**

Because the May 11, 2005 Order of this Court authorizes the Plaintiff to seek its reasonable attorneys fees and costs pursuant to an Ordinance of the Shakopee Mdewakanton Sioux (Dakota) Community, final judgment in this matter has not been entered; and an appeal therefore does not presently lie from the May 11, 2005 Order.

June 9, 2005

Judge John E. Jacobson

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise

Plaintiff,

vs.

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

Defendant.

Court File No. 436-00

IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY
FILED
OCT 2 6 2005
LYNNEA A. FERCELLO
CLERK OF COURT

**MEMORANDUM OPINION AND ORDER**

In this protracted litigation[1], the Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise ("the Enterprise") sought reimbursement for monies paid by its predecessor in interest, Little Six, Inc. ("LSI"), to the Kelley Law Office, who served as attorneys for LSI's former Chairman, Mr. Leonard Prescott in 1993 and 1994. LSI and the Enterprise also sought reasonable attorneys fees and costs incurred by them in maintaining this litigation[2], based upon the provisions of Section 67 of the Community's Business Corporation Ordinance ("the Corporation Ordinance").

[1] A summary of the history of these proceedings, together with citations to the five reported decisions from this Court and the Court of Appeals that the case has produced, appears in this Court's May 11, 2005 decision.

[2] The Gaming Enterprise sought reimbursement for the fees that it actually paid in pursuing this litigation.

On May 11, 2005, following proceedings that included a two-day trail in 2004 and extensive post-trial briefing thereafter, the Court ruled substantially in favor of the Enterprise on its claims for reimbursement of the moneys paid to the Kelley Law Office. The Court also held that under the plain language of Section 67 of the Corporation Ordinance, the Enterprise was entitled to recoup the reasonable attorneys fees and costs it and LSI incurred in this matter. In so holding, the Court noted that Mr. Prescott had not responded to, or in any way resisted, the Enterprise's claims under Section 67. The Court therefore ordered the parties to submit briefing on the only remaining issue, which was the amount of those reasonable fees and costs.

The Gaming Enterprise then submitted evidence regarding the amount of the Plaintiff's fees and costs incurred in these proceedings, and contemporaneously moved for a protective order that would permit Mr. Prescott and his counsel to review the records but that would otherwise prohibit their disclosure to the public. Mr. Prescott objected to the protective order; but pending my decision on the Enterprise's motion, I ordered that the documents summarizing the fees and costs not be disseminated or disclosed.

Mr. Prescott responded to the Plaintiff's statement of attorneys fees and costs by making two general arguments: (1) that attorneys fees and costs in fact should not be awarded in this matter, and (2) that the fees and costs actually sought by the Enterprise are excessive.

In my view, Mr. Prescott's first argument simply is untimely. The question as to whether Section 67 of the Corporation Ordinance entitles the Enterprise to its attorneys fees and costs was squarely presented in the Complaint in this matter, and the

Enterprise's claim to the award was the explicit subject of post-trial briefing by the Enterprise – briefing that drew no response, on the subject of the entitlement to attorneys' fees and costs, from Mr. Prescott. I determined that an award of reasonable fees and costs was justified, on May 11, 2005, and it would be inappropriate for me to revisit that determination here. But I do note that even if Mr. Prescott's argument on this point had been timely made, he has failed to explain why the relevant language of Section 67 of the Corporation Ordinance should not be applied to this case.

Consequently, the question presented to me now by Mr. Prescott's objections relates solely to the amount of the Plaintiff's attorney's fees and costs that is "reasonable", under Section 67. In my view, the burden here is on the Plaintiff to demonstrate the reasonableness of its attorneys' fees and costs. See, e.g., Johnson v. University College, 706 F.2d 1205, 1207 (11 Cir. 1983). To carry this burden, the Enterprise has submitted contemporaneous records setting forth the hours spent on this case and the subject matter of the work completed by the attorneys. Mr. Prescott's objections to those records, and to the work and expenses that they memorialize, are:

1. That certain billed amounts are excessive in light of the work that was performed. He specifically objects to the fact that 82.2 hours of attorney time was spent on the research and drafting of an appellate response brief in connection with Mr. Prescott's interlocutory appeal from my denial of his motion to dismiss; that attorney and paralegal fees for 23.9 hours of work to draft the Complaint in this matter were unreasonable; and that the Enterprise's law firm devoted 70.6 hours of

attorney time and 17.8 hours of paralegal time to researching and drafting a response to Mr. Prescott's motion to dismiss;

2. That many attorney and paralegal hours were billed by the Enterprise's law firm without, in Mr. Prescott's view, sufficiently specific description of the work being done. In particular, Mr. Prescott cites seven entries, totalling 30.2 hours, which describe work performed in June, 2001 simply as "Research re: Appellate brief, Prescott Indemnification"; 4.2 hours under the heading "Prepare exhibit list; confer with Atty. Olson and trial prep."; and 3.9 hours billed to prepare subpoenas and cover letters and "review files".

3. That costs relating to computerized legal research, telefax charges, postage costs, delivery service costs, and photocopying not related to trial exhibits are not properly recoverable in this context.

With respect to each of these arguments, I have reviewed the billings in question, and the resulting work product. I have concluded that in each of the instances of attorney and paralegal work objected to by Mr. Prescott, the time expended by the Plaintiff's law firm was commensurate with the quantity and quality of the work produced, and the billing therefore was "reasonable" under Section 67 of the Corporation Ordinance.

Specifically, with respect to Mr. Prescott's assertions that it was excessive for the law firm to devote 82.2 hours of attorney time to the drafting and research of a reply brief in Mr. Prescott's interlocutory appeal from my denial of his motion to dismiss, I find that the brief which was produced by those hours of work was nearly thirty pages long, containing extensive citation of carefully researched and analyzed case law, and that the

underlying positions it took it apparently were ultimately persuasive to the Appellate Court. I allow as how the costs – in excess of $19,000.00, as I calculate it from the law firm's billings – was high; but the matters at stake and the quality of the product were high, as well.

Likewise, I do not agree with Mr. Prescott's arguments that 23.9 hours to time was excessive for the drafting of the Complaint in this matter. The factual allegations in the Complaint covered more than six years of history, and the prayer sought more than half a million dollars in damages. The Plaintiff never was obliged to amend the Complaint, and the litigation that the Complaint initiated resulted in an award of nearly all sums sought. Under these circumstances, a drafting effort of slightly less than three days seems to me to be entirely reasonable.

Nor do I agree that it was excessive to spend 88.4 hours of combined attorney and paralegal time to the response to Mr. Prescott's motion to dismiss. Mr. Prescott asserts that devoting that amount of time "solely to a motion response", at attorney billing rates of between $230.00 and $250.00 per hour, was inappropriate. But the motion to which the response was being generated was a dispositive one: if the motion had been granted, the Plaintiff's claim for more than half a million dollars would have been dismissed. The memorandum that was produced was, again, substantial (some thirty pages in length, containing detailed factual and legal discussion); and, once again, the memorandum ultimately was persuasive. Under these circumstances, the investment of two-plus weeks of attorney and paralegal time to the product seems to me to be reasonable; and nothing in the record suggests that the hourly billing rates associated with the work were

inconsistent with either the quality of the work or the rates generally prevailing for such work at that time.

I differ, too, with Mr. Prescott's assertion that greater specificity is required to award fees for such matters as "Research re: Appellate brief, Prescott Indemnification", or "Prepare exhibit list; confer with Atty. Olson and trial prep.". The product of that work – the appellate brief, the massive exhibit list, and the evidence and testimony adduced at trial – is before the Court. I do not consider it necessary, given the product that is in the record of this case, and considering the time expenditures billed, to require that the billing records identify exactly what issue was being researched for the appellate brief, or precisely what exhibits and materials were being reviewed in preparation for trial.

As to the billing of costs, I agree with Mr. Prescott that the cost of computerized legal research should not be imposed as an item of taxable costs. Although the federal courts are split on this question, see, e.g., In re Media Vision Technology Securities Litigation, 913 F.Supp. 1362, 1370-71 (N.D.Cal.1996), I find the Eighth Circuit's approach on this matter to be persuasive. See Stadley v. Chilhower R-IV School Dist., 5 F.3d 319, 325 (8th Cir. 1993). It seems to me that the cost of computer-aided research is akin to the cost of maintaining law books on a shelf, and should be regarded simply as a cost of an attorney's doing business[3]. The remaining items of costs, however, including

[3] The record does not contain, and the parties have not provided, a separate itemization of the computerized legal research costs included in the law firm's billings. The Court has examined the record and identified nineteen billing entries, from April 30, 2000 through September 30, 2004, that appear to be billings for computerized research. The total of those entries $1,478.31, and it is that amount that the Court will deduct from the billing award.

copying, paralegal time, postage, delivery services, and fax fees, are in my view acceptable and are properly taxed here.

That leaves, then, only the question of the protective order that the Enterprise has sought to protect the confidentiality of these billing and cost records. The Enterprise suggests that the billing and cost information is "sensitive" and could be damaging if it is "misused". Mr. Prescott responds that no law has been cited that supports the restriction of "sensitive" information – that by seeking reimbursement of its fees and costs the Enterprise has waived its attorney-client privilege, and that no confidential trade secrets or proprietary commercial information is revealed in the billing and cost records.

I agree with Mr. Prescott. In my view, when the Enterprise elected to seek reimbursement of its attorneys' fees and costs and thereby placed the reasonableness of those fees and costs at issue, it waived the privilege and the confidentiality that otherwise would have attached to the records of those fees and costs. Cf. In the Matter of the Children's Trust Fund, 4 Shak. T.C. 41 (Feb. 7, 2000).

For the foregoing reasons, and based upon all the files and pleading herein, it is herewith ORDERED:

1. The Defendant shall pay to the Plaintiff the sum of $185,810.08 in legal fees and costs (that is, $187,393.39 minus a Federal Court filing fee of $105.00 that the Plaintiff conceded, in its Reply Brief filed July 25 herein, was erroneously billed to this file, and also minus $1,478.31 in computerized legal research costs); and

2. The Plaintiff's motion for a protective order with respect to the billing records filed in this matter is DENIED.

October 26, 2005

Judge John E. Jacobson

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

In Re the Marriage of:

James Keith Anderson,

Petitioner

and

Janelle Beth Anderson,

Respondent.

Court File No.: 551-05

**MEMORANDUM AND ORDER GRANTING MOTION PERMITTING ATTORNEY TO WITHDRAW, AND AMENDED SCHEDULING ORDER**

On January 9, 2006, Peter J. Horejsi, Esq. filed a motion seeking (1) the Court's permission to withdraw as counsel to the Petitioner, James Keith Anderson, and (2) an extension of the schedule established in the Court's December 13, 2005 Scheduling Order, to permit the Petitioner to obtain substitute counsel. An affidavit of Mr. Horejsi that accompanied the motion averred that Mr. Horejsi had been unable to contact the Petitioner despite repeated attempts to do so.

Pursuant to Rule 33(d) of the Court's Rules of Civil Procedure, a telephone hearing, on the record, was held on Mr. Horejsi's motion on January 16, 2006. Mr. Horejsi participated, as did David Izek, Esq. on behalf of the Respondent. The Petitioner had received notice of the hearing, but did not participate.

During the hearing, Mr. Horejsi confirmed that the Petitioner had not responded to repeated attempts by Mr. Horejsi to contact him. Those attempts included mailed letters, telephone messages, text messages, and attempts to reach the Petitioner through friends. Mr. Horejsi averred that, under these circumstances, it was impossible for him to fulfill his ethical obligations to the Petitioner.

Mr. Izek opposed Mr. Horejsi's motion, arguing that proceedings in this matter would be more difficult if the Petitioner were not represented by legal counsel; and Mr. Izek opposed Mr. Horejsi' motion for an extension of the schedule established by the December 13, 2005 Scheduling Order, asserting that the Respondent could be prejudiced by delay and that the Petitioner should not benefit from his failure to participate in the proceedings. However, Mr.

Izek had written the Court on December 14, 2005 with the information that he had failed, during the conference that had preceded the Scheduling Order, to note that he had a scheduling conflict which would make it impossible for him to attend the Prehearing Conference scheduled for April 13, 2006.

Because the Court was and is convinced that it would be impossible for Mr. Horejsi to provide adequate legal counsel under the circumstances, the Court orally granted his motion to withdraw, and by the Order below does confirm that decision.

The Court took under advisement Mr. Horejsi's motion for a change in the Scheduling Order. Having now considered the scheduling matter fully, the Court has concluded that Mr. Izek's argument is sound: the fact that the Petitioner has declined to work with his attorney, and has declined to participate, to date, in these proceedings – proceedings that the Petitioner initiated – should not be allowed to work prejudice to the Respondent. It may well be that these proceedings will prove to be difficult; and it also may be that, if Petitioner obtains new legal counsel – which, in the Court's view, would be highly advisable – that counsel may feel it necessary to request a change in the case's schedule. If and when such a request is made, the Court will consider its merits (as the Court does, below, with respect to the Prehearing Conference), but will be disinclined to permit changes that might work harm to the Respondent. At the moment, however, with the Petitioner simply absent from the scene, the Court does not believe there is any sound reason for making a change in the schedule.

With respect to Mr. Izek's scheduling conflict on April 13, 2006, the Court is of the view that it is appropriate to reschedule the Prehearing Conference.

For the foregoing reasons, and based on all the pleadings and materials filed herein, it is herewith ORDERED:

1. The motion of Peter Horejsi and the law firm of McCloud & Boedigheimer to withdraw as legal counsel to the Petitioner is GRANTED, effective January 16, 2006;

2. The Prehearing Conference in this matter will take place at 10:00 a.m., Wednesday, April 19, 2006; and

3. The motion for an extension of the other deadlines in this Court's December 6, 2005 Scheduling Order is DENIED.

January 18, 2006

Judge John E. Jacobson

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

| | | |
|---|---|---|
| Leonard Prescott,<br><br>Plaintiff,<br><br>vs.<br><br>Little Six, Inc., Past and Present Members of Its Board of Directors, Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise, and Shakopee Community<br><br>Defendants. | ) | Court File No.: 554-05 |

# Memorandum Decision and Order

In this litigation, the Plaintiff Leonard Prescott seeks reimbursement from the Defendants for legal fees that he incurred in connection with his defense of earlier litigation that the Defendant, Little Six, Inc. ("LSI"), commenced against Mr. Prescott in October, 1994. The Defendants have moved to dismiss on a variety of grounds. In the view of the Court, their motion must be granted: Mr. Prescott's complaint against LSI is barred by the doctrine of claim preclusion, and as to the other Defendants it is barred by the doctrine of sovereign immunity.

## History of the Litigation

The litigation for which Mr. Prescott is seeking his attorneys' fees was commenced by LSI in 1994. It continued for nearly six years. In the litigation, LSI

sought money damages from Mr. Prescott for certain actions that he took, or was alleged to have taken, during his tenure as Chairman of LSI's Board of Directors. The litigation ended in 2000, when the Shakopee Mdewakanton Sioux (Dakota) Community Court of Appeals concluded that Mr. Prescott was protected by the doctrine of qualified immunity with respect to most of LSI's claims, and that as to the remainder he was entitled to summary judgment. Little Six, Inc., et a. v. Prescott and Johnson, 1 Shak. A.C. 157 (2000) ("Prescott and Johnson"),

At the end of its opinion in Prescott and Johnson, the Court of Appeals stated –

> The parties to this litigation are to bear their own costs and fees. Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994) (parties normally bear own costs and fees); Legal Services of Northern California v. Arnett, 114 F.3d 135, 141 (9th Cir. 1997)(even where statute provides attorney fees for prevailing party, prevailing defendant only awarded attorney fees if claim is frivolous, unreasonable, or groundless).
>
> Little Six, Inc., et a. v. Prescott and Johnson, 1 Shak. A.C. 157, 172 (2000).

Both before and after the Court of Appeals' decision in Prescott and Johnson, other litigation between LSI and Mr. Prescott also was taking place. Specifically, in 1999, the Court of Appeals decided In re Leonard Prescott Appeal from 7/1/94 Gaming Commission Final Order, 1 Shak A.C. 146 (1999) ("Gaming Commission Appeal"), upholding the Shakopee Mdewakanton Sioux (Dakota) Gaming Commission's revocation, in 1994, of Mr. Prescott' Temporary Employment Authorization. Following that Court of Appeals decision, LSI again sued Mr. Prescott in this Court, this time seeking reimbursement for monies that LSI had paid to the Douglas Kelley Law Firm ("the Kelley Firm"), for work that the Kelley Firm had done on Mr. Prescott's behalf in 1994, during his ultimately unsuccessful defense, before the Gaming Commission, of his

Prescott's Temporary Employment Authorization, Little Six, Inc. v. Prescott, Court File No. 436-00 (filed Feb. 10. 2000) ("First Attorneys Fee Litigation")

In the First Attorneys Fee Litigation, Mr. Prescott moved to dismiss on the ground that he was protected by qualified immunity – the same ground that had operated to protect him from certain aspects of the LSI's claims in Prescott and Johnson. This Court denied his motion, (*see*, Little Six, Inc. v. Prescott, 4 Shak. T.C. 73 (2000), and Mr. Prescott filed an Answer, in which he made the following claim for his legal fees:

> As to the allegations contained in Paragraphs 34, 35, 36, 37, and 38 of Plaintiff's Complaint, Count II, Unjust Enrichment, Prescott denies each and every allegation, except for those previously admitted, and he affirmatively alleges that even if he were liable to LSI for reimbursement of funds as alleged by LSI, that he has personally incurred legal fees relating to the civil lawsuit initiated by Plaintiff in 1994 – a lawsuit based on the same nucleus of facts occurring in the same time period and in which Prescott was ultimately found to be the prevailing party – thus entitling him to indemnification by LSI, and consequently, a set-off in legal fees.
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> Little Six, Inc. v. Prescott, Court File No. 436-00 (Answer of Leonard Prescott, at ¶21, filed August 21, 2000) (Emphasis supplied).

