## LIST OF SMSC TRIAL COURT OPINIONS

**Index Vol. 4**
**1999-2003**

# IN THE TRIAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX 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,<br><br>Plaintiff,<br><br>v.<br><br>Leonard Prescott individually, and as current and former officer and/or director of Little Six, Inc.,<br><br>Defendant, | ) | Case No. 436-00 |

## MEMORANDUM OPINION AND ORDER

## FACTUAL BACKGROUND

The underlying factual background of this dispute is discussed at length in the Court's August 8, 2000 Order and Opinion. Basically, in his Motion to Dismiss, Defendant Leonard Prescott (Prescott) argued that Little Six, Inc.'s (LSI's) Complaint should be dismissed under the doctrine of res judicata, or in the alternative, because he is shielded by official immunity. This Court denied Prescott's motion in an order dated August 8, 2000, and Prescott is now attempting to appeal this admittedly non-final order.

On August 24, 2000, Prescott filed a pleading labelled as a notice of appeal, which was addressed to the trial court. The one sentence text of the pleading, states that Prescott "moves" the court to "certify for appeal" the August 8, 2000 order. The Court, in its scheduling order dated August 25, 2000, noted that it would treat the pleading as a non-dispositive motion, and not as a properly filed notice of appeal. Briefing was invited from the parties on whether this Court should certify Prescott's appeal, and a hearing was held on September 20, 2000. I conclude that under this Court's appellate decisions and precedent, Prescott's appeal of this Court's non-final August 8, 2000 order should be certified.

## DISCUSSION

As an initial matter, LSI argues that Prescott's attempt to appeal the August 8, 2000 order should not be entertained because it is untimely. LSI argues that by attempting to appeal the Court's August 8, 2000 decision, Prescott is actually asking for a modification of the August 8, 2000 judgment. Since under the Federal Rules of Civil Procedure motions to modify a judgment must be filed within ten days of judgment, LSI contends Prescott's motion is untimely. See FRCP 59(e).

This court, however, is not necessiarily bound by all the procedural requirements of a federal court. In fact, the SMS(D)C Court of Appeals has specifically declined to incorporate the 10 day limit for motions to certify interlocutory appeals under 28 U.S.C. § 1292 in a case strikingly similar to this. See LSI v. Smith, No. 010-97 (SMS(D)C Ct. App. May 28, 1998). LSI is essentially asking this Court to apply a different ten day limit to motions to certify an appeal – the ten day limit under FRCP 59. Since the Court of Appeals declined to impose a ten day limit on interlocutory appeals in Smith, this Court declines to impose such a limit in this case.

Instead, this Court will adhere to the 30 day time limit as recently announced by the Court of Appeals. The Court of Appeals has interpreted Ordinance 02-13-88-01, Section VII to give parties 30 days to file a notice of appeal, and the Court of Appeals "will not enforce the Ordinance as a limitation on the Court for certification of the matter for appeal." In re: Trust Under Little Six, Inc. Retirement Plans, No. 024-00 (SMS(D)C Ct. App. Sept. 13, 2000) at 3. Since Ordinance 02-13-88-01 Section VII specifically addresses motions to certify appeals, this case falls easily under the 30 day limit of that section. Prescott's motion

to certify this matter for appeal was timely filed on August 24, 2000 under this Court's rules and precedent.

Turning to the merits, it is true an order denying a motion to dismiss is not usually considered an appealable final order. LSI v. Smith, No. 010-97 (SMS(D)C Ct. App. May 28, 1998) at 3. Nonetheless, the SMS(D)C Court of Appeals has indicated that there are at least two contexts in which a non-final order may be appealled. First, if an order satisfies the collateral order doctrine, it may be appealled. LSI v. Prescott, Nos. 017-97, 018-97 (SMS(D)C Ct. App. Sept. 9, 1997). Second, where an appeal may lie from a federal district court, an appeal may also lie from this Court. LSI v. Smith, No. 010-91 (SMS(D)C Ct. App. May 28, 1998); SMS(D)C Rule of Civil Procedure 31.

The collateral order doctrine allows for an immediate appeal of orders which (1) conclusively determine a disputed question, (2) are separate from the merits of the action, and (3) which would be effectively unreviewable on appeal from a final judgment. LSI v. Prescott, Nos. 017-97, 018-97 (SMS(D)C Ct. App. September 9, 1997) at 2. The SMS(D)C Court of Appeals has held that "[o]rders rejecting defenses of absolute or qualified immunity are immediately appealable because immunity is not simply a defense from liability, but entitles its possessor to complete protection against suit. . . . The protection is effectively lost if, based on the lower court's error, the matter goes to trial." Id.

LSI argues that despite the above language from the Court of Appeals, Prescott's immunity claims in this case do not fit within the collateral order doctrine because an appeal from the August 8, 2000 order would not involve abstract questions of law that can be easily resolved on appeal. Instead, LSI contends that there is a disputed issue of fact outstanding -- whether Prescott was acting within the scope of this duty or not -- which disqualifies this case from the collateral order doctrine.

LSI misreads this Court's August 8, 2000 order. In that opinion the Court concluded that whether Prescott was acting within his duty or not was not relevant to the Court's conclusion on immunity. If he was acting outside the scope of his duty he was not shielded by qualified immunity. See, e.g., Little Six, Inc., et al v. Prescott and Johnson, Nos. 020-99, 021-99, 022-99 (SMS(D)C Ct. App. Feb. 1, 2000). If he was acting within the scope of his duty, and the allegations made by LSI are taken as true (as they must be

when considering an immunity claim), Prescott should have known that keeping money he promised to repay violated the rights of LSI. Either way, the Trial Court determined that within the scope of his duty or not, Prescott would not be entitled to a defense of immunity. This legal conclusion does not rest on any disputed issue of fact. The Court's August 8, 2000 order as it pertains to the immunity defenses is immediately appealable under the collateral order doctrine.

The collateral order doctrine, however, does not seem to apply to Prescott's res judicata claims because there is no indication that those issues would be effectively unreviewable from an appeal of a final order. LSI v. Prescott, Nos. 017-97, 018-97 (SMS(D)C Ct. App. September 9, 1997) at 2.

Instead, Prescott argues that these issues are appealable under Rule 31 and the substantive provisions of 28 U.S.C. § 1292. 28 U.S.C. § 1292 allows a U.S. court of appeals, in its discretion, to entertain an appeal if the district court certifies that the order in question involves controlling questions of law, to which there are substantial differences of opinion, and where an immediate appeal would materially advance the termination of the litigation.[1]

In LSI v. Smith, No. 010-97 (SMS(D)C Ct. App. May 27, 1998), the SMS(D)C Court of Appeals incorporated the substantive standards of § 1292(b) and allowed an appeal from a denial of a motion to dismiss on mootness grounds. The Court of Appeals reasoned that an appeal should lie because the mootness issue was one of first impression

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[1] The full text of 28 U.S.C. § 1292(b) states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeal which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

which, if reversed, would materially advance the termination of the litigation. The Court of Appeals, in its discretion, decided to hear the appeal, and reversed.

Similarly, here the res judicata issues raised by Prescott's motion to dismiss are issues of first impression which have not been addressed by the Court of Appeals in any earlier cases. In addition, if the Court of Appeals were to reverse this Court's August 8, 2000 order on the res judicata issues it would clearly advance the termination of this litigation.

While under its rules and precedent the Court of Appeals clearly has discretion to not entertain this appeal, both the Smith and earlier Prescott case indicate that these issues should be certified for appeal by this Court.

Given the confusion of the parties concering the appealability of non-final orders in this case, as well as the Smith case and the earlier Prescott case, I would like to outline the proper procedure for the parties filing appeals. If a party wishes to appeal a decision from a final order, he or she has 30 days from the entry of judgment within which to file a notice of appeal with this Court. In re: Trust Under Little Six, Inc. Retirement Plans, No. 024-00 (SMS(D)C Ct. App. Sept. 13, 2000). That notice of appeal will be transmitted by the Clerk to the Court of Appeals, and a scheduling order shall issue. If a party wishes to appeal a non-final order, he or she should file a motion to certify with this court within 30 days after the entry of judgment. Id.; Ordinance 02-13-88-01, Sec. VII. If this Court denies the motion to certify, the matter is at an end and the case proceeds to trial.[2] If this Court certifies the order for appeal, the motion to certify is converted into a notice of appeal. The Court of Appeals then has 90 day to decide whether it will exercise its discretion to accept jurisidiction over the matter, and the parties are not to submit additional briefing to the Court of Appeals until so ordered. [CITE to provision that requires court to act within 90 days]

**ORDER**

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[2]The reason the matter is effectively at an end at this point is because the denial of a motion to certify itself would not be considered a final order. Therefore, if a party wanted to appeal a Trial Court decision to deny a motion to certify, that party would have to file another motion to certify, which in all likelihood would be denied.

For the foregoing reasons, the Motion to Certify filed by Defendant is GRANTED. The Motion to Certify will be forwarded to the Court of Appeals as a notice of appeal, and that Court will have 90 days to decide whether to accept jurisdiction over the appeal.

Dated: December 28, 2000

Judge John E. Jacobson

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

FILED

FEB 2 6 2001

JEANNE A. SZULIM
CLERK OF COURT

# IN THE TRIAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

David Gregory Crooks

Plaintiff,

v.

The Shakopee Mdewakanton Dakota (Sioux) Community; the Shakopee Mdewakanton Dakota (Sioux) Community Business Council; the Shakopee Mdewakanton Dakota (Sioux) Community Enrollment Committee; Certain Unknown Members of the SMS(D)C Business Council and Enrollment Committee,

Defendants.

Case No. 468-00

## ORDER

On October 31, 2000 this Court denied the Defendants Motion to Dismiss. On November 27, 2000 the Defendant timely filed a Notice of Appeal seeking this Courts Certification of this matter pursuant to Section VII of Community Ordinance No. 2-13-88-01. On December 4, 2000 the Plaintiff filed a Notice of Motion and Motion seeking to force the Defendant to file its Answer and to Vacate the Notice of Appeal on the basis that the Order the Defendant seeks to Appeal is not an "appeallable Order".

In the filing of an appeal a party must follow SMS(D)C Rule of Civil Procedure 31 which states as follows:

> "In any action before the Court of the Shakopee Mdewakanton Sioux Community where a three-Judge panel has not heard the matter, a party may appeal *any decision of the assigned Judge that would be appealable if the decision had been made by a judge of a United States District Court . ...."* emphasis added.

The Court of Appeals in Little Six Inc. Board of Directors, et al. V. L.B. Smith, et al., No. 010-97(SMS(D)C Ct. App. May 28, 1998) , held that Rule 31 incorporates the substantive requirements of finality embodied in 28 U.S.C.§1292, however the Court also cautioned that Rule 31 does not incorporate the procedural requirements of §1292 nor are the requirements imposed on tribal litigants. Here the Community Ordinance referenced by the Defendants in their Notice of Appeal clearly requires that upon motion by any party a matter *may be certified for appeal.* SMS(D)C Ordinance No. 2-13-88-01 §VII. In my view this language places great discretion and responsibility on the trial court judge in his decision to certify while keeping in mind the Court of Appeals concern with respect to finality. I must therefore engage a process which requires the party's to inform the Court as to the arguments which necessitate an appeal of this Order.

**IT IS ORDERED**

1. That the party's submit briefs on the question of why this court's Order of October 31, 2000 should be certified for appeal pursuant to the following schedule:
   a. Defendant Brief due on March 30, 2001
   b. Plaintiff response brief due on April 30, 2001
   c. Defendant Reply brief due on May 15, 2001
   d. Oral argument is not required.
2. Plaintiff's motion to compel Answer is **DENIED**

3. Plaintiffs motion to Vacate the Notice of Appeal is **DENIED**

Dated: February 26, 2001

Henry M. Buffalo, Jr.
Judge

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

FILED

AUG 2 0 2001

JEANNE A. KRIEGER
CLERK OF COURT

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

SCOTT COUNTY STATE OF MINNESOTA

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David Gregory Crooks,

Plaintiff,

v.

THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, and The Shakopee Mdewakanton Sioux (Dakota) Community Business Council and The Shakopee Mdewakanton Sioux (Dakota) Community Enrollment Committee, and Certain Unknown Members of the Shakopee Mdewakanton Sioux (Dakota) Community Business Council Members and Certain Unknown Members of the Shakopee Mdewakanton Sioux (Dakota) Community Enrollment Committee.

Defendants.

Court File No. 468-00

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**OPINION & ORDER**

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On February 26, 2001, the Court issued an Order denying Plaintiffs' motion to vacate Defendant's notice of appeal and compel Defendant's Answer. The Court indicated it would be necessary to consider thoroughly the legal issue of whether to certify for appeal its October 31, 2000 Order denying summary judgment. Upon consideration of the parties' briefs and the legal issues presented, the Court determines that its October 31, 2000 denial of summary judgment should not be certified for appeal. Defendant's notice of appeal is vacated.

Appeal of a denial of summary judgment may be appropriate when, using the federal standard established by 28 U.S.C. § 1292(b) to the extent adopted by SMS(D)C R. Civ. P. 31 and

by this Court, (1) there is a controlling question of law, (2) there is substantial grounds for difference of opinion, and (3) an immediate appeal may materially advance the ultimate termination of litigation. *See* Little Six Inc. Board of Directors, et al. v. L.B. Smith et al., No. 010-97 (SMS(D)C Ct. App. May 28, 1998) (adopting substantive requirements of 28 U.S.C. § 1292(b)); *see also* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 3930 (1996).

As a matter of prevailing jurisprudence, the interest of both trial and appellate courts in avoiding piecemeal litigation is stronger than a litigant's mere desire to appeal a denial of summary judgment in an effort to hasten the termination of litigation. Particularly when a trial court has held that questions of material fact preclude summary judgment, the appellate court should not be burdened with fact-dependant questions of law without first allowing the trial court an opportunity to do its job.

In this case, the Court held in its October 31, 2000 Order that summary judgment was inappropriate because factual questions remained about whether the tribal enrollment process was flawed to the point where it violated Plaintiff's rights under the Community's Constitution. The Court held that it has jurisdiction over Plaintiff's claim and is empowered to offer some potential relief from procedural deficiencies. *See, e.g.,* Weber and Maxwell v. SMS(D)C, No. 364-99 (SMS(D)C Tr. Ct. Dec. 22, 1999) at 3; Stovern et al. v. SMS(D)C, 031-92 (SMS(D)C Tr. Ct. May 30, 1995); Amundsen v. SMS(D)C Enrollment Committee, No. 049-94 (SMS(D)C Tr. Ct. Apr. 14, 1995) at 9. The Court's determination whether Plaintiff is entitled to relief for a violation of Community law while processing his application for enrollment depends on questions of fact that have not yet been revealed.

Under the substantive federal standard, even if there is a controlling question of law about which there is substantial grounds for disagreement, an immediate appeal would not materially advance the ultimate termination of litigation if there are fact questions remaining to be resolved. As stated by Wright, Miller & Cooper,

> There is indeed no reason to suppose that interlocutory appeals are to be certified for the purpose of inflicting upon courts of appeals an unaccustomed and ill-suited role as factfinders. Even when the question is the supposed question of law whether there are any genuine issues of material fact that preclude summary judgment, ordinarily it seems better to keep courts of appeals aloof from interlocutory embroilment with the factual content of the record.

WRIGHT, MILLER & COOPER, *supra*, at 427-28. The questions defendant would bring before the Court of Appeals—whether the Court may grant relief, the protection provided Plaintiff by the Community's Constitution, the relevance of Plaintiffs' questions regarding delay of his membership application, the effect of alleged procedural defects on the Council's decision, and whether the Council's decision may be challenged in Tribal Court—all may be addressed in due course following this Court's adjudication of Plaintiff's claims based on facts revealed at trial. The Court finds, therefore, that under the circumstances and issues relevant in this case, the Court's interest in avoiding piecemeal litigation and in fulfilling its duty as factfinder precludes certification for appeal of the Court's October 31, 2000 denial of summary judgment.

IT IS ORDERED that Defendant's November 27, 2000 Notice of Appeal is vacated.

IT IS FURTHER ORDERED that Defendant shall serve and file an Answer to Plaintiff's Complaint within twenty (20) days of receipt of this Order.

Date: August 20, 2001

Henry M. Buffalo, Jr.
Judge

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

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

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| | | |
|---|---|---|
| **Sylvia Blue,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **vs.** | ) | **Court File No. 467-00** |
| | ) | |
| **Shakopee Mdewakanton Sioux (Dakota) Community** | ) | |
| | ) | |
| **Defendant.** | ) | |

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**Memorandum Opinion and Order**

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**Summary**

The Plaintiff seeks General Assistance payments and a land assignment, under programs established by the Defendant Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"). She asks this Court for a declaratory judgment with respect to her entitlement to receive both sets of benefits, and asks for an order directing the Community to make past and future General Assistance payments to her. The Community has moved to dismiss her Complaint for failure to state a claim upon which relief may be granted, under Rule 12(b)(6) of the Rules of Civil Procedure of this Court. For the reasons set forth below, I believe the Defendant's motion must be granted.