Thereafter, Mr. Prescott pursued an interlocutory appeal of the denial of his motion to dismiss, *see*, Prescott v. Little Six, Inc., 1 Shak A.C. 190 (2001). The appeal was unsuccessful, and following remand and extensive discovery, LSI moved for summary judgment. Responding to that motion, Mr. Prescott made the following argument:

> LSI's 2994 civil lawsuit against Prescott alleged, among other things, that Prescott was liable for misconduct, fraud and/or negligence in the performance of his duties to LSI. The 1994 civil lawsuit against Prescott was ultimately unsuccessful as to each and every allegation and claim. Even though no final judgment of misconduct, fraud or negligence was entered, LSI has not yet indemnified or reimbursed Prescott for the fees and costs he incurred to successfully defend against the claims.

> Article 14 of the Articles of Incorporation, the same Article under which LSI is not claiming entitlement to reimbursement, requires LSI to indemnify Prescott for the fees and costs incurred by him as a result of being made a party to the 1994 civil suit. Because Prescott was successful against the claims of LSI in the 1994 civil lawsuit – he was not found liable of negligence, misconduct or fraud in the performance of his duty to LSI – Prescott is entitled to reimbursement.
>
> If this Court awards LSI summary judgment in accordance with its motion, the Court should order that any such award of repayment be reduced by the amount LSI owes to Prescott as indemnification for his successful defense of the 1994 civil lawsuit. While Prescott has made no formal demand under Article 14 for payment of the indemnification amounts owed by LSI, there is no requirement in the Article that such a request be made. LSI is obligated to make the payment and as yet has not made the payment. Equity, fairness and justice require that any amount awarded to LSI in the matter at bar be reduced by the amount incurred by Prescott in his defense of the 1994 civil action.
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> Little Six, Inc. v. Prescott, Court File No. 436-00 (Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, at 25-26, filed November 7, 2003) (Emphasis supplied).

This Court granted LSI's summary judgment motion in part, and denied it in part. The Court held that as a matter of law Mr. Prescott was liable to reimburse LSI for the amounts that LSI had paid to the Kelley Firm, but also held that there were material facts at issue with respect to whether some of the monies that had been paid to the Kelley Firm were paid for work done for LSI, as opposed to work done for Mr. Prescott. Little Six, Inc. v. Prescott, Court File No. 436-00 (Memorandum Opinion and Order, filed February 17, 2004). The Court's decision did not discuss Mr. Prescott's setoff claim. Instead, it concluded with these words:

> So, inasmuch as there is a disputed issue of material fact, we are obliged to go to trial on that issue, at a time to be determined. The single issue that will be decided at trial will be the extent of the charges from the Kelly [sic] law firm that were directly connected to the proceedings and litigation surrounding "Shakopee Mdewakanton Sioux Community Gaming Commission File No. 94-0024" and any subsequent appeals.

For the foregoing reasons, it is herewith **ORDERED:**

1. That the Plaintiff's motion for summary judgment on the issue of the Defendant's liability to reimburse the Plaintiff LSI for the legal fees and expenses paid by LSI in connection with the proceedings and litigation surrounding Shakopee Mdewakanton Sioux Community Gaming Commission File No. 94-0024 is **GRANTED**; and

2. That the Plaintiff's motion for summary judgment on the amount of the fees and expenses to be reimbursed by the Defendant is **DENIED.**

Ibid, at 8.

Mr. Prescott did not appeal the award of partial summary judgment against him, either at the time of the award or thereafter.

Trial on the issues associated with the Kelley Firm's bills took place on August 23, and 24, 2004. During the trial, no evidence was offered or received by either party concerning Mr. Prescott's setoff claim. Following extensive post-trial briefing, on May 11, 2005 the Court rendered its decision, stating its view of the issues that were before it as follows:

> Today, I decide the amount that Mr. Prescott should reimburse LSI pursuant to his agreement. I also decide the plaintiff's claims for interest and for reasonable attorneys fees and expenses incurred in these proceedings.
>
> Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise v. Prescott, Court File No. 436-00 (Memorandum Opinion and Order filed May 11, 2005 at 5)[1].

The Court concluded that, in fact, all of the work done by the Kelley Firm during the period at issue was done for Mr. Prescott. The Court awarded LSI the sum of $516,871.46 plus interest and reasonable attorneys fees and expenses; and thereafter, on October 26, 2005, the Court rendered a Memorandum Opinion and Order holding that

[1] In 2005, the Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise, as successor to the rights and liabilities of LSI, had been substituted, without objection, as the Plaintiff in First Attorneys Fee Litigation.

$185,810.05 in legal fees and costs had reasonably been incurred by the Plaintiff in the Gamin Commission Appeal Litigation. On October 27, 2005, Judgment in the full amounts awarded was entered.

Mr. Prescott appealed to the Court of Appeals of the Shakopee Mdewakanton Sioux (Dakota) Community. His Notice of Appeal stated that he sought review of –

> ...the May 11, 2005 *Memorandum Opinion and Order* of Judge John E. Jacobson which found in favor of the Plaintiff as to issues of repayment of monies paid for legal fees and costs, payment of pre-judgment interest and payment of attorney fees and costs for prevailing in this Court and the *Memorandum Opinion and Order* of Judge John E. Jacobson issued on October 26, 2005 and the subsequent Judgment entered and filed on October 27, 2005.
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> Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise, f.k.a. Little Six, Inc. v. Prescott, Court File No. 436-00 (Defendant Prescott's Notice of Appeal, filed November 21, 2005).

He did not make any appellate arguments with respect to the setoff claim that he had made in his Answer, and that he had argued to the Court in the summary judgment proceedings.

Instead, on December 29, 2005, while the appeal was pending in First Attorney Fee Litigation, he filed the present case, seeking the approximately $177,000 in attorney's fees he asserts that he incurred in the Prescott and Johnson litigation. He bases his claim on a contract theory, and also on the language of LSI's Articles of Incorporation that were in effect in 1994, which required LSI to reimburse corporate officers in certain circumstances. He makes his claims against four groups of defendants: LSI, the past and present members of the Board of Directors of LSI ("the Directors"), the Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise ("the Enterprise"), and the Shakopee (Dakota) Community ("the Community").

## Discussion

### 1. Sovereign Immunity.

The Directors, the Gaming Enterprise, and the Community all have moved for dismissal based on their claim that Mr. Prescott's suit against them is barred by the doctrine of sovereign immunity. In the Court's view, they are correct. Sovereign immunity protects the Community and its enterprises, and any official or employee acting within the scope of their duties, from suit unless the Community has unequivocally and expressly waived that immunity. Culver Security Systems v. LSI, 1 Shak. T.C. 156 (June 14, 1004); Stopp v. LSI, 2 Shak. T.C. 50 (July 3, 1985).

In his complaint, and in his response to the Defendants' motion to dismiss, Mr. Prescott has not identified any unequivocal and express waiver of immunity by the Community, the Gaming Enterprise, or the Directors. Mr. Prescott argues that since the Community and the Directors were plaintiffs in Prescott and Johnson, they do not possess sovereign immunity in this case, where they are defendants. But Mr. Prescott has not provided the Court with any legal authority for this theory; and in the Court's view the fact that the Community and the Directors filed a complaint against Prescott over twelve years ago does not mean that they thereby forever waived their sovereign immunity for any future lawsuits initiated by Mr. Prescott.

Mr. Prescott also contends that since the membership of LSI is composed of Community members, and since LSI has waived its immunity, it should follow that the Community has waived its immunity as well. But the Community chose to establish LSI as a corporation separate from the Community itself, presumably to protect the Community against exposure to lawsuits related to the activities of LSI. To follow the

Mr. Prescott's reasoning here would be to essentially abolish the Community's ability to establish corporate entities separate from the Community itself. The Court has no legal basis to do such a thing.

In sum, since the Plaintiff has failed to identify any unequivocal and express wavier of immunity from the Community, the Gaming Enterprise, or the Directors, Mr. Prescott's claims against those parties must be dismissed.

LSI also claims that it is protected by sovereign immunity from Mr. Prescott's claim. LSI contends that the proper way to read Mr. Prescott's complaint is that he is bringing both a contract-based claim and a claim based on LSI's Articles of Incorporation. LSI concedes that a claim based on its Articles of Incorporation is not barred by sovereign immunity, because LSI executed a limited waived of its immunity in its Articles; but LSI contends it has not waived its immunity for any contract claim outside Articles. Mr. Prescott, on the other hand, resists having this Court read his complaint as LSI has urged.

I find it unnecessary to resolve these issues, because in my view LSI is correct when it argues that the issues in Mr. Prescott's complaint are barred by the doctrine of claim preclusion.

**2. Claim Preclusion.**

For a claim to be precluded, under this Court's precedents, previous litigation must have involved the same parties, must have been before a court of competent jurisdiction, must have stated the same cause of action as is stated in the present claim, and must have resulted in a judgment on the merits. Prescott v. Little Six, Inc., 1 Shak. A.C. 190, 192 (2001). LSI argues that the issue raised in the instant litigation – whether

Mr. Prescott is entitled to his attorneys' fees incurred in the Prescott and Johnson litigation – was decided both in Prescott and Johnson itself, and in First Attorneys Fee Litigation, and that both cases involved the same parties, and were litigated and decided in a court of competent jurisdiction.

There appears to be little ground for disputing either that Prescott and Johnson and First Attorneys Fee Litigation involved the same parties as the present case or that both cases were litigated and decided in a court of competent jurisdiction. In my view, the issue presented here also was raised in both earlier cases. In the Answer filed in Prescott and Johnson, Mr. Prescott requested his attorney's fees for litigating that case. See Little Six, Inc. v. Prescott and Johnson, Court file No. 048-00 (Separate Answer of Defendant Leonard Prescott, filed Nov. 14, 1994). And although Mr. Prescott ultimately prevailed in that litigation, largely on qualified immunity grounds, the Court of Appeals made it very clear that he was to bear his own attorney's fees. LSI v. Prescott and Johnson, 1 Shak. A.C. 157, 172 (2000).

Then again, in First Attorneys Fee Litigation, Mr. Prescott expressly advanced precisely the same theory of recovery that he espouses here: he claimed that he was due a setoff of any liability because he was owed his attorney's fees from Prescott and Johnson.

Mr. Prescott argues, however, that even if the issue in fact was raised before this Court earlier, still the issue was not properly litigated, nor properly considered by the Court. While if is not certain that the Plaintiff is correct on this point, even if he were his position still must fail. Under the doctrine of claim preclusion, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were

or could have been raised in that action." Rivet v. Regions Bank of Louisana, 522 U.S. 470, 476 (1998). The doctrine bars issues that could have been raised earlier, not only issues that were in fact raised and litigated to the satisfaction of the parties.

Clearly, Mr Prescott could have pressed his claim either in Prescott and Johnson or in First Attorneys Fee Litigation. In Prescott and Johnson, he could have asked the Court of Appeals to reconsider its decision concerning the parties' attorneys fees, based on the theory he has put forth here, but he choose not to.[2] Then, in First Attorneys Fee Litigation, after he raised his claim both in his Answer and in his response to the Plaintiff's Motion for Summary Judgment, and having had summary judgment awarded against him on all issues except issues relating to the nature of the Kelley Firm's bills, he again could have not to pressed his claim either before this Court on a motion to reconsider, or in his appeal to the Court of Appeals. He chose to do neither.

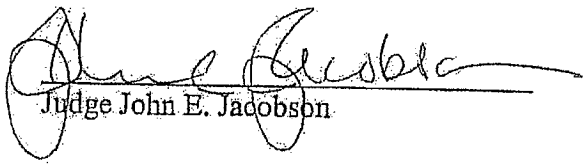
It is not enough for Mr. Prescott to claim that this Court should have reached out and expressly addressed his counterclaim in First Attorneys Fee Litigation. The fact is that the issue raised in Mr. Prescott's complaint in the present case was in fact was raised in earlier litigation between these same parties. In two earlier cases, courts of competent jurisdiction not only failed to grant his claim, but – in Prescott and Johnson – the Court of Appeals specifically mandated that each party was to bear their own costs for that litigation. Under these circumstances, in my view Mr. Prescott is precluded from raising the issue for a third time.

[2] Instead, Mr. Prescott asked the Court for a clarification of its decision, with a pledge to raise this issue in the future. See Plaintiff's Response to Defendant's Motion to Dismiss, Exhibit B, Court file 544-05 (Mar. 31, 2006). The Court of Appeals did not respond to this request for clarification, presumably because in its view the opinion was unambiguous, and presumably a request for clarification falls outside of the scope of this Court's rules.

**Order**

For the foregoing reasons, and based upon all the filings and pleadings herein, the Defendants' motion to dismiss this matter with prejudice is GRANTED.

August 30, 2006



Judge John E. Jacobson

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In Re the Matter of: [redacted] Court File No. 549-05

Minor Child.

Derek Anthony Karlstad,

Plaintiff,

and

Stormy Knight and
Donald Gamber, Jr.,

Defendants.

**MEMORANDUM DECISION,
AMENDED FINDINGS OF FACT, AMENDED CONCLUSIONS OF LAW, AND
AMENDED ORDER**

On August 21, 2006, the Court entered a Memorandum Decision, with Findings of Fact, Conclusions of Law, and an Order. The Order expressly left open two matters: the requirements that must be met in order for the Plaintiff, Derek Anthony Karlstad, to have unsupervised visitation with [redacted] and the arrangements that the parties should make with respect to a parenting consultant or a parenting mediator. The Court gave the parties until September 18, 2006 to provide the Court with their thoughts on those two issues.

Thereafter, the Defendants, Stormy Knight and Donald Gamber filed a motion seeking to amend the Findings, Conclusions and Order; and by letters dated September 18, 2006, both the Defendants and the Guardian *ad Litem* wrote the Court concerning the

visitation and mediator issues. In their motion to amend, the Defendants urged the Court to adopt additional findings of fact concerning the qualifications of Dr. Terri Romanoff-Newman, concerning Dr. Romanoff-Newman's testimony during the August 17, 2006 hearing in this matter, and also concerning the testimony of the Guardian *ad Litem* during the hearing.

On September 19, 2006, the Court held a hearing on the Defendants' motion and on the visitation and mediation issues. The Defendants were represented by Mr. Peter Horesji, and the Guardian *ad Litem* also participated. Neither the Defendants nor the Plaintiff attended.

1. The Defendants' Motion.

During the August 21, 2006 hearing, Mr. Horesji informed the Court that the Defendants brought their motion out of concern that the Court's August 21, 2006 decision might be the subject of collateral attack, under the Indian Child Welfare Act, 25 U.S.C. §1901 – 1963 (2006). The Defendants' motion sought a finding that Dr. Romanoff-Newman "qualified to provide expert opinions regarding the parties, their ability to parent, their mental health, and the bests [sic] interests of [redacted] [sic] as it relates to legal and physical custody". They asked the Court to find that Dr. Romanoff-Newman testified that awarding custody of [redacted] to the Plaintiff likely would result in serious emotional or physical damage to the child, and that it is unlikely that Mr. Karlstad will be able to change his behavior. The Defendants specifically asked the Court to find that Dr. Romanoff-Newman's testimony was "clear and convincing" in this regard. The Defendants also sought findings that Dr. Romanoff-Newman testified that it would be in the "best interests" of [redacted] under the Domestic

Relations Code of the Shakopee Mdewakanton Sioux (Dakota) Community, that she be in the sole legal and physical custody of the Defendants, and also that the Guardian *ad Litem* had testified that awarding the Plaintiff sole physical custody at the present time would likely cause the child serious emotional and physical damage.

Two sorts of issues are raised by the Defendants' motion. The first sort is straightforward, and can be phrased with as follows: did Dr. Romanoff-Newman and the Guardian *ad Litem* testify during the August 21, 2006 hearing as the Defendants suggest? The second sort cannot be answered simply by reference to the transcript, but also can be phrased with a question: what is the appropriate scope of expert testimony in a matter such as this?

As to the first set of questions, Dr. Romanoff-Newman did testify that "awarding physical custody of [redacted] to the Plaintiff] will likely result in serious emotional and physical damage" to the child. (Transcript, p. 58). She expressed the opinion that it was "fairly unlikely" that the Plaintiff could mature and acquire additional parenting skills, but also that it he would be able to do so "if he had help". (Transcript, p. 92). She testified that she had modified her view with respect to the present desirability of a joint custodial arrangement for a variety of reasons. (Transcript, pp 80 – 82, 87 – 89). And the Guardian *ad Litem* testified that in her opinion awarding sole physical custody of [redacted] to the Plaintiff at this time would result in "serious harm... whether it be physical or emotional" to the child, because of the Plaintiff's presently limited resources. (Transcript, p. 135). The fact that those statements were made during the hearing, on the record and under oath, is not fairly disputable.

As to the second issue – the permissible expert testimony – a review of the transcript of the August 21, 2006 hearing leaves no doubt as to Dr. Romanoff-Newman's professional qualifications; and the work that she did with the parties in this case clearly qualifies her to provide expert testimony concerning both the parties' psychological makeup and their present ability to provide proper parenting for [redacted]. Testimony of that sort is well within the bounds of proper expert testimony.

However, it is the Court's view that testimony with respect to what constitutes the "best interests" of [redacted] is outside those bounds. The question of what is "in the best interests of a child" is an issue of law, under the Domestic Relations Code of the Shakopee Mdewakanton Sioux (Dakota) Community, and therefore is not the proper subject of expert testimony. *Cf.* Marx & Co., Inc. v. Diners' Club, Inc., 550 F.2d 505 (2nd Cir. 1977).

2. Visitation.

In response to the Court's request for the parties' views with respect to the Plaintiffs' visitation with [redacted] although the recommendations differed somewhat in their detail, both the Defendants and the Guardian *ad Litem* recommended that unsupervised visitation not take place until the Plaintiff has completed a new chemical dependency evaluation and has complied with all recommendations from such an evaluation; that he be able to demonstrate several months of sobriety; and that when unsupervised visitation begins, it progress from shorter to longer visits. The Defendants also recommended that thereafter the Plaintiff be subject to random drug testing, at the Defendants' request (with the costs to be borne by the Plaintiff if the test proves positive, and by the Defendants if the test proves negative). The Guardian *ad Litem* made no

recommendation with respect to ongoing testing at the Defendants' behest, but did recommend that the Plaintiff complete a parenting skills class as a precondition to unsupervised visitation.

During the hearing, the Court expressed concern about the logistics involved in the present visitation system. The Defendants presently are obliged to bring [redacted] to the Alex and Brandon Safety Center on a scheduled basis; and when the Plaintiff has not come to the Center, the Defendants' trip and time has been wasted. On the other hand, the Plaintiff on occasion has had difficulty communicating with the Defendants, when he has known that he would be obliged to miss a visitation, because he is barred, by a Restraining Order from the Minnesota District Court, from communicating directly with the Defendants, and his alternative – communicating with the Alex and Brandon Center, and asking the Center to contact the Defendants – has posed problems because of the times that the Center is open.

The Court therefore asked the Defendants whether they would consider a change in the visitation arrangements, whereby the Plaintiff would contact the Defendants to notify them that he intended to exercise his visitation rights, and the Defendants would waive the non-communication order for that limited purpose. On September 19, 2006, Mr. Horesji notified the Court that the Defendants would agree to that arrangement, provided that any telephone call from the Plaintiff be made at least one hour before visitation would begin. The Defendants also asked that they be given a telephone number where they could reach the Plaintiff, if an emergency kept them from bringing [redacted] to the Center.

3. Parenting Mediation.

The Guardian *ad Litem*, in her September 18 letter, provided the Court with contact information concerning possible parenting mediation services; and the Court considers that information to provide an adequate basis for establishing an Order with respect to that subject.

For the foregoing reasons, the Court amends its August 21, 2006 Findings of Fact and Conclusions of Law as follows:

Finding of Fact No. 28 is amended to read as follows:

28. Dr. Terri Romanoff-Newman is qualified as an expert to provide expert opinions regarding the parties, their ability to parent, and their mental health. As part of the psychological evaluation conducted by Dr. Terri Romanoff-Newman, the Minnesota Multiphasic Personality Inventory 2 (MMPI-2) was administered to Derek Karlstad, Stormy Knight, and Donald Gamber. Dr. Romanoff-Newman's report and testimony indicated that Derek Karlstad's MMPI-2 test was valid – that he had honestly answered its questions – and that the test results indicated he has clinically diagnosable anti-social personality disorder, characterized by a belief that he can make up his own rules; that he acts without thinking about the consequences; that he tends to take his anger out on those who are weaker than he is; and that he feels discriminated against. Dr. Romanoff-Newman testified that in her view his personal history supported that diagnosis. Dr. Romanoff-Newman testified that awarding physical custody of [redacted] to the Plaintiff would likely result in serious emotional and physical damage to the child. She

expressed the opinion that it was "fairly unlikely" that the Plaintiff could mature and acquire additional parenting skills, but also that it he would be able to do so "if he had help". And she testified that she had modified her view with respect to the present desirability of a joint custodial arrangement for a variety of reasons.

Finding No. 37 is amended to read as follows:

37. The Guardian *ad Litem*, in her report and in her testimony, recommended that the Court award joint legal custody and joint physical custody to Stormy Knight and Donald Gamber and to Derek Karlstad, with Derek Karlstad's visitation being supervised until he is able to demonstrate an abstinence form drugs and alcohol. In her testimony, the Guardian *ad Litem* stated that it would be difficult under the present circumstances for Derek Karlstad to have full joint physical custody of [redacted] because of his lack of resources, and because he depends on others, particularly his mother, for much of his living situation. The Guardian *ad Litem* testified that in her opinion awarding sole physical custody of [redacted] to the Plaintiff at this time would result in "serious harm...whether it be physical or emotional" to the child, because of the Plaintiff's presently limited resources.

The first paragraph of Conclusion of Law No. 1 is amended to read as follows:

1. The minor child, [redacted] is the daughter of a member of the Shakopee Mdewakanton Sioux (Dakota) Community, and is eligible to be a member of the Community; therefore, this Court has jurisdiction over this matter pursuant to Chapter IX of the Domestic Relations Code of the Shakopee

Mdewakanton Sioux (Dakota) Community. Clear and convincing evidence establishes that the Defendants Stormy Knight and Donald Gamber should have sole legal and physical custody of the minor child [redacted]

## AMENDED ORDER

BASED UPON THE FINDINGS AND CONCLUSIONS SET FORTH ABOVE, AND ON ALL OF THE PLEADINGS, EVIDENCE, AND MATERIALS BEFORE THE COURT IT IS ORDERED:

1. The Defendants Stormy Knight and Donald Gamber shall have sole legal and physical custody of the minor child [redacted]
2. The Petitioner Derek Karlstad shall have visitation with the minor child [redacted] Pending further order of the Court, such visitation shall be supervised and shall take place under the terms established in the Court's order of January 30, 2006, provided that prior to each such visitation Derek Karlstad shall notify Stormy Knight and/or Donald Gamber, by telephone, that he intends to exercise his visitation rights, at least one hour in advance of each such visitation.
3. At such time as Derek Karlstad has demonstrated that he is chemical-free and is committed to remain chemical-free, as provided in this Amended Order, he shall have unsupervised visitation on a schedule to be established by the Court at that time. Unsupervised visitation may commence only after (a) Derek Karlstad has completed a chemical dependency evaluation conducted by a person licensed to

conduct such evaluations by the State of Minnesota, with the evaluator having been provided with the information that, during the pendency of these Court proceedings, he provided two hair follicle samples that tested positive for marijuana, and that he informed the Guardian *ad Litem* in these proceedings on August 16, 2006 that he had used marijuana after providing those hair follicle samples; (b) Derek Karlsad has completed all recommendations made by the aforesaid chemical dependency evaluator; (c) Derek Karlstad has submitted hair follicle tests to a testing facility that is licensed by the State of Minnesota to conduct drug testing, to establish that he has been drug free for a period of at least six months following the completion of the aforesaid chemical dependency evaluation; and (d) Derek Karlstad has completed either the Early Childhood Family Education Classes offered at Onamia, Minnesota, or some other comparable parenting skills class.

4. In the event the parties have disagreements with respect to parenting issues, they shall seek to avail themselves of the services of a parenting mediator, such as Duluth Family Mediation (telephone: 218-626-3000), or Cooperative Solutions, Inc., Grand Rapids, MN (telephone: 218-327-4908), or some similar service.

5. The Guardian *ad Litem* in these proceedings is herewith discharged and relieved from any further duties with respect to these proceedings and with respect to [redacted] and the parties.

Date: September 27, 2006

Judge John E. Jacobson

# TRIBAL COURT
## OF THE
# SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

In re the Matter of:

Randolph Scott Gast,
n/k/a Randolph Scott Crooks

Court File Number: 558-06

Plaintiff,

v.

MEMORANDUM AND ORDER

Suzette Jeanenne Gast,

Respondent.

## MEMORANDUM

The Petitioner through his Counsel brings a motion seeking direction from the Court relative to service of process consistent with Rule 34 of the court's civil rules of procedure affecting Enforcement of Foreign Judgments. Upon review of Rule 34 the court finds that service is required but with no further guidance. In such cases we than must turn to the general rule governing service. Service and filing of papers and other documents is governed by Rule 6 of the court's rules. In particular rule 6 (b) of the rules sets forth how service is made and states:

> "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court".

The Petitioner has presented to the court a signed affidavit from his counsel in which the counsel states clearly that the counsel for the Respondent was served the pleadings in this action by mail on August 11, 2006. This action meets the requirements of Rule 6(b).

**ORDER**

**IT IS HEREBY ORDERED:**

That the requirement for service consistent with Rule 34 has been met by the Petitioner and the Petitioner may proceed with this action.

DATE: 10/27/06

Judge Henry M. Buffalo, Jr.

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

COUNTY OF SCOTT

In re the Matter of:

Randolph Scott Gast,
n/k/a Randolph Scott Crooks,

Petitioner,

and

Suzette Jeanenne Gast,

Respondent.

Case No. 558-06

**FINDINGS OF FACT AND ORDER**

The above-entitled matter came before this Court on January 10, 2007, pursuant to motions filed by Petitioner Randolph Scott Crooks, formerly known as Randolph Scott Gast. The Petitioner appeared personally and with his attorney of record, Gary A. Debele, Esq. of Walling, Berg & Debele, P.A., 121 South Eighth Street, Suite 1100, Minneapolis, MN 55402. Neither Respondent Suzette Jeanenne Gast nor any attorney on her behalf appeared at this hearing, nor did the Respondent or an attorney on her behalf file any written submissions with the Court addressing the Petitioner's motions.

Because there was no appearance by the Respondent or an attorney on her behalf, the Court enters the following Findings of Fact and Order as a default determination based upon argument of Petitioner's counsel, the written submissions of the Petitioner, and upon the files and proceedings herein.

## FINDINGS OF FACT

1. That Petitioner Randolph Scott Crooks, formerly known as Randolph Scott Gast, obtained a name change order from Scott County District Court in the State of Minnesota on May 18, 2005, formally changing his name to Randolph Scott Crooks. The Petitioner was born on January 20, 1961. The Petitioner is an enrolled member of the Shakopee Mdewakanton Sioux (Dakota) Community,

and currently resides on land of this Community, with an address of: 15195 Dakota Trail East, Prior Lake, MN 55372.

2. Respondent Suzette Jeanenne Gast was born September 1, 1962. While her current address and exact whereabouts are unknown to the Court, she has a last known address in the State of Texas of 10709 Cow Creek Road, Marble Falls, TX 78654, and also, upon Petitioner's information and belief, maintains a residence in the State of Hawaii at 71-1717 Puu Napoo Drive #36, Kailua-Kona, HI 96740. Notices of proceedings of this Court have been sent to both of these known addresses, as well as her last attorneys of record located in the State of Colorado, known as Carlson, Carlson and Dunkelman, LLC., Drake Landing, 975 North 10 Mile Drive, P.O. Box 1829, Frisco, Colorado 80443. Neither the Respondent nor these attorneys have responded to any of these notices.

3. The Petitioner and the Respondent were divorced in Summit County in the State of Colorado on May 11, 2000 pursuant to a Decree of Dissolution of Marriage filed on that date, file number 99-DR-78, Division R.

4. The Petitioner appeared before this Court and filed a Petition requesting that this Colorado Court Decree be registered with this Court and that this Court exercise subject matter jurisdiction over this divorce proceeding so as to address the Petitioner's post-decree issues.

5. On October 27, 2006, this Court issued an Order indicating that the Petitioner's service of the registration petition and related documents upon the last known addresses of the Respondent, as well as upon her last attorneys of record in the State of Colorado, constituted sufficient service of process for this matter to go forward before this Court. This Court interpreted the Rules of Civil Procedure of this Court and determined that as to Petitioner's requested post-decree relief, there was no requirement of personal service upon either of the parties, but rather, service by mail, as established by the Affidavits of

Service on file with this Court, was sufficient for service of process for these proceedings now before this Court.

6. The parties are the parents of two adult children, Brandon Gast and Cody Gast. Both of the children are enrolled members of this Community.

7. This Court finds that the uncontroverted evidence is that neither the Petitioner nor the Respondent continues to reside in the State of Colorado, where the original divorce decree in this matter was issued. While this Court is not bound by the terms of the Uniform Child Custody Jurisdiction and Enforcement Act, which is a statute currently in effect in the State of Colorado, under that statute, the state in which an original divorce decree was issued may lose jurisdiction over that matter to another Court with sufficient ties to one of the parties to the original marriage dissolution proceeding if neither party continues to reside in the state which issued the original divorce decree. Because neither the Petitioner nor the Respondent continue to reside in the State of Colorado, and because this Court finds that the Respondent had ample opportunity to either proceed with her own motion in the State of Colorado, initiate a motion in the state where she now resides, or, submit to the jurisdiction of this Court and submit a substantive response to the Petitioner's motion, it is appropriate to now register the Colorado divorce decree with this Court and for this Court to assume subject matter jurisdiction over the post-decree issues now being raised by the Petitioner.

8. Further, because the Respondent has not filed any response whatsoever to Petitioner's motion papers and request for registration, the Court finds that the Respondent is now in default on those issues and this Court shall grant the relief requested by the Petitioner.

9. That the Petitioner served upon the Respondent at her last known address and at the address of her last known attorneys of record written Interrogatories and Requests for Production of Documents pursuant to this Court's Rules of Civil Procedure. These discovery requests were dated

November 21, 2006. As of the date of this hearing, no response to these discovery requests has been provided by the Respondent or any attorney on her behalf.

10. That under the Colorado Divorce Decree, the Petitioner was ordered to pay the sum of $10,001.30 per month for child support as to his son Cody Gast. Petitioner was ordered to pay this sum until January 24, 2006, if Cody was not enrolled in school, or, until January 24, 2009, if Cody was enrolled in school. The Colorado Divorce Decree is silent as to the meaning of "enrolled in school." Furthermore, the Petitioner no longer has any access to his two sons of this marriage, he has no way of communicating directly with them, nor has the Respondent herself provided any of the information verifying Cody's enrollment status requested by the Petitioner. As an enrolled adult member of this Community, Cody is now receiving his own substantial per capita payments and other benefits resulting from that enrollment. Therefore, the Court finds it appropriate to consider the Petitioner's motion to terminate any ongoing child support obligation as to his son Cody. Based on the information supplied to this Court, Cody Gast is no longer "enrolled in school" and the Petitioner's child support obligation for Cody Gast should be terminated retroactive to the date of Cody's 18th birthday when he presumably began receiving his per capita payments and other benefits from this Community.

11. In the Colorado divorce decree, the Petitioner was ordered to pay permanent spousal maintenance to the Respondent in the amount of $10,000 per month. The Petitioner has continued to make those payments through a direct bank deposit from his own funds into an account set up by the Respondent. In his post-decree motion before this Court, the Petitioner is asking this Court to review the appropriateness of that ongoing spousal maintenance obligation, both as to duration and as to amount. The Petitioner requested information from the Respondent's as to her current financial circumstances, including her income and living expenses. The Petitioner suspects the Respondent is living a comfortable lifestyle with the support of Cody and Brandon Gast who, as enrolled members of

this Community, receive significant per capita payments as a result of their enrollment status. Because Respondent has failed to provide the Petitioner with reasonably requested information and has refused to participate in any way with these post-decree proceedings, in the interest of equity and fairness, this Court finds it appropriate to suspend the Petitioner's spousal maintenance obligation as to the Respondent, effective February 1, 2007.

12. Under the terms of the Colorado divorce decree, the Petitioner is required to provide medical and dental insurance through this Community for the benefit of the Respondent for so long as such benefits are available and then to pay for alternative medical and dental insurance coverage. In his discovery, the Petitioner requested information as to Respondent's current medical and dental insurance coverage, and again, no response was forthcoming from the Respondent. Therefore, the Petitioner is without knowledge as to whether the Respondent has secured her own medical and dental insurance. Petitioner has stated in his written submissions that he has never received any bill or premium statement indicating a request to pay for said coverage. Until such time as Respondent provides the requested information to the Petitioner and this Court through a duly noticed motion, this Court believes it fair and equitable to suspend the Petitioner's obligation to provide medical and dental insurance for the Respondent or to pay for any of Respondent's uninsured medical or dental expenses, retroactive to the date that the COBRA coverage as to the medical and dental insurance provide by this Community expired.

13. In his motion papers, the Petitioner requested that the Court clarify several aspects of the property disposition as set forth in the Colorado divorce decree. In particular, the parties were directed to equally divide their 1999 federal income tax refund, which Petitioner believes was in excess of $50,000; Petitioner believes the refund was sent to the Respondent. In his sworn affidavits, Petitioner indicates he never received his half of that refund. Similarly, the Petitioner was entitled to receive one-

half of the proceeds from the sale of the parties' marital home located on Cedar Lake in New Prague, Minnesota. Again, the Petitioner has advised this Court in sworn documents that he never has received any of his proceeds from the sale of that home.

14. The Petitioner advises the Court that the Respondent herself raised several post-decree issues in correspondence sent by her attorney in the spring of 2006. She requested a quit claim deed transferring any interest Petitioner had in the parties' Florida time share condominium to her, which was awarded to her in the Colorado divorce decree. She has also requested the title to the motor home which was awarded to her in the Colorado divorce decree; the motor home allegedly remains in the Respondent's possession.

15. Based on sworn submissions by the Petitioner, this Court finds that the Petitioner has provided to Respondent's Colorado attorneys a signed and fully executed quit claim deed as to the time share property which he signed on April 25, 2006. The Respondent has the ability to contact the Minnesota Department of Motor Vehicles and obtain a duplicate title to her motor home. The Petitioner has indicated a willingness to cooperate with the Respondent if she chooses to contact that office.

Based upon the above Findings of Fact, the Court enters the following as its Order:

**ORDER**

1. That the Colorado Divorce Decree, dated May 11, 2000, and entered in Summit County District Court, File Number 99-DR-78, Division R, is hereby registered with this Court, and this Court does hereby assert subject matter jurisdiction over all post-decree issues raised as to that decree.

2. That Petitioner's obligation to pay spousal maintenance to the Respondent pursuant to the Colorado divorce decree is hereby suspended effective February 1, 2007, and shall remain suspended until such time as the Respondent submits a formal motion to this Court requesting review of the issue

of spousal maintenance and provides verification that she has responded to the Petitioner's Interrogatories and Requests for Production of Documents.

3. That the Petitioner is relieved of his obligation to provide medical and dental insurance coverage for the Respondent, to pay for any medical and dental insurance premiums for insurance secured by the Respondent, or to pay any uninsured medical or dental expenses incurred by the Respondent retroactive to the date when this Community stopped providing medical and dental insurance for the Respondent. If the Respondent wishes to have this issue reviewed, she must file a formal motion with this Court and provide written verification that she has responded to the Petitioner's Interrogatories and Requests for Production of Documents.