At the center of the Plaintiff's case are two assertions. In her Complaint, she alleges that

she "is entitled to receive" General Assistance from the Community (Complaint, ¶13); and she alleges that she also "is entitled to receive" a Community land assignment (Complaint ¶14). If there were a legal possibility that she were correct with respect to either or both of those allegations, then her Complaint might state a claim that could survive a motion to dismiss: this Court has been given broad legal and equitable power to redress deprivation of legal rights of members and non-members of the Community.

But I believe that it is clear, as a matter of law, that the Plaintiff does not have the "entitlements" that she claims. She is not possessed of a legal right either to receive money from the General Assistance program or to receive a land assignment from the Community; and the structure of the two programs does not offend the Community's Constitution, the Indian Civil Rights Act, 25 U.S.C. §1302 (2000), or any other applicable law. Therefore, the Plaintiff has not stated a claim upon which relief may be granted.

1. **The Plaintiff, and the Programs at Issue.**

The Plaintiff is 3/16 degree Mdewakanton Sioux (Dakota), but is not a member of the Community. For most of her adult life she was a member of the Lower Sioux Indian Community ("Lower Sioux"), but on September 2, 1996, she voluntarily relinquished her Lower Sioux membership. She is the daughter of a Community member, Rosella Larsen Enyart, and four of her five siblings also are members of the Community. Her fifth sibling presently receives General Assistance from the Community. The materials attached to the Complaint indicate that she moved to the Shakopee Reservation in 1994, to assist in caring for her mother, and that she applied for a land assignment in the Community on January 13, 1994. Letters attached to her Complaint indicate that she requested General Assistance in 1996 and 1997. To

date, the Plaintiff has not received either General Assistance or a land assignment.

The Community's General Assistance program was established by General Council Resolution No. 3-12-92-007. The program operates under Guidelines that were attached as Exhibit A to that Resolution. The Guidelines establish certain eligibility requirements, and then state:

> Any person who meets the requirements described herein, may be added to the General Assistance Program distribution list by a unanimous vote of the Business Council, and in the event the Business Council cannot unanimously approve the addition, then by a simple majority vote of the entire eligible voting membership of the General Council at a Special General Council meeting for that purpose.
>
> General Assistance Guidelines, ¶3.

The Land Assignment program is differently structured; and at present, in fact, it is not functioning. Citing a shortage of available land, the General Council voted in March, 2001 to suspend the making of further land assignments, pending the results of an aggressive land development program. Presumably, the suspension will be temporary. The underlying program has evolved over a period of time. It was initially established in July, 1985, by General Council Resolution No. 7-3-85-001. That Resolution established two priorities for land assignments: the first priority was given to the children of voting members who were residing on the Shakopee Reservation on July 3, 1985, and the second priority was given to children of voting members who were not residing on the Reservation on that date. Within that second group, priority was established "by date of application". In 1992, in Resolution No. 3-12-92-010, the General Council adopted specific lists, reflecting the rank order of priority for both groups; and in 1997, the General Council adopted Resolution No. 11-14-97-001, giving first priority, above

all other categories, to members of the Community. That amended system of priorities remains in place, although the actual issuance of land assignments was suspended as aforesaid.

**2. Discussion.**

Dismissal of a Complaint pursuant to Rule 12(b)(6) of the Rules of Civil Procedure of the Shakopee Mdewakanton Sioux (Dakota) Community is appropriate when "there is no reasonable view of the facts alleged in the Complaint which would support the Plaintiffs' claim." Smith v. Shakopee Mdewakanton Sioux (Dakota) Community Business Council, No. 011-96 (SMS(D)C Ct. App., Aug. 7, 1997), at 3. Here, the Complaint alleges the Plaintiff's Mdewakanton lineage; it alleges that she properly applied for General Assistance and for a land assignment; it alleges that she has received neither; and it alleges that all of her siblings have been treated differently than she. That is the sum and substance of the Complaint.

In my view, there is no set of facts that can be proven in support of these allegations that supports would lead to a conclusion that the Plaintiff is "entitled to" receive General Assistance or a land assignment, or that the Community's denial of those benefits violated the Indian Civil Rights Act, the Constitution of the Community[1], and other unspecified laws of the Community. Accordingly, her Complaint must be dismissed.

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[1] There was discussion during the briefing and oral argument of this case with respect to whether the Constitution of the Community, as it is presently written, affords guarantees of equal protection or due process of law to persons who are not members of the Community; and there was some confusion with respect to the effectiveness of a provision that evidently was cited by Judge Buffalo in an opinion in David Gregory Crooks v. Shakopee Mdewakanton Sioux (Dakota) Community, No. 468-00. In my view, the question as to whether the Community's Constitution presently affords such protections is moot, because the Indian Civil Rights Act clearly does afford them, and the General Council of the Community has expressly given this Court jurisdiction to hear cases brought under that Act. SMS(D)C Ordinance No. 02-13-88-01, Section II.

Fundamentally, I conclude that the Community has the right to do what it has done. Neither the systems it has established for the General Assistance or the land assignment programs, nor the manner in which those programs are alleged to have been administered in this case, violates any applicable law.

As to the General Assistance program, the language of the Guidelines adopted by Resolution 3-12-92-007, establishing the General Assistance program, creates a discretionary program where the Business Council "may" decide to provide benefits by unanimous vote. Obviously, this language vests the Business Council with the right to say either "yes" or "no" to any applicant. Likewise, if an application for General Assistance benefits is brought to the General Council, that body also can say either "yes" or "no". Hence, no applicant for General Assistance benefits has a liberty or property interest in those benefits, and the denial of benefits does not trigger a due process claim under the Indian Civil Rights Act. Clifford Crooks v. Shakopee Mdewakanton Sioux (Dakota) Community, No. 016-97 (SMS(D)C Ct. App., Jan 30, 1998), at 3.

Nor does the General Assistance program violate any guarantee of equal protection of the laws. The program's Guidelines contemplate the weighing of each person individually, by the Business Council and, if the process runs that far, by the General Council. The status of an applicant's siblings or other relatives is irrelevant. No suspect classification is involved in this system, so the equal protection requirements of the Indian Civil Rights Act merely mandate that the system have a "rational basis"; and in my view the very nature of the General Assistance program -- involving consideration of a myriad of personal, historic, and community-based factors -- clearly provides a rational basis for the Guidelines' approach.

The Land Assignment program likewise does not offend the Indian Civil Rights Act or any other applicable law. It creates a system of priorities, based on membership and residence. Those factors are not suspect classifications, and they have a rational relationship with legitimate governmental purposes of the government of an Indian tribe with a small membership and a small land base. So, the priorities in the Land Assignment Program do not offend the Equal Protection provisions of the Indian Civil Rights Act. And, as with the General Assistance program, although an applicant does have the right to have his or her application processed by the Community's officers in the time and under the requirements contemplated by the law creating the program, Amundsen v. Shakopee Mdewakanton Sioux (Dakota) Community Enrollment Committee, No. 049-94 (SMS(D)C Tr. Ct., Sept. 16, 1996) an applicant does not have a liberty or property interest in receiving the assignment. And nothing in the law requires that, once a governmental program is established, it and the priorities it establishes must remain unchanged for all time: governmental programs under which persons apply for benefits can change without offending the due process rights of applicants. Amundsen v. Shakopee Mdewakanton Sioux (Dakota) Community Enrollment Committee, No. 049-94 (SMS(D)C Tr. Ct., Apr. 14, 1995). Hence, the fact that the Community gave priority to children of members who resided on the Reservation, over children of members not residing on the Reservation is not inconsistent with the Indian Civil Rights Act. Nor is the fact that, during the pendency of the program, the Community adopted a resolution under which all Community members clearly were given priority over all other categories of land assignment applicants.

## ORDER

For the foregoing reasons, and based on all of the pleadings and materials filed herein, the

Defendant's Motion to Dismiss is GRANTED.

November 14, 2001

John E. Jacobson
Judge of Tribal Court

# IN THE TRIAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT — STATE OF MINNESOTA

Ann T. Ho,

Plaintiff,

v.

Case No. 472-00

Little Six, Inc.,

Defendant.

## MEMORANDUM OPINION AND ORDER

In her Complaint, Plaintiff alleges that on July 29, 1998, she was injured on the premises of the Defendant, and that the injury was the result of Defendant's negligence. Plaintiff filed this action on December 1, 2000, more than twenty-eight months after her alleged injury. In its Answer, Defendant denied that it was negligent and raised several affirmative defenses; and after filing its Answer, Defendant filed a motion for summary judgment arguing that Plaintiff failed to file this lawsuit within the time mandated by the applicable statute of limitations. For the reasons set forth below, I have concluded that the Defendant's motion must be granted.