4. That the Petitioner's obligation to pay ongoing child support for Cody Gast is hereby terminated retroactive to Cody Gast's 18th birthday. Any obligation requiring the Petitioner to provide medical or dental insurance coverage for Cody Gast, or to pay for any of his uninsured medical or dental expenses is hereby terminated retroactive to that same date.

5. That the Respondent shall immediately provide verification to the Petitioner and to this Court that she has provided the Petitioner with one-half of the 1999 federal income tax refund, or if she has not done so, she shall immediately provide to the Petitioner the sums due and owing to him pursuant to the Colorado divorce decree.

6. That the Respondent shall immediately provide an accounting to the Petitioner and this Court of the receipt of any and all proceeds from the sale of the parties' Cedar Lake home, located in New Prague, Minnesota, and provide verification that she has paid to the Petitioner his one-half of those proceeds, or if she has not done so, immediately provide said proceeds to the Petitioner.

7. That all obligations by the Petitioner to transfer his ownership interest in the Florida time share condominium have been satisfied.

8. That the Respondent shall take whatever steps are necessary, if she so desires, to obtain a replacement title to the motor home which she was awarded in the parties Colorado divorce decree. If requested by Respondent, the Petitioner shall cooperate as necessary if the Respondent seeks to obtain a new title to this motor home.

9. That so long as Petitioner continues to reside on the lands of this Community, and until such time as the Respondent appears before this Court to successfully challenge the subject matter jurisdiction of this Court over post-decree matters relating to the Colorado marriage dissolution between the parties, this Court shall continue to have subject matter jurisdiction over this divorce proceeding and any and all post-decree motions.

10. A copy of these Findings of Fact and Order shall be served upon the Respondent at her last known mailing addresses and upon the address of her last known attorneys of record. An Affidavit of Service by mail shall be provided to the Court and such service shall be deemed good and proper service.

11. All other provisions of the Colorado divorce decree not modified by these Findings of Fact and this Order shall remain in full force and effect.

Dated: 3/8/07

Henry M. Buffalo, Jr.
Judge of Tribal Court

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

SCOTT COUNTY STATE OF MINNESOTA

In Re the Marriage of: Court File No. 515-03

Teresa L. Coulter,
Petitioner

and **ORDER**

Kenneth W. Coulter,
Respondent.

The parties settled their martial dissolution action in an order that was issued on May 14, 2004. That order included a section that described how the health insurance of each party and their children was to be provided.

The Respondent has now filed a motion for the reimbursement of out of pocket medical expenses, reimbursement for medical insurance premiums, and for attorney's fees under this provision. The Respondent argues that the language in the decree dissolving their marriage supports his interpretation. The Petitioner disagrees and has filed a counter motion requesting that certain property that was omitted from the original order be given to her.

The relevant portion of the marital dissolution order reads:

> The Petitioners currently has health and dental insurance coverage through the SMSDC for herself, the Respondent, and the minor children. The Petitioner has agreed to maintain coverage for herself and the Respondent through the SMSDC and she further agrees to continue to pay monthly insurance premiums to continue to cover the Respondent for a period of ten (10) years starting March 1, 2004. This coverage shall continue to be provided through SMSDC for as long as Petitioner is able to provide that coverage, and thereafter, through private health insurance coverage that is comparable to the coverage now in place. The Respondent has agreed to cooperate with the Petitioner so as to obtain such coverage that is the most reasonably priced coverage available and comparable to the coverage now in effect. In the event the Respondent becomes employed or has access to other comparable insurance, he has agreed to obtain said coverage and any

> costs associated with that not paid by an employer shall be paid by the Petitioner during the ten (10) year period referenced in this Judgment and Decree. The parties have further agreed that each will pay their own uninsured medical and dental expenses themselves, and any uninsured expenses for the minor children shall be paid by the Petitioner.

The Court disagrees, in part, with Respondent's reading of this section. The fairest way to read this section is to conclude that the Petitioner must pay Respondent's medical insurance premiums, if any insurance is in place, but that otherwise, each party is responsible for their own uninsured medical costs. This reading is supported by the fact that the second sentence and the second to last sentence state that Petitioner's obligation is to pay the insurance premiums of the Respondent. These sentences do not impose an obligation on the Petitioner to find insurance for the Respondent, or to make sure the Respondent always maintains his insurance. Instead these sentences only impose an obligation to pay insurance premiums on insurance that is in place. The last sentence then specifically states that uninsured costs are to be borne by each party.

The Respondent in this case was without insurance for a period of time. He argues that the Petitioner was responsible for a lapse in his insurance, and that under this section she must pay his uninsured medical costs from the period of the lapse, and that she must pay his uninsured costs under his new medical insurance. Such a reading cannot be supported by the language of this section. The section clearly states that each party is to pay their own uninsured medical expenses, and there is no obligation imposed on the Petitioner to make sure the Respondent maintains his insurance.

In addition, there is nothing in the record that indicates the Petitioner caused Respondent's insurance to lapse by some act of bad faith or malice. In fact, in an affidavit attached to his motion, Respondent alleges that the Community failed to notify him that his insurance was running out, and when he complained about the lack of notice, the Community extended his insurance for another six months. Respondent claims that at the end of this six month period, the Community did not re-notify him about his insurance lapsing and the Petitioner did not assist him in finding new insurance. However, once the Community terminated his insurance the first time, and told him it would extend his insurance for only six months, the Respondent had more than adequate notice that he should make sure he had new insurance. There is nothing in the May 14, 2004 order that imposes upon the Community or the Petitioner an obligation to insure that the Respondent sought out and enrolled in a new insurance program.

The Respondent's motion for coverage of his out of pocket expenses and his uninsured medical costs is denied. However, the Petitioner must continue to pay any insurance premiums on any insurance the Respondent obtains for the remainder of the period stated in the May 14th order.

The parties also dispute who should receive a piece of property that was omitted from the original property division. Normally, this Court can only modify an order dividing martial property if a motion is brought within one year of the order, which is clearly not

the case here. SMS(D)C Domestic Relations Code, Chap. III, Section 5(g). However, since this property was never included in the original order, this is not actually a motion to modify an existing property division. It is not as if the parties here are attempting to undo a previously settled decision by this Court. Instead they are looking to this Court for guidance on what is essentially a new issue, so that the time limit in Section 5(g) does not apply.

Respondent argues that the pontoon boat in question should be his because it was an upgrade from an earlier boat that had originally been a gift from the Petitioner. The trail the Respondent attempts to trace is too long. The Petitioner bought the pontoon boat, has kept the boat since the divorce four years ago, and she should keep it now. The Respondent also conceded at the hearing on this motion that the Petitioner should be able to keep the jet skis. The Petitioner's motion to amend the divorce decree to reflect her continuing possession and sole ownership of the pontoon boat is granted, and the decree is also amended to reflect her possession and sole ownership of the jet skis.

Both sides have requested attorney's fees for litigating these motions. Parties to a lawsuit normally bear their own costs and fees. Little Six, Inc. v. Prescott and Johnson, 1 Shak. A.C. 157 (Feb. 1, 2000). Neither party has presented evidence compelling enough to upset this presumption. Each party is to bear these own fees and costs for this litigation.

**IT IS HEREBY ORDERED:**

1. That the Respondents relief requested is **DENIED.**

2. That the Petitioner's motion to amend the divorce decree to reflect her continuing possession and sole ownership of the pontoon boat and jet skis is **GRANTED.**

3. The Respondent will do all that is necessary to provide a clear title to such property in the name of the Petitioner.

4. The request for attorney's fees and costs by both party's is **DENIED.**

Date: 9/5, 2007

Henry M. Buffalo Jr.
Judge

**TRIBAL COURT**
**OF THE**
**SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY**

**COUNTY OF SCOTT** **STATE OF MINNESOTA**

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In re the Marriage of

Wesley Eugene Brooks,

Petitioner,

And

Court File No. 575-07

Tara Lynn Corwin,
(f/k/a/ Tara Lynn Corwin-Brooks)
Respondent.

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**Memorandum Decision, Amended Findings of Fact, Conclusions of Law, and Judgment and Decree**

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In this marriage dissolution matter, the Court entered a Memorandum Decision, Findings of Fact, Conclusions of Law, and Judgment and Decree on September 6, 2007. Thereafter, the Petitioner moved the Court to amend its Findings of Fact, Conclusions of Law, and Judgment in three general respects. The Respondent opposed the motion, and on October 2, 2007 the Court heard oral argument on the motion. At the close of oral argument, the Court ruled from the bench with respect to two aspects of the Petitioner's motion, pertaining to certain vehicle payments and to certain credit card debt, but reserved ruling on the third, pertaining to an award of attorneys' fees, pending the results of legal research. The Court now memorializes its first two rulings, making certain amendments to its Findings and Conclusions pertaining to the vehicle payments and

credit card debt; and the Court declines to amend its previous ruling with respect to attorneys fees, for the reasons discussed below.

**Vehicle Payments.** In his motion, the Petitioner contended that the Court erred in its Findings concerning the manner in which per capita payments are used to make payments on three vehicles – a 2005 Cadillac Escalade EXT, a 2005 Dodge Dakota pickup, and a 2006 Harley-Davidson Screaming Eagle motorcycle. In Findings No. 14, 17, and 18 the Court found that the monthly payments for those vehicles was made "from an account that [the Petitioner] maintains at the South Metro Credit Union". The Petitioner argued that the payments are in fact made to the South Metro Credit Union (which financed the vehicles' purchase) by virtue of an assignment that the Petitioner has directed the Shakopee Mdewakanton Sioux Community to make.

The Petitioner was correct: the record of the trial in this matter reflects that the payments are made by the Community to the South Metro Credit Union, and the Court will correct its Findings of Fact accordingly.

However, the Petitioner also contended that, by virtue of the error in the Findings, the Court effectively overstepped its authority when it directed that the vehicle payments continue to be made. The Petitioner observed that the Court lacks authority, under the Domestic Relations Code of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"), to direct the Community to make per capita payments for any purposes other than for child support; and the Petitioner suggested that the effect of the Court's September 6, 2007 Order was to improperly direct the Community to make the Petitioner's car payments.

But, as the Court observed when it ruled from the bench on the Petitioner's motion, the Court did not direct the Community to do anything with the Petitioner's per capita payments, in its September 6, 2007 Order. The Court ordered the Petitioner to continue to make the payments – which surely is something that is within the power that the Community gave to the Court when it adopted the Domestic Relations Code.

Accordingly, although the Court will clarify Conclusions of Law numbers 6.a., 6.b., and 6.c., the Court will not otherwise amend the Order relating to the legal obligation of the Petitioner to pay the amounts owing on the vehicles in question.

**Credit Card Debt.** The Petitioner argued that the effect of the Court's September 2, 2007 Order was to give him responsibility for certain credit card debt that the Respondent incurred following the filing of the instant proceedings. That was not the Court's intent. Accordingly, as the Court indicated on the record at the close of oral argument on October 2, the Findings and Conclusions will be amended to allocate equally between the parties the consumer debt that was incurred prior to the date of the commencement of these proceedings.

**Attorneys fees.** Finally, the Petitioner argued that the Court did not make Findings of Fact that would legally justify the award to the Respondent of a portion of her attorneys fees. In Conclusion of Law No. 10, the Court awarded the Respondent $6,500 in attorneys fees – in addition to $1,000 in fees that were incurred in connection with the Petitioner's contempt of court – which represented approximately one-half of her fees

(and which, in dollar terms, was reduced by $2,500 that the Petitioner had paid for the Respondent's car insurance). In Conclusion of Law No. 10, the Court said –

> Because the Petitioner 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, the Court has concluded that it is appropriate to award the Respondent a portion of her attorneys fees.

The Petitioner, in the brief in support of his motion and in oral argument, contended that the Court's award was not tied to any particular aspect of the Respondent's attorney's itemized bills. He argued that those itemized bills do not indicate that the Petitioner's absence obliged the Respondent's counsel to spend more time on this litigation than she otherwise would have, and that unless the Court could tie its award to some such specific additional burden, the decision to award the fees was improper.

The Court disagrees. This matter was unusually difficult to litigate, for the Petitioner's legal counsel, the Respondent's legal counsel, and the Court, in substantial part because after the Petitioner filed the case he disappeared, fleeing from law enforcement authorities. He therefore was unavailable to participate in discovery that could have served to make a factually tangled case less problematic. Typically, mediation would be a logical course for the parties and the Court to consider in proceedings of this type, but that was obviously not possible here because the Petitioner was either on the run or in custody. (And it is worth noting that, before the Petitioner was apprehended, he clearly was aware of the manner in which this case was moving forward, because his legal counsel was able to speak with him by telephone.)

This Court has adopted, for many purposes, the Federal Rules of Civil Procedure; and for federal courts, the Supreme Court of the United States has said this about fee-shifting:

> Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' 6 J. Moore, Federal Practice 54.77(2), p. 1709 (2d ed. 1972); see, e.g., Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 n. 4, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968); Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962); Bell v. School Bd. of Powhatan County, 321 F.2d 494 (CA4 1963); Rolax v. Atlantic Coast Line R. Co., 186 F.2d 473 (CA4 1951). In this class of cases, the underlying rationale of 'fee shifting' is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant.

*Hall v. Cole*, 412 U.S. 1, at 5 (1973).

With this authority in mind, it was and is the Court's conclusion that the Petitioner's behavior justifies the shifting, for punitive purposes, of one half of the Respondent's attorneys fees to the Petitioner.

**Amended Findings of Fact, Conclusions of Law, and Judgment and Decree**

For the foregoing reasons, and based upon all the pleadings and materials herein, **Findings of Fact numbers 14, 17, and 18 are amended as follows:**

14. Prior to the parties' marriage the Petitioner transferred title to the 2005 Cadillac Escalade EXT vehicle to Respondent. Thereafter, throughout the time following the purchase, to and including the time of trial, the Petitioner has made monthly payments for the vehicle by way of assignment, directly taken by the Shakopee Mdewakanton Sioux

Community from the Petitioner's per capita payment proceeds and sent to the South Metro Federal Credit Untion, the bank that financed the purchase of the vehicle.

17. Throughout the time following the purchase of the motorcycle that is the subject of Finding No. 16, to and including the time of trial, the Petitioner has made monthly payments for the motorcycle by way of assignment, directly taken by the Shakopee Mdewakanton Sioux Community from the Petitioner's per capita payment proceeds and sent to the South Metro Federal Credit Union, the bank that financed the purchase of the motorcycle. The Court finds that, prior to the parties' marriage, the Petitioner intended to give title of the motorcycle that is the subject of Finding No. 16 to the Respondent, while retaining any debt owing on the motorcycle as his own.

18. On Father's Day, 2005, the Petitioner purchased a 2005 Dodge Dakota pickup truck. Title to the truck was placed in TLC Design. The Respondent testified at trial that 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. In purchasing the vehicle the Petitioner used a vehicle that he owned but that was encumbered beyond its value, and a vehicle that the Respondent owned. Throughout the time following the purchase

of the truck that is the subject of this Finding, to and including the time of trial, the Petitioner has made monthly payments for the truck by way of assignment, directly taken by the Shakopee Mdewakanton Sioux Community from the Petitioner's per capita payment proceeds and sent to the South Metro Federal Credit Union, the bank that financed the purchase of the truck. The Court finds that, prior to the parties' marriage, the Petitioner intended to give title of the vehicle that is the subject of this Finding No. 18 to the Respondent, while retaining any debt owing on the vehicle as his own.

For the foregoing reasons, and based upon all the pleadings and materials herein,

**Conclusions of Law numbers 6.a., 6.b., and 6.c. are amended as follows:**

6. **Vehicles.**

a. The 2005 Cadillac EXT vehicle is solely the property of the Respondent; but the debt owing on the 2005 Cadillac EXT vehicle is solely that of the Petitioner. The allocation of this debt to the Petitioner is not an award of the Petitioner's "per capita payments", inasmuch as the Court's order does not direct the Shakopee Mdewakanton Sioux Community to continue to make the vehicle payments, but instead directs to the Petitioner to do so.

b. The 2006 Harley Davidson Screaming Eagle Motorcycle that is the subject of Finding No. 16 is solely the property of the Respondent, but

the debt owing on the motorcycle is solely that of the Petitioner. The allocation of this debt to the Petitioner is not an award of the Petitioner's "per capita payments", inasmuch as the Court's order does not direct the Shakopee Mdewakanton Sioux Community to continue to make the vehicle payments, but instead directs to the Petitioner to do so.

c. The pickup truck that is the subject of Finding No. 18 is solely the non-marital property of the Respondent but the debt owing on the vehicle is solely that of the Petitioner. The allocation of this debt to the Petitioner is not an award of the Petitioner's "per capita payments", inasmuch as the Court's order does not direct the Shakopee Mdewakanton Sioux Community to continue to make the vehicle payments, but instead directs to the Petitioner to do so.

For the foregoing reasons, and based upon all the pleadings and materials herein,

**Conclusion of Law No. 9.c. is amended as follows:**

9. **Debts.**

...

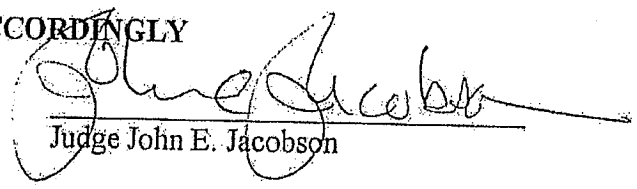
c. The consumer debts listed in Finding No. 28.c. that were incurred prior to February 23, 2007, when this matter was filed, are the joint and several responsibility of the parties. Debts incurred thereafter are the sole responsibility of the party that incurred them.

...

For the foregoing reasons, and based upon all the pleadings and materials herein, the remainder of the Petitioner's Motion is **DENIED.**

**LET JUDGMENT BE ENTERED ACCORDINGLY**

October 15, 2007



Judge John E. Jacobson

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT — STATE OF MINNESOTA

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|---|---|
| Joanna Byrant and Bryan Rouse,<br>Plaintiffs,<br>vs.<br>Anderson Air, Inc.,<br>Defendant. | Court File No. 580-07 |

**Memorandum Opinion and Order**

**Introduction**

This case is before the Court on Defendant Anderson Air's motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim on which relief can be granted. Joanna Bryant and Bryan Rouse, who reside on lands held in trust by the United States for the Shakopee Mdewakanton Sioux (Dakota) Community, sued Anderson for breach of contract, breach of warranty, and negligence.[1] All three causes of action allegedly arose from Anderson's faulty installation of in-floor heating in plaintiffs' house under a contract between Anderson and the plaintiffs' general contractor, Performance Construction.

[1] Complaint at ¶ 1.

Anderson argues that this Court lacks jurisdiction over plaintiffs' claims because the underlying contract is between two non-Indian parties, Anderson and Performance. Anderson further asserts that because plaintiffs are neither parties to nor beneficiaries of the contract between Anderson and Performance, they have failed to state a claim on which relief can be granted. Finally, Anderson argues that because plaintiffs are engaged in arbitration against Performance over the same issues raised by their complaint here, they should be estopped from suing over those claims in this Court. For the reasons set forth below, the Court finds that it possesses subject-matter jurisdiction over the plaintiffs' claims, that Anderson has not met the standards for dismissal for failure to state a claim on which relief can be granted, and that this matter should be stayed pending the outcome of the plaintiffs' arbitration with Performance.

**Subject Matter Jurisdiction**

Under Tribal law, this Court has jurisdiction over "all civil causes of action arising on land subject to the jurisdiction of the [Community]."[2] And while Anderson may be correct that the contract between Anderson and Performance—under which Anderson performed work on plaintiffs' house—was between non-Indians and not executed on Community lands, the *causes of action* pleaded by plaintiffs—breach of that contract, breach of warranty, and negligence—did allegedly take place on

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[2] SMS(D)C Resolution No. 11-14-95-003, § I. Lands subject to the jurisdiction of the Community include lands held in trust by the United States for the Community. *Id.*

Community lands.[3] Thus, plaintiffs have pleaded causes of action that fall within this Court's subject-matter jurisdiction.[4]

**Failure to State a Claim upon which Relief Can be Granted**

Dismissals for failure to state a claim are "not favored"[5] and are "appropriate only if there is no reasonable view of the facts alleged" that would support the plaintiffs' claims.[6] In considering a motion to dismiss for failure to state a claim, "the Court assumes all the facts alleged in the complaint are true and views the allegations in the light most favorable to the plaintiff."[7] Generally, in considering a motion to dismiss for failure to state a claim, the Court will look only at the plaintiffs' pleadings to determine whether they are sufficient to state a claim.[8]

Plaintiffs have alleged three causes of action against Anderson. First, they allege that they were third-party beneficiaries of a contract between Anderson and the

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[3] Complaint at ¶¶ 1, 3.

[4] Anderson asserts that because the contract under which it performed the work at plaintiffs' home was between non-Indians, the Court lacks subject-matter jurisdiction under *Culver Security Systems, Inc. v. Little Six, Inc.*, 1 Shak. T.C. 156 (June 14, 1994). In *Culver*, the Court ruled that it lacked jurisdiction over a breach-of-contract dispute between two non-Indians that did not affect the Community or Community members. *Id.* at 164. But this Court's subject-matter jurisdiction was expanded after the *Culver* decision by Resolution 11-14-95-003, quoted above, and plaintiffs' claims fit within the Court's expanded jurisdictional mandate.

[5] *Crooks v. Shakopee Mdewakanton Sioux (Dakota) Community*, 4 Shak. T.C. 92, 93 (Oct. 31, 2000) (internal citations omitted).

[6] *Smith v. Shakopee Mdewakanton Sioux (Dakota) Community*, 1 Shak. A.C. 62, 64 (Aug. 7, 1997) (citing *Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc.*, 988 F.2d 1157 (Fed. Cir. 1993)).

[7] *Crooks*, 4 Shak. T.C. at 93 (citing *Welch v. Shakopee Mdewakanton Sioux (Dakota) Community*, 2 Shak. T.C. 112 (Feb. 7, 1996), *aff'd*, 1 Shak. A.C. 42 (Oct. 14, 1996)).

[8] 5B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 1357 (3d ed. 2004).

general contractor they hired, Performance Construction, and that Anderson breached that contract.[9] Anderson argues that plaintiffs were not third-party beneficiaries of the contract because they can meet neither the "duty owed" nor the "intent-to-benefit" tests for determining when a party is a third-party beneficiary under Minnesota law.[10]

In Minnesota, one claiming to be a third-party beneficiary must show that the contract "express[es] some intent by the parties to benefit the third party through contractual performance" or "that the promisor's performance under the contract [discharges] a duty otherwise owed the third party by the promisee."[11] Anderson may be correct that plaintiffs cannot meet either of these tests. But the Court cannot determine that based on a review of the pleadings alone.

Anderson submitted a copy of the Anderson-Performance contract with its motion to dismiss. And while the Court could consider a contract whose authenticity was unquestioned if it were "integral to the complaint,"[12] as the Anderson-Performance contract is, Anderson itself alleges that the contract contains some terms

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[9] Complaint, ¶ ¶ 13-15.

[10] Anderson's Memorandum in Support of Motion to Dismiss at 5. The Community has no law on third-party beneficiaries, and the Court may look to common law in other jurisdictions, like Minnesota, for guidance. SMS(D)C Resolution No. 11-14-95-003, § V.

[11] *Cretex Cos., Inc. v. Constr. Leaders, Inc.*, 342 N.W.2d 135, 138 (Minn. 1984). (holding that third-party beneficiaries need only meet the duty-owed *or* the intent-to-benefit test to demonstrate third-party beneficiary status, but not both).

[12] *Streit v. Bushnell*, 424 F. Supp. 2d 633, 639 (S.D.N.Y. 2006) (discussing standards of review for Rule 12(b)(6) motions). *See also In re K-Tel Int'l, Inc. Sec. Litig.*, 300 F.3d 881, 889 (8th Cir. 2002) ("The court may consider, in additional to the pleadings, materials 'embraced by the pleadings' and materials that are part of the public record.") (internal citations omitted).

that were unwritten, so its contents have yet to be determined.[13] For the present, plaintiffs have pleaded that a contract exists, that they are third-party beneficiaries of the contract, and that the contract was breached, causing them damages. In short, they have properly pleaded their claim, and it cannot be dismissed for failure to state a claim.

Plaintiffs' second cause of action is for breach of warranty,[14] a claim Anderson doesn't mention in its motion to dismiss. This Court has previously permitted a breach-of-warranty claim to go to trial,[15] and Minnesota courts have recognized a common-law cause of action for breach of an implied warranty of fitness for a particular purpose. In *Robertson v. Stephen Farmer's Co-op*, a farmer's co-op hired a lumber company to build a storage facility, which subsequently collapsed due to "the selection of inappropriate material and faulty design."[16] The Minnesota Supreme Court found:

> This we believe to an appropriate case for extending to construction contracts the doctrine of implied warranty of fitness for the purpose, under circumstances where (1) the contractor holds himself out, expressly or by implication, as competent to undertake the contract; and the owner (2) has no particular expertise in the kind of work contemplated; (3) furnishes no plans, design, specifications, details, or blueprints; and (4) tacitly or specifically indicates his reliance on the

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[13] *See* Aff. of Don Anderson at ¶ 4. The Court makes no finding regarding the contents of the contract between Anderson and Performance.
[14] Complaint at ¶¶ 10-12.
[15] *Florez v. Jordan Constr. Co.*, 4 Shak. T.C. 124, 130 (Jan. 15, 2002) (denying contractor's motion for summary judgment on breach-of-warranties claim brought by homeowner).
[16] 143 N.W.2d 622, 625 (Minn. 1966).

> experience and skill of the contractor, after making known to him the specific purposes for which the building is intended.[17]

At least one Minnesota court has subsequently concluded this implied warranty extends to renovations in an existing house, such as those at issue here.[18] Given this, and plaintiffs' allegations that Anderson made and breached warranties to them, Anderson has not shown that plaintiffs cannot prevail on a breach-of-warranty claim.

Plaintiffs' final cause of action is for negligence.[19] Anderson doesn't address this cause of action in its motion to dismiss, either. But common-law negligence claims against builders are not unusual, and are not mutually exclusive of warranty claims.[20] To establish a claim for negligence, a plaintiff must demonstrate that the defendant (1) owed her a duty, (2) breached that duty, (3) that the defendant's breach was the proximate cause of the plaintiff's injury, and (4) that she suffered actual injury.[21] In this case, the plaintiffs have alleged that Anderson Air owed them a duty to construct their home in a manner consistent with sound construction practices, and that Anderson breached that duty, causing them damages. They have properly pleaded the claim, and it therefore withstands the motion to dismiss.

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[17] *Id.* at 626.
[18] *Northwood Log Homes v. Davies*, No. C7-91-1111, 1991 WL 238323 (Minn. Ct. App. Nov. 19, 1991).
[19] Complaint at ¶¶16-18.
[20] *See, e.g., Marshall v. Marvin Anderson Constr.*, 167 N.W.2d 724, 727 (Minn. 1969).
[21] *See Kostelnik v. Little Six, Inc.*, 1 Shak. A.C. 92 (Mar. 17, 1998); *Van Zeeland v. Little Six, Inc.*, 4 Shak. T.C. 153 (Nov. 25, 2002).

## Conclusion

The Court has subject-matter jurisdiction to hear plaintiffs' claims because they allegedly arose on lands held in trust for the Community by the United States. The fact that one of the plaintiffs' causes of actions is based on a contract executed between non-Indians on lands outside the Court's jurisdiction is not relevant to the Court's analysis because Anderson's alleged breach of the contract took place within the Court's jurisdiction. Furthermore, dismissal for failure to state a claim upon which relief can be granted is not warranted in this instance because plaintiffs have properly pleaded their causes of action.

In addition to moving to dismiss for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted, Anderson also argued that plaintiffs should be estopped from bringing their causes of action because they are already seeking relief against the general contractor, Performance, on similar claims in arbitration. In response, plaintiffs agreed that it would be appropriate for the Court to stay this matter pending the outcome of the arbitration proceedings they initiated. The Court agrees.

## Order

1. Anderson Air's motion to dismiss is denied.

2. Proceedings in this matter are stayed until plaintiffs obtain a final decision in or settle the arbitration proceedings they initiated against Performance Construction.

3. Plaintiffs must notify the Court and Anderson Air within five days of receiving an arbitration award or signing a settlement agreement in the arbitration proceedings between plaintiffs and Performance Construction. Upon receipt of the notice, the Court will schedule a status conference in this case.

November 6, 2007

Vanya Hogen

Judge Vanya S. Hogen

**TRIBAL COURT**
**OF THE**
**SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY**

**COUNTY OF SCOTT** **STATE OF MINNESOTA**

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In re the Marriage of

Jeannie Marie Ross,

Petitioner,

and

Christopher A. Fields,

Respondent.

Court File No. 384-99

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**Memorandum Decision and Order**

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On January 4, 2008, the Court received a letter from the Respondent, Christopher A. Fields, reporting on the present status of [redacted] the Petitioner's son whose legal and physical custody was given to the Respondent by the Court in previous proceedings. At the same time, the Director of Social Services of the Shakopee Mdewakanton Sioux Community ("the Community") forwarded to the Court, at Mr. Fields' request, a report from the Waylusing Academy at Prairie du Chien, Wisconsin, where [redacted] presently is staying, receiving therapy, and attending school. The Academy's report detailed [redacted] present needs and suggested possible course of treatment and care for the future. Because Mr. Fields' letter proposed disbursements from the trust account established for [redacted] benefit by the Community, the Court treated the letter as a petition under section

14.6.A. of the Gaming Revenue Allocation Amendments to the Community's Business Proceeds Distribution Ordinance, Ordinance No. 10-27-93-002.

The Court held two hearing on Mr. Fields' petition. At the conclusion of the first hearing, on January 22, 2008, the Court asked Mr. Fields to meet with representatives of the Community to discuss the particulars of his petition. Those discussions took place, but they did not lead to a meeting of minds, and so during the second hearing, on February 4, 2008, the Court took sworn testimony from Mr. Fields and from Ms. Kim Goetzinger, the Community's Director of Social Services, and the Court heard argument from Mr. Fields and the Community's legal counsel with respect to the appropriateness of Mr. Fields' request.

Mr. Fields testified that he sought a monthly disbursement from [redacted] trust account in the amount of $2,653.00 (his January 4, 2008 letter stated that he sought that amount on a weekly basis, but during the February 4 hearing he informed the Court that this was a typographical error). He stated that he sought $560.00 per month for gasoline, for trips to visit [redacted] at Waylusing Academy and to bring [redacted] from the Academy to the Twin Cities for weekend visits; he sought $439.00 per month for oil changes, $100.00 per month for general upkeep on his vehicle, $714.00 per month for lodging while at Prairie du Chien, $540.00 per month for food while traveling, $150.00 per month for "family entertainment", and $150.00 per month for child care for [redacted] the son of Mr. Fields and the Petitioner.

The Community opposed all of these requests, stating both that many of them seemed unduly large and also that, in any case, this Court's March 28, 2000 Order awarded generous child support to Mr. Fields for a number of purposes that no longer are

applicable, in light of [redacted] present circumstances, and that those now-surplus sums should be more than sufficient to cover the expenses that Mr. Fields may incur, for visitation and transportation, while [redacted] is at Waylusing Academy.

The Court agrees with the Community.

When the Court gave custody of [redacted] to Mr. Fields it gave him a very substantial upward deviation from "guidelines" child support, expressly because the Court was convinced that providing for [redacted] needs would require certain specific, regular, and substantial monetary outlays. In its March 28, 2000 Order, the Court awarded Mr. Fields $1,600.00 per month for therapy requirements for [redacted] $400.00 per month for [redacted] school needs and allowances; $200.00 per month in child care for [redacted] (together with $800.00 per month for [redacted]; $400.00 per month for recreation, entertainment and travel; $456.00 per month for automobile insurance, maintenance, gas and license fees; and $600 per month for food. In addition, the Court awarded substantial sums for Mr. Fields' residential mortgage, taxes and insurance, utilities, clothing, home maintenance, and personal items, because the Court concluded that Mr. Fields' would be required to be a constant presence in [redacted] life. In total, as matters stand, Mr. Fields receives in excess of $92,000 per year in child support. (After the Court entered its March 28, 2000 Order, the General Council of the Community amended the Community's Domestic Relations Code, limiting the extent to which the Court could upwardly deviate from its child support guidelines, and authorizing persons in the Petitioner's situation to seek a reduction from previous upward deviations; but the Petitioner never has sought such a reduction, so support in this matter continues to be paid in the amount originally ordered).

During the January 22 and February 4, 2008 hearings on Mr. Fields' Petition, the Court received evidence to the effect that all of [redacted] expenses at the Waylusing Academy – all his therapy, education, and health care expenses – are presently being paid by the insurance that [redacted] has through the Community. The Court also received evidence to the effect that the Academy will arrange and pay for [redacted] transportation for visits home. (Home visits, at this point, would occur one per month, although that could increase to two per month if [redacted] earns the extra visit through his participation and cooperation with the Academy's program). Hence, substantial amounts that Mr. Fields receives as child support for particular purposes – the $1,600.00 per month for [redacted] therapy, the $400.00 per month for [redacted] school needs and allowance, the $200.00 per month for [redacted] child care – clearly are not needed at present for those purposes; and necessarily some portion of other amounts, such as the $800.00 per month for [redacted] child care, $400.00 per month for general recreation, entertainment and travel, and $600 per month for food, probably are not be required at the moment because [redacted] is not now present in the home. So, in the Court's view, withdrawing any amount from [redacted] trust account would not be "necessary and appropriate", as that phrase is used in section 14.6.A. of the Community's Gaming Revenue Allocation Amendments to the Community's Business Proceeds Distribution Ordinance.

**ORDER**

For the foregoing reason, the Petition by Christopher A. Fields for disbursements from the trust account of [redacted] is DENIED.

February 18, 2008

Judge John E. Jacobson

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



David A. Kochendorfer,

Employee,

vs.

Shakopee Mdewakanton Sioux Community

Employer,

and

Berkley Risk Administrators Company,

Administrator.

Worker's Compensation Appeal
Court File No. 603-08

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The Appellant, David A. Kochendorfer, was employed by the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community") as a carpenter. During his employment, he sustained two injuries to his back. On December 4, 2006, he was struck on the back by the metal door of a dumpster and was unable to work for a period of approximately two and one-half months. He returned to work on February 20, 2007, and on that day was again injured while he was lifting heavy furniture. Thereafter, he was seen by a number of health care providers, some of whom fell within the definition on an approved "health care provider" under section D.5. of the Workers' Compensation Ordinance of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Ordinance"), and some of whom did not. During the Appellant's course of treatment, disagreements arose between him and some of the medical professionals who were treating him. Eventually, the Administrator discontinued payment of his benefits, asserting that (i) the Appellant had failed to cooperate with reasonable medical or vocational rehabilitation as required by section D.3.d.5 of the Ordinance, and (ii) that the pain the Appellant was experiencing was due to a pre-existing condition and therefore was excluded from compensation under section C.3.n. of the Ordinance. Then, in June, 2007, the Appellant's employment was terminated by the Community on the grounds of misconduct, and thereafter the Administrator asserted that compensation also should be denied because of that misconduct, under section D.3.d.2 of the Ordinance.