Rule 28 of the SMS(D)C Rules of Civil Procedure requires that summary judgment be entered only if there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Little Six, Inc., et al v. Prescott and Johnson, Nos. 020-99, 021-99, 022-99 (SMS(D)C Ct. App. Feb. 1, 2000); Feezor and St. Pierre v. SMS(D)C et al, No. 311-98 (SMS(D)C Tr. Ct. May 19, 1999). When considering whether there is a genuine issue of material fact, it is the duty of the Court to

view the evidence in the light most favorable to the non-moving party, and to give that party the benefit of all reasonable inferences drawn from that evidence. Id. However, in the instant case the parties do not dispute any of the facts necessary to resolve Defendant's motion. Therefore, the only question is whether the Defendant is entitled to judgment as a matter of law.

In their briefs and pleadings, the parties agree on the following: Plaintiff alleges she was injured on July 29, 1998. Plaintiff reported the injury to Defendant shortly thereafter. A letter submitted by Defendant makes it clear that at least by March 1999, Plaintiff was represented by legal counsel. Plaintiff sent a demand letter to Defendant on November 19, 1999, and Defendant denied the demand on February 24, 2000. Plaintiff filed this action on December 1, 2000, the summons was issued December 4, 2000, and Defendant was served the Complaint on January 4, 2001.

On November 12, 1996, by General Council Resolution 11-12-96-001, the Shakopee Mdewakanton Sioux (Dakota) Community adopted a Tort Claims Ordinance, which has been in effect since that date. Section 9 of the Tort Claims Ordinance states:

> The statute of limitations for all claims brought against the Community is two (2) years and the right to bring a claim against the Community shall begin to accrue on the date of the act or omission giving rise to the claim, or on the date a reasonable person under the same or similar circumstances would have known of the injury, loss or other damages incurred as a consequence of the act or omission of the employee of the Community.

The Tort Claims Ordinance gives this Court jurisdiction to hear tort claims against the Community and its entities, as follows:

> The Shakopee Mdewakanton Sioux (Dakota) Tribal Court shall have original and exclusive jurisdiction to hear claims brought pursuant to this Ordinance, subject to the terms of the Ordinance, and all claims not brought in the Shakopee Mdewakanton Sioux (Dakota) Tribal Court shall be deemed invalid.

The undisputed facts make it clear that this is not a case where the Plaintiff was ignorant of her injury or disadvantaged somehow by not being represented by counsel. Plaintiff appears to have been represented by counsel since at least March, 1999; and from the record it appears that Plaintiff and her counsel had ample opportunity to investigate and pursue Plaintiff's claim within the two year period after her injury.

Plaintiff's counsel states that his delay in filing this suit for almost ten months (from the date the demand was reject by Defendant in February, 2000 until the Complaint was filed in December, 2000) "had to do with arriving at acceptable arrangements for costs needed to prosecute the claim." See Plaintiff's Response to Defendant's Motion for Summary Judgment, at 3. Although it is not clear to the Court how negotiating a client-attorney agreement on costs could drag out for ten months, including the time when the statute of limitations was scheduled to run, such discussions are simply not a reason to toll the statute. To his credit, Plaintiff's counsel does not make that argument.

Plaintiff does argue, however, that her lawsuit is not barred because her notice and demand letters, sent on March 12, 1999 and November 19, 1999 respectively, constitute a "claim" brought within two years of July 29, 1999, such that the Tort Claims Ordinance's statute of limitations was satisfied. Plaintiff argues that the term "claim" in Section 9 of the Tort Claims Ordinance should not be understood to require a lawsuit filed in Tribal Court. Instead, Plaintiff argues that as long as the Defendant is given some level of notice of a claim within two years, the statute is satisfied.

Plaintiff's attorney fails to offer any case law or textual support for this interpretation; but he argues that the Tort Claims Ordinance should be strictly construed against the Defendant because, he asserts, the Defendant was responsible for drafting the Ordinance. Even assuming, without deciding, that common law rules of contract construction may apply to questions of statutory interpretation (a proposition with respect to which there would appear to be significant question), the Plaintiff is simply incorrect about the facts. The Defendant here, Little Six, Inc. (LSI), is not the government of the Shakopee Mdewakanton Sioux (Dakota) Community. LSI has no responsibility for promulgating the laws of the Community. Rather, LSI is a subsidiary economic enterprise of the Community, possessing no power under the SMS(D)C Constitution to pass legislation. Therefore, under these facts, the Plaintiff clearly is not entitled to any special interpretive presumptions.

And -- with or without presumptions -- Plaintiff's interpretation of Section 9 is simply unpersuasive. Statutes of limitation are created to give certainty to the relationship between those who claim injury and those purportedly responsible for the injury, by putting a finite end to any potential legal liability one party may have to another. The

practical effect of Plaintiff's interpretation would be to completely erase that certainty. Under Plaintiff's approach, there would be no known, finite time within which a potential plaintiff would be required file in this Court, before his or her claim would be time-barred.

It is true that the Tort Claims Ordinance does not specifically define the term "claim"; and Section 10 of the Ordinance requires that the "claim" be presented to legal counsel for the Community. But it also is absolutely clear that, if an allegedly injured party wishes to seek judicial redress, the party's "claim" must be brought to this Court under Section 6 of the Tort Claims Ordinance; and Rule 4 of our Rules of Civil Procedure of this Court (which has been in place since 1988, and which was modeled after Rule 3 of the Federal Rules of Civil Procedure) leaves no doubt as to the only way in which a claim can be heard in this Court:

> A civil action shall be commenced by filing a complaint with the Clerk of Court.

Therefore, the term "claim", as used in both Sections 6 and 9 of the Tort Claims Ordinance , clearly means the initiation of a lawsuit by filing a complaint in this Court.

Under the plain language of Section 9, Plaintiff had two years from her alleged injury on July 29, 1998 to bring a claim, by filing a lawsuit, in this Court. To comply with the statute of limitations in the Tort Claims Ordinance, Plaintiff would have had to file her suit by July 29, 2000. She did not file her lawsuit until December 1, 2000, and her suit therefore is barred by the statute of limitations.

**ORDER**

For the foregoing reasons, this action is barred because the Plaintiff failed to file this lawsuit within the applicable statute of limitations. Defendant's Motion to Summary Judgement is GRANTED.

Dated: 11/21/01

John E. Jacobson
Judge

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

FILED
DEC 2 7 2001

JEANNE A. KRIEGER
CLERK OF COURT

# IN THE TRIAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

David Gregory Crooks

Plaintiff,

v.

The Shakopee Mdewakanton Dakota (Sioux) Community; the Shakopee Mdewakanton Dakota (Sioux) Community Business Council; the Shakopee Mdewakanton Dakota (Sioux) Community Enrollment Committee; Certain Unknown Members of the SMS(D)C Business Council and Enrollment Committee,

Defendants.

Case No. 468-00

## MEMORANDUM OPINION AND ORDER

The Defendants in this case have requested that the Court reconsider its earlier order denying the certification of an interlocutory appeal under Rule 31 of the SMS(D)C Rules of Civil Procedure. See LSI Board of Directors v. L.B. Smith, et al., No. 010-97 (SMS(D)C Ct. App. May 28, 1998) (Rule 31 incorporates substantive, but not procedural requirements of 28 U.S.C. § 1292). The order Defendants had attempted to appeal was a denial of Defendants' motion to dismiss. The order was dated October 31, 2000. Specifically, Defendants argue that since its original motion was one for dismissal, rather than summary judgment, the Court's August 20, 2001 order denying the interlocutory appeal was in error. In addition, Defendants argue that since other parties in other cases

have attempted to rely on the Court's order denying the motion to dismiss as precedent, the Court should reconsider the significance of its earlier order and allow an appeal.

The Court is unpersuaded by Defendants' arguments. As the October 31, 2000 order denying the motion to dismiss makes clear, the Court concluded that dismissal was not appropriate because Defendants had failed to show that there was no set of facts under which Plaintiff could support his complaint. The Court simply permitted Plaintiff an opportunity to prove up his claims.