The Appellant sought review of the Administrator's decisions before a Hearing Examiner, under section F.7. of the Ordinance. The Hearing Examiner elected to review the matter based on the written record, without conducting a hearing, as is her prerogative

under the Ordinance, and on August 22, 2007 she affirmed the Administrator's denial of benefits. She concluded that the Appellant's ongoing pain was a result of a pre-existing condition, and therefore she did not reach either the issue relating to the Appellant's alleged failure to cooperate with a reasonably rehabilitation program or the issue relating to his termination for misconduct. The Hearing Examiner said:

> The findings on the [Appellant's] 12-6-06 MRI, which predate the 2-20-07 injury, as well as the findings on the 3-13-07 MRI clearly show preexisting degenerative conditions in Employee's lumbar spine. No acute vertebral fractures were seen on either MRI. The pre and post 2-20-07 MRI's are virtually identical though the written descriptions in the reports vary slightly due to the wording choices of the physicians reading the films.
>
> Dr. Sherman his [sic] 5-9-07 report opined that Employee has preexisting conditions in the lumbar spine which may have been aggravated on 2-20-07 causing symptoms of pain. This opinion is consistent with the MRI findings noted above.
>
> In light of the Employee's preexisting underlying degenerative conditions of the lumbar spine and the clarity of Ordinance C.3.n., Employee's claim is denied and the Claim Petition is dismissed.

From this decision, the Appellant filed a timely appeal with this Court under section F.8. of the Ordinance, but for reasons that are not altogether clear the record in this matter was not forwarded to the Court until January 24, 2007.

The record on appeal is fairly voluminous. It is comprised of medical records from a number of the persons and entities with whom the Appellant consulted, correspondence between the Appellant and the Administrator, and the Appellant's affidavits and argument concerning those other documents.

Having reviewed the record, the Court must observe that the Appellant's affidavits and arguments are in many places very difficult to follow. But it is at least clear that he contends that the pain he experienced after February 20, 2007 was not a result of a pre-existing condition, and that he did not fail to comply with reasonable rehabilitative requirements.

The Court's role in an appeal of this sort is limited. Under the Ordinance, the Court cannot reverse the Hearing Examiner's factual findings. Section F.8. of the Ordinance provides:

> ***F.I. Appeal.*** There shall be no further review of factual decisions made by a hearing examiner. A decision by a hearing examiner concerning legal issues, whether the result of an evidentiary hearing or more, may be appealed by either party to the Shakopee Mdewakanton Sioux (Dakota) Judicial Court. The appeal must be filed with the Judicial Court in writing within 30 days of the date of the

appeal and shall be served on all parties. The Judicial Court may remand the matter to the hearing examiner for additional factual determinations if the Judicial Court determines that the factual record is inadequate. The decision of the Judicial Court shall be final.

However, the Court does have the authority and the responsibility to review the Hearing Examiner's conclusions of law, and as is noted above, has the authority to "remand the matter to the hearing examiner for additional factual determinations if the Judicial Court determines that the factual record is inadequate".

Upon due consideration, the Court has concluded that a remand in this matter is appropriate, because although the Hearing Examiner found that the Appellant's condition, as shown in the two MRI's, did not appreciably change from December, 2006 to March, 2007, the Hearing Examiner did not, in the Court's view, make sufficiently specific findings that tie the Appellant's pre-existing condition to the pain that the Appellant assertedly experienced after February 20, 2007. In addition, in the Court's view, the Hearing Examiner and the Administrator appear to have ignored a pertinent provision of the Ordinance. Section C.4. of the Ordinance provides:

> *C.r. Coverage in Cases of Prior or Subsequent Injuries.* In cases of multiple personal injuries, if an injury sustained during the course of employment with an Employer is the material or principal cause of the Employee's disability or need for medical treatment, the Employer shall be liable for all benefits to which the Employee may be entitled under this Ordinance. If an injury sustained during the course of employment with an Employer is not the material or principal cause of the Employee's disability or need for medical treatment, the Employer shall not be liable for any benefits under this Ordinance. In the event of a dispute concerning apportionment, a neutral physician shall be appointed by the Administrator, and the opinion of the neutral physician shall be binding on the Employee and the Employer.
>
> (Emphasis supplied).

Here, the Court is of the view that the pre-existing condition that the Hearing Examiner found, based upon her review of the Appellant's MRI's, should be interpreted as a prior "injury". Therefore the Administrator should have appointed a "neutral physician" to examine the Appellant and his medical records to determine whether, given the Appellant's pre-existing condition as it is revealed by the MRI's and other evidence, the pre-existing condition "is the material or principal cause of the Employee's disability".

The Court therefore remands this matter to the Administrator with instructions that a neutral physician be appointed to make that determination. If that physician's concludes that, in fact, the Appellant's February 20, 2007 injury likely was not "the material or principal cause" of his disability, then under the Ordinance this matter is at an end because the neutral physician's findings are "binding on the Employee and the Employer", under section C.4. of the Ordinance. If, on the other hand, the neutral

physician's finding is that the Appellant's pre-existing condition likely is not "the material or principal cause" of his disability, then further proceedings will be necessary before the Hearing Examiner concerning the contentions of the Administrator that were not dealt with in the Hearing Examiner's August 22, 2007 decision.

March 11, 2008

Judge John E. Jacobson

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

| | |
|---|---|
| Tanya Moldenhauer,<br><br>Employee,<br><br>vs.<br><br>Shakopee Mdewakanton Sioux Community,<br><br>Employer,<br><br>and<br><br>Berkley Risk Administrators Company,<br><br>Administrator. | Court File No. 591-07 |

**Memorandum Opinion and Order**

Tanya Moldenhauer suffered a work-related injury while employed by the Community. She was treated for the injury and received workers'-compensation benefits from the Community. A controversy later arose over whether Moldenhauer's continuing symptoms were the result of her work-related injury or a pre-existing back injury. After receiving evidence, including an independent medical examination ("IME"), the Hearing Examiner ruled that Moldenhauer's continuing symptoms were

the result of her pre-existing back injury[1] and therefore not covered by workers'-compensation benefits.[2]

Moldenhauer appealed the Hearing Examiner's ruling to this Court, claiming that she was unrepresented during the Hearing Examiner's review and did not have an opportunity to present testimony demonstrating that her ongoing symptoms (primarily groin pain) arose from her work-related injury rather than her pre-existing back injury. She makes this claim even though the Hearing Examiner gave her the opportunity to present written evidence regarding her groin pain and its source, and she did not present any.[3] The Hearing Examiner determined—because Moldenhauer presented no evidence to contradict the IME findings—that a hearing was unnecessary, and decided the case on the written record.[4]

That decision was well within the Hearing Examiner's discretion. The Workers' Compensation Ordinance provides that a Hearing Examiner's decision on whether to hold a hearing is final,[5] which means it is not appealable here. In fact, this Court's jurisdiction in workers'-compensation appeals is quite limited. The Court is prohibited from reviewing a Hearing Examiner's factual findings, although it can

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[1] Hearing Examiner Findings and Order at 3. The IME was performed by Dr. Thomas Raih, who concluded that Moldenhauer's symptoms were caused by her pre-existing back condition.

[2] *See* Shakopee Mdewakanton Sioux (Dakota) Community Worker's Compensation Ordinance, § C.3 ("No benefits under this Ordinance shall be allowed for any injury or death caused by or arising out of . . . [a] preexisting condition . . .").

[3] Hearing Examiner Findings and Order at 3 ("The Hearing Examiner wrote to the parties on May 21, 2007 requesting that the parties should address [Moldenhauer's] complaints of groin pain and provide any additional information to the Hearing Examiner by 6-8-07. No additional evidence or information was received by the Hearing Examiner . . . .").

[4] *Id.*

[5] Worker's Compensation Ordinance at § F.7 ("The decision of the hearing examiner whether or not to grant an evidentiary hearing on the record shall be final.").

remand a matter to the Hearing Examiner for additional evidence if it determines that the factual record is inadequate.[6] Essentially, then, the Court can only review the Hearing Examiner's legal conclusions.

Moldenhauer has failed to identify any legal issue on which her appeal is based. And while she claims the factual record is incomplete with respect to her groin symptoms, the record demonstrates that she was given an opportunity to supplement the record and did not avail herself of it. This Court has ruled on several occasions that a claimant who fails to make her factual case to the Hearing Examiner cannot use the appeal process to get a second bite at the apple.[7] Moldenhauer's chance to prove that her symptoms derived from her work-related injury was before the Hearing Examiner, and because she missed it, the Court is without authority to overturn the Hearing Examiner's decision.

Accordingly, the decision of the Hearing Examiner is AFFIRMED and Moldenhauer's appeal is DENIED.

So ordered.

March 11, 2008

Vanya S. Hogen, Judge

[6] *Id.*, § F.8.
[7] *See, e.g., David v. Shakopee Mdewakanton Sioux Community*, 4 Shak. T.C. 17, 20 (Nov. 1, 1999); *Brass v. Shakopee Mdewakanton Sioux Community*, 3 Shak. T.C. 39, 43 (Mar. 4, 1997).

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

**COUNTY OF SCOTT** **STATE OF MINNESOTA**

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Shakopee Mdewakanton Sioux Community
Gaming Enterprise,

Plaintiff,

vs. Court File No. 436-00

Leonard Prescott,

Defendant.

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**Memorandum Decision**

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During an April 8, 2008 telephonic scheduling conference, I invited counsel for the parties to submit written comments as to whether I should recuse myself from participating further in this matter[1]. I explained that I recently had learned that Plaintiff's attorneys have begun representing certain parties at the Lower Sioux Indian Community whom I had represented in the recent past, and who I believe my former law firm[2], Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C., continues to represent. I have had no dealings of any sort with Plaintiff's counsel concerning their work at the Lower Sioux Reservation; but I raised the matter because I think it is essential for the

[1] Using the first person pronoun in this opinion, though unusual in judicial writing, will vastly simplify the process of explaining the situation confronting me; I therefore, this once, will employ that odd usage.

[2] At the end of October, 2007, I retired as a shareholder in Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C. I continue, however, to be of counsel to the firm.

functioning of this Court, within the Shakopee Mdewakanton Sioux Community and in the larger world, to have transparency in the Court's business.

In response to my suggestion, Defendant's counsel has submitted two letter briefs, urging me to recuse myself. Neither brief actually discusses the matter which caused me to ask for counsel's views on my continued participation; but the Defendant's arguments and views nonetheless should be addressed.

In the first brief, filed on April 16, 2008, he argues that recusal is appropriate in light of several documents attached to the brief. Among the attachments are materials, of uncertain date but certainly a number of years old, reflecting the then-current staffing of various Tribal Courts in Minnesota (staffing which, as a matter of public record, has significantly changed – Plaintiff's legal counsel no longer sits on any of the Minnesota Tribal Courts). Also among the attachments is a motion that earlier counsel for the Defendant filed with this Court, in 1994, seeking the recusal of all then-sitting judges, in proceedings captioned In re Leonard Louis Prescott Appeal from 7/1/94 Gaming Commission Final Order, Court File No. 041-94.

In his second brief, filed on April 30, 2008 (actually responding to the Plaintiff's Motion for an Order to Show Cause, but also discussing whether any of the Court's judges can properly hear the Motion), the Defendant calls attention to the fact that Judge Vanya Hogen, who joined this Court in February, 2007, represented the Plaintiff, prior to joining the Court, while she was in private practice with the Faegre & Benson law firm. In light of that fact, and given the totality of the circumstances, the Defendant argues that "the current members of the Court cannot possibly claim total independence in this matter", and therefore asks "that this Court not hear Plaintiff's motion or that an outside

Judge be appointed to hear this matter." (Defendant's April 30, 2008 Memorandum in Response to Plaintiff's Motion for Order to Show Cause, at 2 – 3.)

Having reflected on these arguments, I am not without sympathy to the Defendant's views; and if this Court could, in fact, appoint other judges to hear matters of this sort, I might well consider doing so. But neither I nor any other judge of this Court has such power[3], and I therefore am firmly convinced that I should not recuse myself.

In large measure, the Court of Appeals of the Shakopee Mdewakanton Sioux (Dakota) Community dealt with the Defendant's arguments in 1994, in response to the very motion that Defendant's present counsel has attached to his first brief. I think it is worth quoting the Court of Appeals' response to that motion at some length:

> This Court takes very seriously any suggestion that its decisions may be regarded by litigants, or members of the Community, or the public generally, as being biased. But in our admittedly subjective view, that suggestion, in the cases at bar, is unfounded. And, perhaps more compellingly, from an objective standpoint it is pointless, because, as the trial judge correctly concluded, if the judges of this Court do not hear the [Mr. Prescott's] cases, there is no judicial remedy available to [Mr. Prescott] within the Community's government.
>
> It is undeniably true that, for historical and other reasons, the size of the bar which practices for Indian tribes in this nation is relatively small, and attorneys who serve tribes may tend to encounter one another more frequently than, perhaps, attorneys in other areas of practice. It is true that each of the judges of this Court has encountered, and may in the future encounter, in different contexts, the attorneys who serve as counsel for the [Shakopee Mdewakanton Sioux Community Business Council and Gaming Commission]. Neither the judges of this Court nor the attorneys for [the Business Council and Gaming Commission] have attempted to hide this fact. Indeed the facts were the subject of a formal "Letter of Disclosure", dated May 31, 1994, which appears in the record of this matter.
>
> It also bears noting that this phenomenon, where one or more judges has encountered attorneys and parties in other contexts, is not one-sided, in these two cases. One of the judges of the Court, Judge Jacobson, in the past served as co-counsel, for a different client, with one of the attorneys who represents [Mr. Prescott]. And before he was appointed to this Court, Judge Jacobson also

represented [Mr. Prescott] himself, in certain matters unrelated to the facts of these cases. At a different level of connection, two of the judges of this Court, including the trial judge in these cases [Judge Buffalo], were appointed to the Court at a time when [Mr. Prescott] was Chairman of the Community.

But no judge of this Court has evinced any personal bias with respect to any party to these cases. None of the judges of the Court have served as counsel to either party concerning these cases[4], nor are any judges a material witness concerning these cases. And no judge, and no family member of a judge, has any interest in these cases, financial or otherwise. Therefore, there clearly is no requirement that any judge must disqualify himself under the provisions of Rule 32(b) of the Rules of Civil Procedure of the Court of the Shakopee Mdewakanton Sioux Community.

But [Mr. Prescott] asserts that, nonetheless, Rule 32(a) of the Rules, requires each of us to disqualify ourselves, because the impartiality of each of us "might be reasonably be questioned".

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

In re: Leonard Louis Prescott, Appeal from July 1, 1994 Gaming Commission Final Order, and Prescott v. Shakopee Mdewakanton Sioux (Dakota) Community Business Council, 1 Shak. A.C. 11, at 15 – 17 (1995).

The Court of Appeals went on at some length to parse the Community's law with respect to the number of judges who serve on this Court and the manner of their appointment. The opinion concluded that the law is unambiguous: this Court has a maximum of three judges, and neither those judges nor anyone else has the power to appoint additional or ancillary judges for any purpose.

[4] This statement certainly was true in 1995; but as the Defendant notes, with the appointment of Judge Hogen to the Court, it no longer is true; and in ruling as I do with respect to my own continued participation in this matter I express no opinion with respect to the appropriateness of Judge Hogen's participation in any part of these proceedings – and since no aspect of the matter presently is before Judge Hogen, any argument with respect to that question, by any party, is both premature and speculative.

The circumstances that confront me today resemble the circumstances that confronted each of the judges of the Court thirteen years ago: the history of my service as Mr. Prescott's legal counsel is unchanged; the Plaintiff's legal counsel no longer serve as judges for any of the tribes that I or my former firm represent, but the Plaintiff's legal counsel now does represent a party that my former firm also represents; neither I nor anyone else on this Court has the power to appoint additional judges; I have no bias toward or against any party in this matter; I have no financial interest in this matter; and I have not participated as legal counsel with respect to any aspect of this matter.

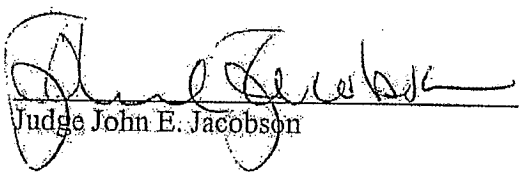
If I were to recuse myself, the Plaintiff's motion necessarily would be heard either by Judge Buffalo, whose relationship to this matter is virtually identical to my own, or by Judge Hogen, who in fact has participated as legal counsel in matters ancillary to this proceeding. Hence, no purpose whatever would be served by my recusal.

Before ending my discussion of this matter, I think it is worth recalling what the Supreme Court of the State of Minnesota said, when it was discussing the necessities that on occasion require judges to decide cases that, in other circumstances, they might wish not to decide:

> ...we must frankly admit that there is such an indirect interest [in the case at bar] that were it possible to do so we should all be happy to declare ourselves disqualified. Nothing is better established than the principle that no judge or tribunal should sit in any case where he is directly or indirectly interested. [citations omitted]. However, this principle must yield to the stern necessities of the case; and when there is no other tribunal that can determine the matter, it is the duty of the Court, which would ordinarily be disqualified, to hear and determine the case, however disagreeable it may be to do so. The judicial function of courts may not be abdicated even on the grounds of interest when there is no other court that can act.
>
> State ex rel. Gardner v. Holm, 62 No.W. 2d 52, at 53-54 (1954).

I do not consider that I have even an indirect interest in this case, and the relationships that I do have, or have had, with the Defendant and with the Plaintiff's counsel, are minimal and will not affect my judgment. Still, for appearances' sake I would dearly love to recuse myself. But the "stern necessities" that confronted the Gardner Court also confront me, and so I will hear the Plaintiff's motion.

May 5, 2008



Judge John E. Jacobson

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



David A. Kochendorfer,

Employee,

vs.

Shakopee Mdewakanton Sioux Community — Worker's Compensation Appeal

Employer,

and

Berkley Risk Administrators Company,

Administrator.

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On April 25, 2008, the Court in this matter ruled that the phrase "neutral physician", as it is used in Section C.4. of the Workers' Compensation Ordinance of the Shakopee Mdewakanton Sioux Community ("the Ordinance"), meant not only that the appointed physician must be "an impartial, licensed, practitioner of medicine, with no active engagement on either side of the dispute in question", but also that the physician "will not be influenced in any way by a relationship with the Community or the Administrator [and therefore] that the physician should not have been employed by the Community in other similar claims". On May 16, 2008, the Administrator filed a Motion for Further Clarification of the Court's order. Specifically, the Administrator asked the following three question:

1. Is the Administrator correct to read a reasonable time limit into the Court's instruction?

2. Is the Administrator correct to interpret the phrase "employed by ... the Administrator" as being limited in scope to the undersigned Claims Examiner, or other person in that position?