Denying an interlocutory appeal in order to allow the development of a factual record is appropriate in this case, even if the original order was premised on a motion to dismiss. Federal courts routinely deny certification of interlocutory appeals, even if the appeal is from a denial of a motion to dismiss, where the remaining questions are factual rather than legal. See, e.g., Arnett v. Gerber, 575 F.Supp. 770, 772 (S.D.N.Y. 1983) (refusing to certify a denial of a motion to dismiss, the court states "This complex case, involving interrelated claims under the antitrust laws, federal securities laws, and Delaware corporate law, is in its early stages. Numerous factual issues bearing directly on the selection of the appropriate remedy, if any, remain undeveloped or disputed. In the absence of a more fully developed factual record, certification under § 1292(b) is inappropriate. . ."); Pettit v. Amer. Stock Exchange, 217 F.Supp. 21, 32 (S.D.N.Y. 1963) ("Appellate review cannot be meaningful in this context. Defendants would be seeking the final resolution of difficult substantive questions in a complex factual setting with no more than the bare allegations of the complaint to define the controversy. It is likely that important facts will be developed beyond the present confines of the pleadings, that might have a vital impact on the court's assessment of the issues."); see also Paschall v. Kansas City Star Co., 605 F.2d 403 (8th Cir. 1979).

This case is no different. Any reference in the Court's August 20, 2001 order to Defendant's earlier motion as one for summary judgement does not change this analysis. Plaintiffs have simply failed to meet the heavy burden required to certify a non-final interlocutory order for appeal.[1]

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[1] The Eighth Circuit has recently noted that this burden is significant. In discussing 28 U.S.C. § 1292, upon which SMS(D)C Rule 31 is based, the Eighth Circuit has noted:

In addition, the fact that other parties in other cases have relied on the October 31, 2000 order is not significant. Parties routinely use other opinions as precedent, and this by itself is not sufficient to justify an interlocutory appeal under Rule 31. In any event, the threat of conflicting opinions that the Defendants believe the October 31, 2000 order will create has apparently not materialized in the other case where that order was cited. See Blue v. SMS(D)C, No. 467-00 (Tr. Ct. Nov. 11, 2001) at n. 2 (harmonizing October 31, 2000 order in this case with arguments in that case).

**ORDER**

For the foregoing reasons, Defendant's Motion for Reconsideration is DENIED and this Court's August 20, 2001 Order denying the certification of an appeal stands.

Dated: December 27, 2001

Henry M. Buffalo, Jr.
Judge

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. . . § 1292(b) "should and will be used only in exceptional cases where a decision on appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted cases." S. Rep. No. 2434, 85th Cong., 2d Sess. (1958), reprinted in 1958 U.S.C.C.A.N. 5255, 5260; accord In re San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1010 n.1 (1st Cir. 1988); Ashmore v. Northeast Petroleum Div. of Cargill, 855 F. Supp. 438, 440 n.2 (D. Me. 1994); FDIC v. First Nat'l Bank of Waukesha, Wis., 604 F. Supp. 616, 619-20 (E.D. Wis. 1985); Biggers, 171 F. Supp. at 95-96; Charles Alan Wright et al., Federal Practice and Procedure § 3929 (1982 & Supp. 1994) ("Opinions given to general pronouncements about the proper method of applying § 1292(b) frequently announce that it is to be used sparingly, in exceptional cases."). A motion for certification must be granted sparingly, and the movant bears the heavy burden of demonstrating that the case is an exceptional one in which immediate appeal is warranted. Bank of New York v. Hoyt, 108 F.R.D. 184, 189 (D.R.I. 1985).

White v. Nix, 43 F.3d 374, 376 (8th Cir. 1994).

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

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Stephen and Tammy Florez,

Plaintiffs,

vs.

Jordan Construction Co. and
Fritz M. Jordan,

Defendants.

Court File No. 473-01

**MEMORANDUM OPINION**

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Defendants Jordan Construction Company and Fritz M. Jordan (hereinafter "Defendant" or "Jordan") filed a motion for summary judgment asserting Plaintiffs' claims for breach of contract, breach of warranties, breach of covenant of good faith and fair dealing, fraud, negligence, and conversion fail as a matter of law. As explained herein, because material questions of fact remain, Defendant's motion is denied.

## I. FACTS

Plaintiffs allege facts in this case as follows. Plaintiffs Stephen and Tammy Florez are residents of the Shakopee Mdewakanton Sioux (Dakota) Community ("SMS(D)C" or "the Community"). Complaint ¶ 1.1. They live at 2699 Eagle's Circle in Prior Lake, Minnesota, on land held in trust for the Community and assigned to Stephen Florez. Id. On May 5, 2000, Plaintiffs entered into a contract with Defendant Jordan Construction Company and its sole proprietor, Fritz Jordan. Id. ¶ 2.1. Jordan lives and keeps his principal place of business at 5260 Town Hall Drive, Rockford, Hennepin County, Minnesota. Id. ¶ 1.2-3. Jordan operates a home construction business and solicits and conducts business in the Community. Id. ¶ 1.

In the Contract executed on May 5, 2000, Defendant agrees to construct "a two-story addition to the south side of house as per plans & specs" according to a payment and work time schedule for a total cost of $128,000. Id. Exh. 1. The payment schedule requires $35,000 to start, $25,000 in June following the demolition of the deck and framing of the new structure, $25,000 in July following completion of the drywall, and $43,000 "upon completion of job and lien waivers." Id. The Contract guarantees all materials and labor "as specified, and the above work will be in accordance with the drawings and specifications provided." Id.

The job specifications attached to the Contract include a provision requiring the contractor to obtain all building/electrical permits for the project and expectations for the completion of demolition, construction, drywall, and electrical work, as well as windows, stucco finish, paint, certain fixtures and appliances. Id. Exh. 1. The Bid Form signed by Jordan indicates an expected start date of May 8, 2000 and an expected completion date of August 15, 2000. Id. Jordan verbally promised Plaintiffs that he would use only experienced laborers and would be present on the worksite to supervise work crews, and Plaintiffs relied upon these promises in agreeing to Contract provisions. Id. Exh. 4; Stephen Florez Affid. ¶ 7.

Plaintiffs paid Defendant $35,000 to start on May 8. Complaint Exh. 2. Plaintiff Stephen Florez kept a journal for the project in which he noted his concern that by mid-May, Defendant did not yet have a SMS(D)C construction permit at the worksite. S. Florez Deposition p. 40. By May 17, Plaintiff Stephen Florez believed construction was progressing slowly. Id. at 46. On May 23, Stephen Florez picked up the construction permit himself from SMS(D)C Administrator Bill Rudnicki. Id. at 50. Also on May 23, framing began, and Stephen Florez became concerned about the lack of workers' safety precaution on the work site. Id. at 61. On May 24, one of Defendant's workers, Dan Morton, accidentally shot a nail through his hand with a nail gun. Id.

at 57, 61. At around that time, two of Defendant's workers quit or were suspended from the job. Id. at 62. By May 27, Stephen Florez was dissatisfied with the work progress because of workers failing to show up, safety concerns, and "as far as tools, numerous items." Id. at 73. At one point, the SMS(D)C building inspector, LeRoy Houser, visited the work site and remarked that the framing was not straight, or "plumb." Id. at 76. On June 12, Stephen Florez sent a letter to Defendant demanding that "major problems" with construction be corrected, claiming that framing was not plumb and progress was not according to the work schedule. Complaint Exh. 4. Plaintiff asserted in the letter that Defendant had not been present on the work site to supervise crews as promised, and workers had arrived on the site without proper tools. Id. Plaintiff also alleged Defendant had failed to comply with directives by Leroy Houser that framing be corrected prior to placing roof trusses. Id. Plaintiff informed Defendant that he had proceeded in a manner that would "require extensive repair and rehabilitation" and that the general quality of workmanship was "far below standard." Id. Plaintiff stated: "This situation is absolutely not acceptable. This letter is notice that I am not satisfied with your work and progress on the project. If the problems are not corrected immediately, I will be forced to cancel our contract and locate another builder to complete the project." Id. (emphasis in original). Defendant promised Plaintiffs he would complete framing and get back on schedule. Complaint ¶ 3.4.

Plaintiffs paid Defendant the next installment of $25,000 on June 27. S. Florez Depo. p. 31. Despite Defendant's promises, however, he continued to ignore the building inspector's directive to correct the framing, and he did not complete it by the end of June as provided in the Contract. Complaint ¶ 4.3, Exh. 1. Defendant also allegedly asked Plaintiff to lie to the state electrical inspector about a permit so that Defendant could run the wiring. S. Florez Depo. p. 90. Defendant's crew rough framed the windows for crank-out instead of the double-hung windows

provided in the specifications, twice ordered the wrong type of windows, and installed two windows incorrectly. Id. at 90-91.

On July 6, 2000, Defendant told Stephen Florez that he planned to attend a week retreat for his church. S. Florez Depo. at 84. Stephen Florez told Defendant the framing needed to be fixed immediately, and Defendant said he was attending the retreat anyway. Id. Stephen Florez then fired Defendant and ordered him to collect his workers and tools and leave the property. Id. at 85. Florez sent a letter canceling the Contract as a result of Defendant's breach of the Contract and failure to perform as promised. Complaint Exh. 5. In this letter, Plaintiff demanded a full accounting of the $60,000 paid on the Contract, documentation of any payments, the return of any unused portion, and lien waivers. Id. Defendant did not respond to the letter. Complaint ¶ 4.6.