3. Is the Administrator correct to interpret the phrase "similar claims" to mean workers' compensation claims involving the Employer?

The Administrator's stated reason for its requests, and for its interpretation, reduced to its essence, involves the scope of the Administrator's business. In the materials that accompanied its motion, the Administrator explained that it "is a very large, nationwide,

risk management company, administering nearly 150,000 property/casualty and workers' compensation claims for more than 50,000 clients annually." (Administrator's May 15, 2008 Motion and Memorandum, at 5.) Under these circumstances, the Administrator asserted, it would be virtually impossible for the claims examiner who administers the Shakopee Mdewkanton Sioux (Dakota) Community's file to ensure that a given physician has not, at some time in the past, performed some service for some other claims examiner, working for a different client, within the Administrator's firm:

> ...If the Court intended its instruction to be broader than the Administrator's reading of the instruction, then the Administrator could conceivably be barred from appointing a physician who has ever been used by the Administrator in any past workers' compensation claim. In that event, the Administrator is concerned that it would be exceedingly difficult, if not impossible, to find such a physician.
>
> Moreover, the Administrator is concerned that it would be excessively burdensome to even determine whether a given physician had ever been used by the Administrator in a past workers' compensation claim. The Administrator has no way of running a computerized name check to determine if it has ever previously used a given physician. Performing such a check would require pulling up and looking into each newer computerized workers' compensation file, and physically pulling and looking into each older paper workers' compensation file, to determine which physician performed the independent medical examination in each case.

Ibid, at 5-6.

The Administrator suggested that a reasonable "look-back" period would be two to three years, and that the look-back should include only employment by the Shakopee Community, and/or by the Community's past and present claims examiners, and not employment by other of the Administrator's claims examiners.

In response, the Employee in this matter submitted two letters to the Court, one dated May 23, 2008 and one dated June 5, 2008. In each, the Employee noted that he recently had been hospitalized, and in each he argued that a neutral physician, under Section C.4. of the Ordinance, should not be an "Independent Medical Examiner". The Court understands the Employee's contention, in this regard, to mean that the neutral physician should not also have been used by the Administrator as an Independent Medical Examiner in workers' compensation files – and that is the thrust of the Court's April 15, 2008 Order. But the questions posed by the Administrator, remain: does the phrase "neutral physician", as it is used in the Ordinance, debar any physician who at any time has worked for any client or any claims examiner of the Administrator?

The Court does not believe that the Ordinance should be read that broadly. The Court accepts the Administrator's argument that a rule of reason must apply here, and that sufficient neutrality is guaranteed if a physician has not had a connection either with the Community's workers' compensation files or with the Community's present claims

examiner for some finite previous period. But the Court is not convinced that the "two or three years" suggested by the Administrator suffices to ensure neutrality. In the Court's view, the Neutral Physician should have been, at least for the previous five years, a stranger both to the Community's workers' compensation claims and to the person or persons presently responsible for handling the Community's claims.

Accordingly, it is herewith ORDERED that the Neutral Physician appointed in this matter under Section C.4. of the Workers' Compensation Ordinance of the Shakopee Mdewakanton Sioux Community shall not have been employed, in connection with any workers' compensation claims, by the Community or by the claims examiner who presently is responsible for handling the Community's workers' compensation claims, for at least the previous five years.

June 9, 2008

Judge John E. Jacobson

COURT OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Shakopee Mdewakanton Sioux Community
Gaming Enterprise,

Plaintiff,

vs.

Court File No. 436-00

Leonard Prescott,

Defendant.

**Memorandum Decision**

This matter came on for a hearing before the undersigned Judge on May 8, 2008, on Plaintiff's motion to hold Defendant in contempt for failure to pay a judgment entered by this Court on October 27, 2008.[1] For the reasons set forth below, the Plaintiff's motion is denied.

As an initial matter, the Court notes that it addressed in a separate Memorandum Decision, dated May 8, 2008, the Defendant's arguments regarding recusal. Per that decision, I will not and cannot recuse myself from hearing the motion at issue, given the facts that Defendant could make the same or similar arguments about either of the other

[1] Plaintiff styled its motion as one for an order to show cause why Defendant should not be held in contempt for failure to pay a judgment. However, at the hearing, Plaintiff agreed with the Court that this Court's Rules of Civil Procedure do not contemplate an order to show cause, and that the Court should treat the proceeding simply as a motion to hold the Defendant in contempt.

two Judges of this Court, and that the Judges of this Court do not have the power to appoint additional or ancillary judges. See generally, In re: Leonard Louis Prescott, Appeal from July 1, 1994 Gaming Commission Final Order, and Prescott v. Shakopee Mdewakanton Sioux (Dakota) Community Business Council, 1 Shak. A.C. 11, at 15 – 17 (1995). But I reiterate that, for the sake of appearances, I would happily recuse myself if I could and if recusal would satisfy Defendant's concerns. But inasmuch as recusal is neither possible nor helpful, I will simply state again for the record that I have no bias toward or against any party in this matter, I have no financial or other interest in this matter, and I have not participated as legal counsel with respect to any aspect of this matter.

Turning, then, to the motion at hand: On October 26, 2005, this Court ordered that judgment be entered on the Plaintiff's action to recover legal fees and costs expended by Plaintiff for defense of Defendant's gaming license. Section 67 of the Community's Business Corporation Ordinance shifts fees and costs to the losing party in cases such as this, and consequently this Court held that the judgment also included Plaintiff's reasonable attorney's fees and costs expended in seeking the judgment. The Court's judgment was duly entered on October 27, 2005. Defendant appealed the judgment to the full Tribal Court of Appeals, which eventually affirmed, Shakopee Mdewakanton Sioux Community Gaming Enterprise v. Prescott, No. 032-05 (Shakopee Ct. App. 2006). Meanwhile, during the time that the Defendant's appeal to the Tribal Court of Appeals was in progress, the Plaintiff registered the judgment in the Scott County District Court, seeking collection; and in response, the Defendant filed a motion, in the District Court, for relief from the judgment. The District Court denied that motion, Shakopee

Mdewakanton Sioux Community Gaming Enterprise v. Prescott, No. 70-CV-05-25680 (D. Minn. Scott County 1995), and the Minnesota Court of Appeals subsequently affirmed the denial. Shakopee Mdewakanton Sioux Community Gaming Enterprise v. Prescott, No. A06-1880 (Minn. Ct. App. 2006). The Plaintiff's collection action therefore is again pending before the Scott County District Court, and the Defendant evidently continues to resist that action. But now the Plaintiff has returned to this Court and, with the instant motion, asks that the Defendant be held in contempt for having failed to pay the judgment.

Plaintiff clearly has the right to seek execution of its money judgment in proceedings in the Courts of the State of Minnesota. Minn. Ct. C.P.R. 10.02; Minn. R. Civ. P. 69. But doing so initiates a distinct and separate action in a distinct and separate forum, and in that forum the Defendant has the right to resist the Plaintiff's action under the laws of the State of Minnesota. The Courts of the Community and the Courts of the State of Minnesota were created by separate sovereigns, and one cannot intervene in a matter that is pending in front of the other. See e.g., Thorstenson v. Norton, 440 F.3d 1059, 1064 (8th Cir. 2006) (holding that plaintiff who sought to enforce judgment from state court in pending tribal court action did so without any force of law); see generally Iowa Mut. Ins.Co. v. LaPlante, 480 U.S. 9, 14-16, 107 S.Ct. 971, 975-77 (1987)

Let it be clear: this Court believes its judgment is entirely valid. The record in this protracted, painful matter is public, the decisions that led to the judgment are published, and the judgment has been affirmed and is final. But courts have considerable discretion in determining contempt issues. See Erickson v. Erickson, 385 N.W.2d 301, 304 (Minn. 1986); and Cf. Barnes v. Bosley, 828 F.2d 1253, 1259 (8th Cir. 1987);

Mower County Human Servs. v. Swancutt, 551 N.W.2d 219, 222 (Minn. 1996). And, exercising that discretion in this matter, I do not consider that the Defendant's resistance to the Plaintiff's collection efforts in the Courts of the State of Minnesota constitutes contempt of this Court. Further, I view the motion for contempt penalties as a mechanism that, if granted, would simply extend the cost and time of the proceedings. The parties are well aware of the rules of procedure which govern these courts – rules which must not be used to harass litigants or prolong proceedings.

The underlying controversy between the parties is now over fourteen years old. It has brought, and continues to bring, disruption and cost to the litigants and to the Community as a whole. It should come to an end. The judgment should be paid or should be the subject of a reasonable compromise. But the Defendant's resistance to the Plaintiff's collection efforts in the Minnesota District Court does not merit a finding of contempt in this Court – a finding that in all likelihood would give further life to a matter that should be laid to rest.

For the foregoing reasons, and based upon all the files, records and proceedings herein, the Plaintiff's motion is DENIED.

June 9, 2008

Judge John E. Jacobson

COURT OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Shakopee Mdewakanton Sioux Community Gaming Enterprise,

Plaintiff,

vs.

Court File No. 436-00

Leonard Prescott, individually, and As current and former officer and/ Or director of Little Six, Inc.

Defendant.

Memorandum Opinion and Order

On October 27, 2005, after years of litigation and many published opinions, the Court entered judgment in this matter, in favor of the Plaintiff, in the amount of $516,871.46, plus pre-judgment and post-judgment interest on that amount, plus $185,810.08 in legal fees and costs. The Court thought that perhaps the entry of that judgment might end the Court's involvement in the matter. But it was not to be. After initiating collection proceedings against the Defendant in the Courts of the State of Minnesota – proceedings that are ongoing at the present time – the Plaintiff filed a motion in this Court seeking to have the Defendant held in contempt of court.

The Plaintiff asserted that the Defendant has the means to pay the judgment, has failed to pay the judgment, and – in resisting the Plaintiff's collection efforts in the Minnesota Courts – has asserted that this Court repeatedly had acted improperly in deciding matters against him.

On June 9, 2008, the Court denied the contempt motion, holding that the Plaintiff's actions in the Courts of the State of Minnesota did not constitute contempt of this Court. On June 17, 2008, the Plaintiff filed another motion, seeking reconsideration of its contempt motion. The Court set a briefing schedule, permitting the Defendant to file a response by July 3, 2008, and allowing the Plaintiff to file any reply to the

Defendant's response by July 11. In fact, the Defendant did not file a timely response[1]; but, surprisingly, on July 11, 2008 the Plaintiff nonetheless filed a pleading styled a "Reply in Support of Motion to Reconsider".

In an affidavit that the Plaintiff filed in support of its motion, Plaintiff's counsel asserted that the Court, in focusing on the proceedings in the Minnesota State Courts, had missed the point of the Plaintiff's contempt motion. Counsel's affidavit asserted that three things, and only three things, should matter to the Court: the fact that this Court's money judgment exists, the fact that the Plaintiff has the resources to pay the judgment, and the fact that he has not paid it. The Plaintiff's subsequent "Reply" declared that, if this Court were to take a view different from the Plaintiff's, then –

> ...[the Court] will have neutered itself, and word will quickly spread that one need not be concerned about complying with any order *this* Court issues; one need simply ignore it, for the Court itself will refuse to exercise its valid powers to enforce it.
>
> Plaintiff's Reply in Support of Motion to Reconsider, at 2 (filed July 11, 2008).

Nonetheless, the Court now denies the Plaintiff's motion to reconsider.

Motions to reconsider, as such, are not contemplated by this Court's Rules of Civil Procedure. Our Rule 28 does, however, incorporate Rules 59 and 60 of the Federal Rules of Civil Procedure which, respectively, deal with "amendment of" and "relief from" judgments; and a body of federal case law exists under which a motion to reconsider will be treated as a motion for amendment of a judgment, under Rule 59(e), if the motion is filed within ten days of the entry of the order at issue, and as a motion for relief from judgment if it is filed after that time. *See* Saunders v. Clemco Industries, 862 F.2d 161, 168 n.11 (8th Cir. 1988) (citing Venable v. Haislip, 721 F.2d 297, 299 (10th Cir. 1983) (*per curiam*). For purposes of considering the Plaintiff's motion, the Court will accept that time-driven distinction, and will consider the Plaintiff's motion, filed eight days after the order at issue, as a motion to alter or amend a judgment.

A party seeking to invoke Federal Rule 59(e) must either establish that the decision of the Court at issue involves a manifest error of law or fact, or must present newly discovered evidence. Here, the Plaintiff contends that the Court misunderstood the law of the Community relative to contempt of Court. The Plaintiff asserts – without any citation, it must be noted – that "[u]nder Shakopee Mdewakanton Sioux Community law, the method of obtaining compliance [with a money judgment] is contempt, not

[1] On August 6, 2008, the day that the Court finalized this Memorandum and Order, a "Contempt Reply Memorandum" and a supporting Affidavit signed by Defendant's counsel arrived in the mail. The envelope indicated that the materials were mailed on August 4, 2008, more than thirty days outside the time specified by the Court's scheduling order. The materials therefore were not filed by the Clerk or considered by the Court.

garnishment, and the remedy must be applied here." (Affidavit of Jeffrey S. Rasmussen in Support of Motion to Reconsider, at paragraph 7, filed June 17, 2008, at 9.)

But that argument ignores Rule 30 of this Court's Rules of Civil Procedure, which has been the law of the Community since the Rule was adopted some twenty years ago. Rule 30 incorporates Rule 69(a) of the Federal Rules of Civil Procedure, which provides:

> (1) *Money Judgment; Applicable Procedure.* A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution – and in proceedings supplementary to and in aid of judgment or execution – must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

Federal case law interpreting Rule 69(a) holds that equitable relief in collecting a money judgment – which can be awarded under the "unless the court directs otherwise" proviso of the Rule – is appropriate only if the judgment debtor has engaged in culpable conduct, or if the circumstances before the court are exceptional. *See e.g.*, Ardex Laboratories, Inc. v. Cooperider, 319 F.Supp.2d 507 (E.D. Pa. 2004). The Court takes this to be the law of the Shakopee Community, and the Court finds nothing that is either culpable or exceptional here. As the Court observed in its June 9, 2008 decision, the Plaintiff has obtained a valid judgment, and has begun proceedings to execute on that judgment in a fashion that is consistent both with the laws of the Community and with the laws of the State of Minnesota; in response, the Defendant has sought to assert defenses that he believes the laws of the Minnesota may afford him. Nothing in these circumstances is, in this Court's view, culpable or exceptional.

Contempt powers, which this Court clearly possesses, must be used very carefully, and should not be used merely as a collection tool when other mechanisms are available. *See e.g.*, Shuffler v. Heritage Bank, 720 F.2d 1141, 1147 (9th Cir. 1983) (holding that the proper means to secure compliance with a money judgment ordering payment of attorney fees is to seek a writ of execution); Bahre v. Bahre, 230 N.E.2d 411, 414-415 (Ind. 1967) (holding that contempt proceedings are inappropriate remedies to enforce the payment of counsel fees); and In re Estate of Bonham, 817 A.2d 192, 195 (*accord*).

In short, the Plaintiff has failed, under Rule 28 of this Court's Rules of Civil Procedure, to establish that any manifest error of law was committed by the Court when it denied the Plaintiff's motion for a contempt finding. Therefore the Plaintiff's instant motion must be and is DENIED.

August 6, 2008

Judge John E. Jacobson

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

COUNTY OF SCOTT STATE OF MINNESOTA

In Re the Marriage of:

Alan Welch,

Petitioner,

and

Mary M. Welch,

Respondent.

File No. 590-07

## MEMORANDUM DECISION

The parties in this litigation agree that some spousal maintenance should be paid by the Petitioner, who is a member of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"), to the Respondent, who is not. But the parties disagree with respect to the duration of the maintenance award: the Respondent contends that maintenance should be permanent, and the Petitioner disagrees, suggesting that it continue only for six years, when the parties' son will have graduated from high school, and also suggesting that the Domestic Relations Code of the Community ("the Domestic Relations Code") may not authorize a permanent award. The Respondent also seeks an award of her attorneys fees, which the Petitioner resists.

In Findings of Fact and Conclusions of Law filed today, I set forth what I believe to be the salient aspects of the parties' history and present circumstances; I award the Respondent maintenance in an amount that will be reduced but that will not be eliminated when the parties' child graduates from high school; and I deny the Respondent's request

for an attorneys fee award. In this Memorandum, I will set forth the analysis underlying those decisions.

The Court clearly has been given the authority to award spousal maintenance. Chapter III, section 6 of the Domestic Relations Code expressly authorizes such an award, and sets forth explicitly the standards that the Court is to apply when considering an application for such an award:

> ***Maintenance.***
>
> **a. When awarded.**
>
> If no valid antenuptial contract 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; 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.

On the face of this, there is no limitation with respect to the duration of an award: absent an agreement of the parties to the contrary, "maintenance may be awarded in cases the Tribal Court deems appropriate." But the Petitioner suggests that ambiguity, with respect to the Court's authority, may derive from the provisions of Chapter III, section 5 of the Domestic Relations Code, governing the division of property in marriage dissolution proceedings.

Chapter III, section 5 begins with language virtually identical to that in Chapter III, section 6:

> ***Division of property upon divorce.***
>
> **a. Marital property.**

> If no valid antenuptial contract to the contrary exists between the spouses, the marital property of the spouses is to be divided equitably upon divorce. The Tribal Court shall consider the length of the marriage; the contributions, financial and nonfinancial of both spouses; the standard of living to which each spouse has become accustomed; the financial needs of each spouse; and any other factor the Court finds appropriate. The Tribal Court shall not consider the misconduct of either spouse when making its determination.