Plaintiffs hired a new contractor, Mahowald Builders, Inc., to correct deficiencies in Defendant's work and complete the job. Id. Exh. 6, 7. Mahowald claimed 170.5 hours of correction time on the addition, Id. Exh. 7, and estimated remediation cost at $7,260. Complaint ¶ 4.9. On August 2, 2000, Leroy Houser sent a letter to Defendant reiterating Plaintiffs' concerns and demands and threatening to petition the Tribal Business Committee to revoke Defendant's privilege of doing business in the Community if Defendant did not produce documentation fully accounting for the project as requested. Id. Exh. 6. Defendant responded by producing documentation that Plaintiff says was "fraudulent on its face." Complaint ¶ 4.8.

Defendant disagrees with Plaintiffs' version of the facts. Defendant contends that Plaintiff Stephen Florez "interposed himself in almost every aspect of the project including ongoing and disruptive behavior" but that, "[r]egardless, the project proceeded in a workmanlike manner." Fritz Jordan Affid. ¶ 4-5. Jordan states that he promised and fully intended to comply

with the Contract. Id. ¶ 6. Jordan does not admit or deny his alleged promise to be present on the worksite to supervise work crews but admits that he told Plaintiff of his intention to spend a week at a church retreat and "further assured Plaintiffs that the project would continue in my absence." Id. ¶ 8-9. Defendant contends that, had Plaintiffs not terminated him on July 6, six weeks away from the expected completion date, "[t]he project would have been completed on August 15, 2000 in strict concordance with the contract." Id. ¶ 10. Finally, Defendant disputes the measure of Plaintiffs' damages, stating that the second contractor was hired on a "cost-plus" basis rather than bidding the project and therefore having to abide a higher standard of efficiency as Defendant had done. Id. ¶ 12.

## II. ANALYSIS

A. Summary Judgment Standard

Rule 28 of the SMS(D)C Rules of Civil Procedure requires that summary judgment only be entered for the moving party if there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Welch v. SMS(D)C, No. 036-94 (SMS(D)C Tr. Ct. Nov. 27, 1995). Summary judgment is not appropriate where there are disputed issues of material fact. Welch et al. v. SMS(D)C, No. 023-92 (SMS(D)C Tr. Ct. June 3, 1993). When considering a motion for summary judgment, it is the duty of the Court to view the evidence in the light most favorable to the non-moving party and to give that party the benefit of all reasonable inferences drawn from the evidence. Barrientez v. SMS(D)C, No. 007-88 (SMS(D)C Tr. Ct. Sept. 7, 1990).

B. Breach of Contract

Common law principles concerning the existence, performance and breach of contract are well established. "A contract is a promise or a set of promises for the breach of which the law

gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1 (1979 Main Vol.). "When performance of a duty under a contract is due, any non-performance is a breach." Id. § 235. An oral promise may be binding, Id. § 4, and a promise reasonably inducing action may be enforceable. Id. § 90. If one party fails to perform as specified under the contract, the other party may cancel the contract upon consideration of all the circumstances, including the allowance of a reasonable time to cure any failure or defect in performance. Id. § 237. The critical inquiry is whether the parties' conduct was reasonable under the circumstances. Such an inquiry is necessarily fact-specific and is not usually appropriate in the context of summary judgment. Rather, factual disputes are appropriately addressed at trial and resolved by the factfinder.

In this case, the parties agree that they entered into a Contract on May 5, 2000 for Defendant to construct an addition to the south side of Plaintiffs' home for a total cost of $128,000, with payments to be made according to a time and work schedule. Plaintiffs allege that Defendant induced Plaintiffs' agreement to Contract terms by promising to be present on the work site to supervise work crews and by using only experienced employees. Plaintiffs claim Defendant breached the Contract by, at various times, failing and refusing to appear at the worksite and by using inexperienced laborers. Plaintiffs also allege Defendant's breach of the Contract by failing to correct structural flaws in the framing according to the contractual timeline. Defendant, by contrast, responds that he did not breach the Contract and asserts that it was Plaintiffs who breached by canceling the Contract on July 6, 2000. Defendant further contends that Plaintiffs' measure of damages is skewed to Jordan's detriment because the second contractor was hired on a "cost-plus" basis.

The material questions of fact dominating the parties' dispute preclude summary judgment. Did Defendant breach the contract through improper performance? Were Plaintiffs justified in terminating Defendant and canceling the contract? If so, is Defendant entitled to keep any of the $60,000 paid to him, and how much? May Plaintiffs collect the full amount they claim was required for remedial work? Each of these questions and more require factual inquiry at trial. Defendant claims summary judgment is appropriate because no material fact exists, but his argument rests on contradictions of fact.

Defendant's sole legal argument regarding Plaintiffs' contract claims—notwithstanding those arguments that entirely ignore Plaintiffs' factual and legal assertions that it was Defendant who first breached the contract and failed to account for the $60,000 he was paid—seems to be that Plaintiffs' evidence of breach would be inadmissible and therefore disregarded for purposes of summary judgment. Defendant points to no legal authority for his rather startling proposition that only expert testimony would be admissible at trial and Stephen Florez's personal observations must somehow be disregarded because he is "not an experienced contractor" (itself a factual assertion). Defendant's Brief in Support of Motion at 9. This Court requires evidence to establish a claim, which may be presented at trial by witnesses with personal knowledge of a matter, not only by "experts." SMS(D)C Rule 27 (applying Minnesota Rules of Evidence to the trial of actions before the Court); Minn. R. Evid. 602. Whether a witness is credible is a fact issue for trial. As detailed below, each of Plaintiffs' claims entails standards of proof that require full discovery and determination of facts.

C. Breach of Warranties

Plaintiffs allege Defendant breached express, implied, and statutory warranties by promising to build and repair the new addition and failing to do so. Whether Plaintiffs' factual

assertions are true are factual issues for trial. Defendant may not invoke summary judgment by merely contradicting Plaintiffs' version of the facts.

D. Breach of Covenants

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement," and the appropriate remedy for breach of that duty varies with circumstances. Restatement (Second) of Contracts § 205 (1979 Main Vol.). Plaintiffs' allegation that Defendant breached his duty of good faith and fair dealing is coextensive with Plaintiff's factual allegations supporting claims for breach of contract, negligence, and fraud. Defendant has not responded to Plaintiffs' assertion that he had a duty of good faith and fair dealing but admits there is a Contract between the parties and denies that he has conducted himself in an "unworkmanlike manner." Questions of material fact remain for trial.

E. Negligence

To establish a prima facie case of negligence, Plaintiff must allege facts sufficient to demonstrate (1) that Defendant owed him a duty, (2) that Defendant breached that duty, (3) that Defendant's breach was the proximate cause of plaintiff's injuries, and (4) that Plaintiff suffered actual injury. *See* Kostelnik v. Little Six, Inc., No. 019-97 (SMS(D)C Ct. App. March 17, 1998), at 5.

The supporting facts and required determinations for negligence in this case are identical to Plaintiffs' breach of contract claim. Plaintiffs have alleged that Defendant had a contractual duty to timely construct Plaintiffs' home addition in a workmanlike manner, that they paid Defendant $60,000 for which he has not fully accounted, and that Defendant breached his duty in numerous ways, entitling Plaintiffs to cancel the contract and requiring Plaintiffs to incur the additional expense of repairing problems caused by Defendant. Plaintiffs' allegations, if true,

entitle them to recover from Defendant under principles of negligence. Defendant disputes Plaintiffs' version of the facts but has not shown as a matter of law any fatal deficiency in Plaintiffs' cause of action. This is a matter to be resolved at trial.

F. Conversion

A claim for conversion requires a showing that Defendant has wrongly taken or withheld money or personal property that is rightfully Plaintiffs'. *See generally* 18 Am. Jur.2d Conversion §§ 1, 2 (1985). Plaintiffs allege that Defendant took payment of $60,000 to construct the home addition but did not account for expenditure of it under the parties' Contract, entitling Plaintiffs to the return to all or a portion thereof. Plaintiffs have stated a claim for conversion, and Defendant has responded only with contradicting factual assertions without a demonstration that Plaintiffs' prima facie case fails as a matter of law. This is a factual dispute for trial.