But Chapter III, section 5 goes on, in a series of subsections, to deal with particular forms of property – it discusses the "separate property" of the spouses, in subsection b; "untraceable property", in subsection c.; "professional degrees", in subsection d.; "pensions", in subsection f.; and – central to the Petitioner's argument here, "per capita payments", in subsection e.:

> **Per capita payments to tribal members.**
>
> 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).

The parties here agree that Petitioner's sole source of income is, and for the duration of the parties' marriage was, his per capita payments from the Community. Given that fact, the Petitioner suggests that an award of permanent spousal maintenance here could be regarded as, in effect, creating a property transfer of his per capita payments – a transfer that is inconsistent with the just-quoted language of Chapter III, section 5.e.

But that argument ignores the clear differences between the circumstances that prompt property division and maintenance awards. Property division parses a thing to which both parties have obtained legal ownership. Spousal maintenance by definition involves a situation where one of the parties has no ownership of the thing being

transferred, and has resources generally insufficient to maintain the way of life that equity dictates is appropriate. Under Chapter III, section 5.e., the Court has no power whatever to ascertain the value of the future stream of the Petitioner's per capita payments and award one-half (or any other fixed fraction) of that amount to the Respondent. But the Court does have the power – and the duty – to consider the position that a marriage dissolution will leave the former partners, and to order that a fixed stream of payments be made to protect the more vulnerable party from an inequitable change in his or her life's circumstances. For that reason, the Domestic Relations Code deals with the two sorts of awards in two separate sections, and in so doing the Community clearly prohibited the award of per capita payments as part of a property distribution, but did not forbid consideration of the income represented by per capita payments when the Court makes a spousal maintenance award.[1]

The Petitioner also cautions the Court that any maintenance award must be approached carefully; and the Court agrees. When a marriage is dissolved, the former partners have a legal obligation to use their best efforts to support themselves; and an award of maintenance from one party to the other can be justified only if there will be a great disparity between the parties' post-dissolution income and there has been a stable relationship of considerable duration and there was a history of notable contributions to the relationship by the party seeking maintenance.

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[1] As is noted above, the Petitioner here has proposed an award of maintenance that would for six years. But if Chapter III, section 5.e. of the Domestic Relations Code eliminated the consideration of per capita payments when the Court awards maintenance, even such a "temporary" award would be impermissible where, as here, the Petitioner's sole source of income is per capita payments. The Court is convinced that such a result cannot be squared with the straightforward language of Chapter III, section 6.a..

Here, the Petitioner seeks to cast his relationship with the Respondent as of a "relatively short" duration. But the Findings of Fact, filed today, set forth in detail the unambiguous truths that, before their separation, the Respondent and the Petitioner cohabited for twenty years. The Respondent lived with the Petitioner for virtually her entire adult life. And, as the Findings of Fact detail, throughout the parties' time together, the Respondent accepted very considerable responsibilities – both parties testified that she had responsibility for the construction, remodeling, upgrading, and maintenance of the parties' residences, and also – for years before their marriage – had responsibility for the care and education not only of the parties' child, who was born two years before the marriage commenced, but also of the Petitioner's two children from a previous relationship.

Chapter III, section 6.a. of the Domestic Relations Code directs the Court, when considering an award of maintenance, to weigh the duration of the parties' marriage, their respective contributions thereto, the standard of living to which they have become accustomed, their financial needs, and "any other factor the Court finds appropriate." When, as here, parties were in a stable, committed, mutually contributing relationship for some eleven years before their marriage, the Court deems it appropriate to consider that relationship and those contributions as a factor in assessing an award of spousal maintenance.

To be clear, the Court does not suggest that pre-marital contributions should be considered in the dissolution of all – or even most – marital relationships. Such matters must be considered very carefully, on a case-by-case basis. But here, in their testimony, the parties fundamentally agreed that the caregiving and homemaking responsibilities of

the Respondent were extensive and continuous for a period that, in total, was more than twice as long as their marriage, and that, in the Court's view, deserves consideration under Chapter III, section 6.a.

So, too, does the fact that unless 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. The testimony of the Petitioner's vocational expert, detailed in the Findings of Fact, was compelling in this regard: given the Respondent's abilities, she qualifies only for "entry level" work, and going forward her possible advancement will be limited simply to a slightly higher pay grade in the same sort of work.

In the view of the Court, all of these factors taken together require that the Respondent receive a continuing stream of maintenance payments from the Petitioner, in the amounts discussed in the Findings of Fact. To hold otherwise would be to work injustice.

The Respondent also sought an award of her attorneys fees. This Court does have the power to render such an award in marriage dissolution proceedings and in other matters if a party has committed misconduct or behaved inappropriately. But throughout these proceedings the Petitioner has acted in a straightforward and honorable fashion; he participated fully in mediation proceedings that led to very constructive settlement

agreements relating to child custody and property division; and as a consequence of that property division, the Respondent will receive resources that will enable her to both discharge her debts and pay her attorneys fees. Hence, there is no justification here for making an attorneys fee award in any amount.

August 18, 2008

Judge John E. Jacobson

COURT OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY



COUNTY OF SCOTT

STATE OF MINNESOTA

Daniel Edwin Jones,

Petitioner,

vs.

Court File No. 491-02

Michelle Marie Steinhoff,

Respondent.

**Memorandum Opinion and Order**

In 2002, in this paternity matter, the parties stipulated to Findings of Fact and Conclusions of Law, and an Order for Judgment; and the Court adopted those Findings and Conclusions, and entered Judgment accordingly. In the stipulated Conclusions, the parties agreed to share joint legal custody of their minor child, and the Respondent was awarded sole physical custody of the child, subject to "reasonable and liberal rights of visitation" in the Petitioner. The parties stipulated, and the Court ordered, that any effort by the Petitioner "to modify the physical custodial status" of the parties' child "shall be done in the district court of Minnesota", and that this Court "is divested of jurisdiction" for such issues. But the parties also stipulated, and the Court ordered, that "[i]f the parties are unable to agree on visitation, either party needs to return to Tribal Court and request that a specific visitation schedule be ordered".

Following the entry of that Judgment, the Petitioner was incarcerated for a period of years by the State of Minnesota; and following his release, on July 15, 2008, he filed a motion with this Court seeking a schedule for visitation, asking that the Respondent no longer be given access to the trust account being held for their child by the Shakopee Mdewakanton Sioux (Dakota) Community pursuant to section 14.6 of the Gaming Revenue Allocation Amendments to Business Proceeds Distribution Ordinance No. 10-27-92-002 ("the Gaming Revenue Ordinance Amendments"), and asking that the Court give him what he termed "the first option" to care for the parties' child whenever the Respondent might otherwise leave the child with a third-party caregiver for more than three hours.

The Respondent then filed what she termed a "Countermotion", opposing the Petitioner's motion in its entirety, asking that any visitation between the Petitioner and

the child be both supervised and of a short duration (in light of the fact that there has not been any considerable contact between the Petitioner and the child for most of the child's life), and that the Petitioner's wife not be present during visitation. The Respondent also sought the appointment of a "qualified individual" to make recommendations with respect to visitation; she sought sole legal custody of the child; and she sought an order directing the Petitioner to pay any costs relating to the "qualified individual" and to pay "need-based" attorneys' fees to the Respondent.

On August 27, 2008, the Court heard oral argument on the parties' motions. At the conclusion of the hearing, the Court appointed Ms. Jody Alholinna, Esq., as the "qualified person", sought by the Respondent, to advise the Court and the parties with respect to visitation issues. The Court stated its view that, pending Ms. Alholinna's recommendations and the parties' comments thereon, a schedule for visitation should be established; that the schedule should provide visitation on a more frequent basis than it had been; and that pending Ms. Alholinna's recommendations visitation should be supervised by Ms. Heidi Simon or some other qualified, neutral person on the Shakopee Community's staff. The Court urged the parties to negotiate a visitation schedule pending Ms. Alholinna's recommendations, but stated that if such efforts failed the Court would consult with Ms. Simon and establish a schedule.

The Court observed that the Petitioner's motion to amend the Respondent's access to the child's trust account was not properly brought in this proceeding – that the motion, if it is to be put before the Court, should be brought in the proceeding that the Respondent brought under section 14.6.A. of the Gaming Revenue Ordinance Amendments; and the Petitioner expressed the view, with which the Court concurs, that the expense of Ms. Alholinna's services will be borne by the Community's funding for Guardians ad Litem. The Court took the remaining matters before it under advisement.

**ORDER**

For the foregoing reasons, and based on all the files and materials herein, it herewith is ORDERED:

1. That Jody Alholinna, Esq. is appointed to advise the Court and the parties with respect to issues concerning the Petitioner's visitation of the parties' minor child;

2. That the parties shall seek to agree on a regular schedule for the Petitioner's visitation of the parties' minor child, which schedule shall involve more frequent visitation than has been the case in the past; but if the parties are unable to agree upon a visitation schedule, the Court will establish one;

3. That, pending further order of the Court, the Petitioner's visitation shall be supervised by Ms. Heidi Simon or some other qualified, neutral person;

4. That the Petitioner's motion to modify the Respondent's access to the trust account held by the Shakopee Community for the parties' minor child is denied, for the reasons recited above;

5. That all other aspects of the parties' motions will be taken under advisement by the Court, and the parties will appear before the Court to hear, and comment upon, the recommendations of Ms. Alholinna, at 1:00 p.m. on Thursday, October 2, 2008.

September 3, 2008

Judge John E. Jacobson

IN THE TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

| | |
|---|---|
| Pamela Kloeppner,<br>Employee,<br>vs.<br>SMSC Gaming Enterprise,<br>Employer,<br>and<br>Berkley Risk Administrators Company,<br>Administrator. | Court File No. 621-08 |

**Memorandum Opinion and Order**

## Introduction

This Court's review in workers'-compensation appeals is very narrow. We may hear only appeals concerning "legal issues," and "there shall be no further review of factual decisions made by a hearing examiner."[1] Thus, to prevail, an appellant must demonstrate that the hearing examiner made an error of law. If the court finds such an error, it may remand the matter back to the hearing examiner for additional factual determinations.[2]

[1] SMSC Workers' Compensation Ordinance, § F.8.
[2] *Id.*

In this case, appellant—the employee, Ms. Kloeppner—alleges that the legal error the hearing examiner committed was basing his decision on an inadequate factual record.[3] Specifically, she alleges that she was not permitted an opportunity to reply to the information submitted by her employer in response to her appeal. She claims that the information her employer submitted was "completely false," and that she had no reason to anticipate that the employer would submit such false information. Her employer, the Community's Gaming Enterprise, argues that remand is inappropriate because the factual record supports the hearing examiner's decision.[4]

**Factual Background**

Ms. Kloeppner injured her shoulder in February 2007 while working as a beverage server for the Community's Gaming Enterprise, and subsequently re-aggravated her injury while on the job in December 2007 and January 2008.[5] She received partial and then total disability payments from the Community's workers'-compensation fund. In June 2008, Kloeppner was examined by an independent medical examiner ("IME") hired by the Community's workers'-compensation benefits administrator. The IME concluded that Kloeppner could return to work with "restrictions of 25 pounds lifting and no repetitive use of the upper extremities above shoulder level."[6] Kloeppner's treating physician found that she had "chronic shoulder pain," but found no structural abnormalities and noted during one

[3] *See* Employee's Responsive Memorandum at 2.
[4] Response to Pamela Kloeppner's Appeal Brief at 3.
[5] Findings & Order of the Hearing Examiner at 2 (Oct. 28, 2008).
[6] Report of Dr. Robert Barnett at 9 (Jun. 20 2008).

visit that he had told Ms. Kloeppner "on many occasions that I do not think there is anything else that can be done."[7]

After receiving the report from the IME, the Gaming Enterprise offered Kloeppner a "light-duty job" that met the restrictions set forth by the IME.[8] Kloeppner declined the job and did not report for work.[9] According to an e-mail submitted to the hearing officer by the administrator, when Kloeppner was offered the light-duty job and told to report for work on July 5, she responded "'I cant [sic], I have plans, and my Dr had me out until August.'"[10] After Kloeppner refused to return to work, the Gaming Enterprise terminated her, and the workers' compensation-benefits administrator discontinued her workers'-compensation benefits.[11]

Kloeppner appealed that discontinuation to the hearing examiner, arguing that the job she was offered was not really "light duty" and would have violated her treating physician's recommendations.[12] The hearing examiner found that Kloeppner had been seen by multiple physicians, and that "the medical records reflect there is no evidence of any objective abnormality or structural damage to employee's right upper extremity."[13] He also found that "the employer has been willing to provide work for the employee within restrictions set forth

[7] Clinic Progress Note by Dr. Anthony Spagnolo for visit on Aug. 12, 2008, submitted to Hearing Examiner by Ms. Kloeppner.
[8] Findings & Order at 2.
[9] *Id.*
[10] E-mail from C. Smythe to Kathy Klein and Erin Kiencksee dated Jul. 7, 2008, submitted to Hearing Examiner by Berkley Risk Administrators Company, LLC.
[11] Notice of Discontinuation of Workers' Compensation Benefits, Jul. 24, 2008.
[12] Oct. 10, 2008 Letter from Thomas Bedeem (attorney for Kloeppner) to Hearing Examiner.
[13] Findings & Order at 2.

by the medical providers who have treated the employee," and that Kloeppner's refusal to even attempt the "light-duty" job, was unreasonable. [14]

**Analysis**

Kloeppner's primary argument to the Court is that had the hearing examiner permitted her to reply to the information the benefits administrator submitted during the administrative appeal, she would have been able to prove that the job she was offered was not really "light duty," to dispute the version of events surrounding the job offer, and to testify about how the job she was offered fit (or, rather, didn't fit) with the job restrictions recommended by the IME.

As the Enterprise correctly points out, the hearing examiner's decision about whether to hold a hearing on a workers'-compensation appeal is final and nonreviewable.[15] So to the extent that Kloeppner's argument is that the hearing examiner erred by declining to hold a hearing, it is unavailing. Deciding whether to hold an evidentiary hearing was within the hearing examiner's complete discretion.

But Kloeppner's argument is not just that the hearing examiner should have held a hearing; she also argues that he should have permitted her an opportunity to reply to the written submission of the administrator. The Workers' Compensation Ordinance does not require that a claimant be permitted to reply to the submission of the administrator. The Ordinance requires the hearing examiner to "make a review of the denial of claim or discontinuance of benefits by the Administrator, the claim petition of the Employee, and any

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[14] *Id.*

[15] SMSC Workers' Compensation Ordinance, § F.7 ("The decision of the hearing examiner whether or not to grant an evidentiary hearing on the record shall be final.").

other written evidence submitted by the Administrator or the Employee."[16] And it empowers the hearing examiner to "solicit or obtain such additional written evidence as the hearing examiner deems necessary or equitable to render a decision."[17]

In this case, the hearing examiner gave both the employee and the administrator an opportunity to submit written materials (extending the deadline for Ms. Kloeppner upon her request), and forewarned them that he was "inclined to decide this claim without a hearing," so they should be sure to "present a thorough written argument that not only addresses whether a hearing should be conducted but also in supported of your respective positions."[18] Both parties submitted written arguments and evidence, and Ms. Kloeppner submitted additional information a few days after her initial submission.[19]

Based on the Notice of Discontinuance of Workers' Compensation Benefits she received, at the time she made her submissions to the hearing examiner, Ms. Kloeppner knew that the primary issue on her appeal was whether she should have taken the light-duty job she was offered.[20] Thus, if she had any testimony or proof to offer regarding the work she was offered or why she did not take it, she should have provided it in writing to the hearing examiner. "This Court has ruled on several occasions that a claimant who fails to make her factual case to the [h]earing [e]xaminer cannot use the appeal process to get a second bite at the apple."[21]

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[16] *Id.*
[17] *Id.*
[18] Sept. 22, 2008 Letter from Hearing Examiner to Parties.
[19] *See* Oct. 20, 2008 Letter from Thomas Bedeem to Hearing Examiner (with enclosures).
[20] *See* Notice of Discontinuance of Workers' Compensation Benefits, Jul. 24, 2008.
[21] *Moldenhauer v. Shakopee Mdewakanton Sioux Community*, No. 591-08, slip op. at 3 (Mar. 11, 2008) (citing *David v. Shakopee Mdewakanton Sioux Community*, 4 Shak. T.C. 17, 20 (Nov. 1, 1999); *Brass v. Shakopee Mdewakanton Sioux Community*, 3 Shak. T.C. 29, 43 (Mar. 4, 1997)).

This Court can only remand matters to the hearing examiner if it determines that the factual record is inadequate.[22] Said another way, "[w]here a record presented for review does not contain sufficient findings the court may remand the cause to the [agency] for further proceedings."[23] Here, the hearing examiner made specific findings to support his conclusion that Kloeppner's benefits were properly terminated. He found that no doctor who had seen her had found an objective abnormality or structural damage to her shoulder, that she was offered reasonable light-duty work, and that her refusal of that work without even attempting it was unreasonable.[24] The factual record on these points was not inadequate, and therefore no remand is necessary.[25]

Accordingly, the decision of the hearing examiner is AFFIRMED and Kloeppner's appeal is DENIED.

So ordered.

May 18, 2009

Vanya S. Hogen, Judge

[22] Workers' Compensation Ordinance, § F.8.

[23] *Chillstrom v. Trojan Seed Co.*, 242 N.W.2d 471, 487 (Minn. 1954) (reviewing whether workers' compensation commission had made findings specific enough to support its conclusions).

[24] Findings & Order at 2-3.

[25] The Court notes that the hearing examiner did not cite to or rely on the statement in the Enterprise e-mail that Kloeppner said she wouldn't show up for the new job in part because she "already had plans," so any suggestion that the hearing examiner improperly relied this statement without permitting Kloeppner to rebut it is simply inaccurate. In any event, Kloeppner should have been aware of this allegation because it is contained in the Notice of Discontinuation of Workers' Compensation Benefits ("The employee was contacted by her supervisor on July 2, 2008 and advised that she should come into work on July 5, 2008. The employee replied that she could not come into work, as she had plans and was not available for work.").