G. Fraud

The elements of fraud are the making of a false representation of a past or existing material fact that is susceptible of knowledge, while knowing it to be false or without knowing whether it was true or false, with the intention of inducing the person to whom it was made to act in reliance upon it or under such circumstances that such person was justified in so acting and was thereby deceived or induced to so act to his damage. Children's Broadcasting Corp. v. Walt Disney Co., 2001 WL 345207 (8th Cir. 2001). A basic rule of contract law is that a contract induced by fraud may be rescinded by the defrauded party. 17A Am. Jur.2d, Contracts § 567 (2000). In the case of material misrepresentations made and relied upon affecting work under a building or construction contract, the contract may in some circumstances be rescinded upon discovery of the misrepresentations. 13 Am. Jur.2d Building and Construction Contracts § 110 (2000).

In this case, Plaintiffs allege that the Defendant fraudulently induced them to enter into the Contract by promising he would be present on the work site to supervise work crews and assuring that only experienced laborers would be employed. Defendant admits in his Affidavit that he planned to take a week off to attend a retreat. Defendant alleges disputed facts in support of his conclusion that Plaintiff Stephen Florez's presence on the construction site was disruptive and negatively affected work progress. The questions whether Defendant used inexperienced laborers and misrepresented his intentions, and whether Plaintiffs reasonably relied on Defendant's alleged misrepresentations, are material fact questions for trial.

## III. CONCLUSION

In consideration of the foregoing, Defendant's Motion for Summary Judgment is denied.

IT IS SO ORDERED.

Date 1/15/02

Robert Grey Eagle

Hon. Robert A. Grey Eagle

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

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Stephen and Tammy Florez,

Plaintiffs,

vs.

Jordan Construction Co. and
Fritz M. Jordan

Defendants.

Court File No. 473-01

**ORDER**

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This matter came before the Court for telephonic hearing on November 2, 2001 before the Honorable Robert A. Grey Eagle. Steven H. Silton, Esq. appeared on behalf of the Defendants. Mitchell Scott Paul, Esq. appeared on behalf of the Plaintiffs.

The Court issues this Order following a thorough review of the record in this case and the materials contained therein.

IT IS HEREBY ORDERED:

Defendant's Motion for Summary Judgment is denied.

Dated: 1/15/02

Robert Grey Eagle
Hon. Robert A. Grey Eagle
Judge of the Tribal Court

# IN THE TRIAL COURT OF
# THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

| | | |
|---|---|---|
| David Gregory Crooks<br><br>Plaintiff,<br><br>v.<br><br>The Shakopee Mdewakanton Dakota (Sioux) Community; the Shakopee Mdewakanton Dakota (Sioux) Community Business Council; the Shakopee Mdewakanton Dakota (Sioux) Community Enrollment Committee; Certain Unknown Members of the SMS(D)C Business Council and Enrollment Committee,<br><br>Defendants. | ) | Case No. 468-00 |

## MEMORANDUM OPINION AND ORDER

In this case, Plaintiff claims he has satisfied the requirements for Community membership and should be made a member. The Defendants largely agree with his factual allegations, but argue that the General Council's decision to reject his membership application may not be reviewed by this Court. Since I conclude that Community law does not provide this Court with the power to issue the relief the Plaintiff seeks, I conclude that the Defendants are entitled to a judgment as a matter of law.

## I. FACTUAL BACKGROUND

Plaintiff claims to qualify for membership under Art. II, Sec. 1 of the SMS(D)C Constitution, which states:

> All descendants of at least one-fourth (1/4) degree Mdewakanton Sioux Indian blood who can trace their Mdewakanton Sioux Indian blood to the Mdewakanton Sioux Indians who resided in Minnesota on May 20, 1886, Provided, they apply for membership and are found qualified by the governing body, and provided further, they are not enrolled members of some other tribe or band of Indians.

Complaint ¶ 9. Plaintiff specifically alleges that he is at least ¼ Mdewankanton Sioux, that he is a lineal descendant of Amos Crooks, George Crooks, and Alice Crooks, that all of these individuals were living in Minnesota on May 20, 1886, and that all these individuals were listed as Mdewakanton Sioux residents on the Henton Census Roll. Complaint ¶ 11. Plaintiff also alleges that he is not presently enrolled in any other tribe or band of Indians. Complaint ¶12.

Plaintiff alleges that he filed an application for membership in October 1994, and that after a substantial delay, the Community's Enrollment Committee recommended that he be granted membership in July of 1996. Complaint ¶ 13, ¶ 24. Plaintiff also alleges that there were three challenges to his membership application by Community members, each of which were denied. Complaint ¶ 25. Nonetheless, despite the recommendation of the Enrollment Committee and the rejection of all challenges against his application, the General Council voted to deny Plaintiff's application. Complaint ¶ 25. Plaintiff alleges that to date he has never received an explanation of why his application was rejected. Complaint ¶ 25.

The Defendants filed a motion to dismiss the Complaint that was denied. See Crooks v. SMS(D)C, No. 468-00 (SMS(D)C Tr. Ct. Oct. 31, 2000). Without an answer to the allegation from the Plaintiff, the Court concluded that the Plaintiff had stated a claim upon which relief may be granted and that the Court could not say there was no set of facts to support those claims. The Defendants then spent considerable efforts attempting to appeal or reverse that non-final order. Those efforts were denied and the Defendants were ordered to file an Answer. See Crooks v. SMS(D)C, No. 468-00 (SMS(D)C Tr. Ct. Dec. 27, 2001).

The Defendants filed an Answer on January 17, 2002, in which they largely admit most of the Plaintiff's allegations. The Defendants admit that the Plaintiff is at least ¼ Mdewankanton Sioux, that he is a lineal descendant of individuals who were living in

Minnesota on May 20, 1886, and that those descendants were listed as Mdewakanton Sioux residents on the Henton Census Roll. Answer ¶ 1. Defendants also admit that the Plaintiff is not presently enrolled in any other tribe or band of Indians. Answer ¶ 1.

Defendants admit that Plaintiff filed an application for membership, and that after some delay, the Community's Enrollment Committee recommended that he be granted membership. Answer ¶ 18; Memorandum in Support of Motion for Judgment on the Pleadings, at 2. Defendants also admit that there were three challenges to Plaintiff's application and each was denied. Answer ¶ 19. Nonetheless, despite the recommendation of the Enrollment Committee and the rejection of all challenges against his application, Defendants admit the General Council voted to deny Plaintiff's application. Answer ¶ 19. Plaintiff alleges that to date he has never received an explanation of why his application was rejected, and the Defendants do not refute this allegation. Answer ¶ 19.

Defendants then filed a motion for judgement on the pleadings, arguing that since the factual elements of this case were largely undisputed, the Defendants were entitled to judgement as a matter of law.

## II. LEGAL DISCUSSION

As stated in the Court's October 31, 2001 order, the Plaintiff has not failed to state a claim in this case. He raises claims under the Indian Civil Rights Act, and the ICRA applies to non-members of this Community. Blue v. SMS(D)C, No. 467-00 (Tr. Ct. Nov. 11, 2001) at n.1 (noting that ICRA applies to non-members and jurisdictional statute allows this Court to entertain ICRA claims).

However, prior to the October 31, 2001 order from this Court, the Defendants had not filed an Answer in this case, so the development of a factual record was in its infancy. The Defendants have now filed an Answer that largely admits the allegations made by the Plaintiff. Now, the Defendants do not argue that the Plaintiff has failed to state a claim in his Complaint, but rather that given the facts alleged and admitted, the Defendants are entitled to judgement as a matter of law on the pleadings under Rule 12. Because I conclude that under Community law there is no relief that this Court can grant the Plaintiff, Defendants are entitled to judgment as a matter of law.

In discussing the requirements for membership under Article II, Section 1 of the Community's Constitution, the Defendants make a distinction between eligibility and qualification. Defendants argue that although Plaintiff has met all the eligibility requirements in Article II, Section 1, he is not qualified for membership because the General Council did not vote to accept him as a member. The Defendants argue that because the language of Article II, Section 1 states that an applicant for membership must be "found qualified by the governing body", this means that the General Council must vote on each membership application, and if this vote is adverse to an applicant, he or she cannot be made a member. See Ordinance No. 6-08-93-001, Sec. II.

The problem with the Defendants' argument is that reading Art. II, Sec. 1 to create a General Council vote requirement for each applicant means that a determination of who is qualified is completely subjective and is not based on any articulated standards. According to the Defendant's position, a person, such as the Plaintiff, can meet every objective standard for membership under the Constitution, but he or she can still be rejected by the General Council for no reason at all, or because the person is not popular or good looking or smart enough for the tastes of the Community's membership.

The Court is very sympathetic to the Plaintiff's arguments that Resolution No. 6-08-93-001, which adopts an interpretation of Art. II, Sec. 1 permitting the General Council vote, may be rife with substantive due process or equal protection problems. For example, under the Defendants' interpretation of Art. II, Sec. 1, two people could meet all the objective requirements for membership, they could even be biological twins, and yet one could be found "qualified" by a General Council vote and the other found not qualified. From the briefing to date, the Court is unable to determine how such a distinction could be supported by a rational basis in law.

However, the Defendants do appear to be correct when they state this Court is not able to offer Plaintiff the relief he requests. No matter how the Plaintiff cuts it, his Complaint clearly states that he is requesting that this Court:

> 1. Enter an Order determining Plaintiff's eligibility for membership in to the Community and granting Plaintiff membership in the Community, and determining Plaintiff's eligibility for membership benefits from the date of the Plaintiff's submission of his application for membership in the Community, including per-capita payments payable to Plaintiff and all other social and economic benefits attendant thereto.

Complaint, at 8.

The Plaintiff has failed to put forward any persuasive theory of Community law that grants this Court the power to do as he requests. To put it quite simply, there does not appear to be any provision of Community law that allows this Court to make someone a member after the General Council has voted to deny that same person membership.[1]

Precedent from this Court supports this conclusion. The Court of Appeals has concluded that there is no automatic or self-enrollment under Article II, Sec. 1(b) or 1(c) of the Community's Constitution for people who claim they meet the membership requirements -- applications for membership must be approved by the appropriate Community officials under standards established in accordance with the Constitution and the Enrollment Ordinance. Clifford Crooks, Sr. v. SMS(D)C, No. 016-97 (SMS(D)C Ct. App. Jan. 30, 1998). Although arguably dicta, the Trial Court stated in Weber v. SMS(D)C et al, No. 364-99 (SMS(D)C Tr. Ct. Dec. 22, 1999) that:

> [T]he actual decisions which are made on enrollment applications are for the Community alone to make. A person who clearly traces his or her lineage to a Mdewakanton who clearly resided in Minnesota on May 20, 1886 is not entitled, as a matter of right, to membership in the Community. He or she can be rejected by the General Council on any basis the General Council deems appropriate.

The Community admits that the Enrollment Director did in fact delay the handling of the Plaintiff's application for membership. But the Court of Appeals has held in the past that there is nothing in the Constitution or Enrollment Ordinance requires the Enrollment Committee or General Council to approve or disapprove an application within a certain time frame. Clifford Crooks, Sr. v. SMS(D)C, No. 016-97 (SMS(D)C Ct. App. Jan. 30, 1998). Although Plaintiff's allegation involve the Enrollment Director, even if binding precedent did not call into question the viability of Plaintiff's claim regarding delay, the remedy for such a delay would not be for this Court to admit him to

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[1] The Community did, however, represent to this Court at oral argument that there is no limit on the number of times the Plaintiff may return to the General Council for reconsideration of his qualification for membership.

membership. At most, an appropriate remedy might be for the Court to order the processing of his application. However, Plaintiff acknowledges that even though there was a delay in processing his application, the Enrollment Committee did, eventually, recommend his application for membership. His claim based on delay, therefore, appears to be moot.

## ORDER

Because Community law does not permit this Court to provide the relief the Plaintiff seeks, Defendants are entitled to judgment as a matter of law.

Dated: April 23, 2002

Henry M. Buffalo, Jr.
Judge

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

SCOTT COUNTY STATE OF MINNESOTA

File No. 475-01

Wade Donald LaDoux,

Plaintiff,

v.

Little Six, Inc., a foreign corporation,
d/b/a Mystic Lake Casino,

Defendant.

## MEMORANDUM AND ORDER

The purpose of this Memorandum and Order is to clarify the status of this case, in light of the Order to Dismiss, entered by the Court on September 3, 2002, and in light of correspondence sent to the Court by counsel for the Defendant, following the Order's entry.

Because the issue raised by the Defendant's letter is controlled by the pleadings that were filed in this matter, it will be helpful to briefly summarize those filings. The Plaintiff initiated this matter on March 30, 2001 by filing a Complaint, alleging that, while he was on premises owned by the Defendant, he had been injured as a consequence of the Defendant's negligence. The Defendant did not file an Answer or a Motion for Summary Judgment, but on July 1, 2002 instead filed a Motion to Dismiss, together with supporting materials, and scheduled a hearing on its Motion for September 5, 2002. Then, on August 21, 2001, the Plaintiff filed a Notice of Dismissal; and, on September 3, 2002, stating that it was acting pursuant to that Notice, the Court entered its Order to Dismiss. Thereafter, by letter, counsel for the Defendant advised the

Court that, unless the Dismissal was with prejudice, the Defendant would object and would seek a hearing on its Motion to Dismiss. In response, counsel for the Plaintiff orally informed the Court Administrator that in the Plaintiff's view the dismissal should be without prejudice.

Upon review of this Court's Rules of Civil Procedure, it is clear that the Plaintiff's position is correct, and that the Court erred in entering its Order to Dismiss. This Court's Rule 26 incorporates verbatim the provisions of Rule 41 of the Federal Rules of Civil Procedure; and which provides:

> **(a) Voluntary Dismissal: Effect Thereof.**
>
> (1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23(e) [relating to dismissal of class actions], of Rule 66 [relating to receivers], and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state any action based on or including the same claim.
>
> (Emphasis added).

Clearly, it was this provision which the Plaintiff invoked with his Notice of Dismissal; and since the Defendant had filed neither an Answer nor a Motion for Summary Judgment, the Plaintiff was entitled to do so, and was entitled to a dismissal without prejudice. The Court's Order to Dismiss was, in fact, a nullity. The Rule clearly entitled the Plaintiff to dismiss "without order of court", so the effect of the filing of the Plaintiff's Notice was to terminate the action as of the date of the filing. There was, then, no live action remaining, after that date, upon which the Order to Dismiss could operate.

Accordingly, since this Court's jurisdiction over the Plaintiff's action ended on August 21, 2002, it is **ORDERED:**

That the September 3, 2002 Order to Dismiss in this matter is herewith withdrawn.

Dated: September 4, 2002

John E. Jacobson
Judge

# IN THE TRIAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Lynne R. Cannon,

Petitioner,

v.

Leonard Prescott,

Respondent.

Case No. 486-02

## MEMORANDUM OPINION AND ORDER

As with a similar case filed in this Court and heard at the same time, see Wright v. Prescott, No. 487-02 (SMS(D)C Tr. Ct.), the procedural posture of this case is sufficiently complicated to warrant some explanation. Petitioner in this case filed an action in the Minnesota state courts seeking child support from the Respondent. On July 17, 1995, the Minnesota state court issued an order concluding that Respondent was the father of the child in question and ordered the Respondent to do the following:

> (1) to pay $1,330.00 a month in child support,
> (2) to maintain health insurance through the Community, and that the Respondent would pay 75% of any uninsured medical and health expenses, while the Petitioner would pay 25% of such costs, and
> (3) to pay child care expenses.

On February 19, 2002, the Petitioner moved this Court for permission to enforce the July 17, 1995 Minnesota state court order in this Court. Respondent did not object, and the Trial Court issued an order granting full faith and credit to the July 17, 1995 order.

On June 12, 2002, Petitioner filed a motion in this Court requesting that the child's support award be increased. She has also asked that (1) the Respondent establish an automatic deposit system for his child support payments, (2) that Respondent pay any out of pocket, uninsured therapy or medical expenses related to the child's special education needs, (3) that the child be awarded income and interest stemming from Respondent's failure to timely enroll the child as a member of the Community, and (4) that she be awarded attorney's fees for this motion. Lastly, Petitioner has submitted a supplemental affidavit seeking to have the Respondent pay for the child's naming ceremony. Petitioner supported these requests with affidavits and exhibits.

**LEGAL DISCUSSION**

After the Trial Court granted full faith and credit to state court's July 17, 1995 order, the child support award in this case states that Respondent is to pay Petitioner $1,330.00 a month. The Petitioner would like that amount increased.

The Domestic Relations Code was amended in 2001 to make clear how child support awards are to be calculated and how a request for an increase in child support is to be handled. Specifically, the resolution accompanying those amendments states that

> Members of the Community have not been afforded the full protection of the law of the Community due to misinterpretations or misunderstandings of the [child support] guidelines in the Domestic Relations Code . . . [and] the General Council determines it is necessary to clarify its intent and purpose in promulgating the Domestic Relations Code and to clearly specify the limits on the exercise of discretion by the Tribal Court in determining awards of child support . . .

Chapter III, Section 7(a) provides a set of guidelines for child support awards. When read together with the cost of living increases in Section 7(f), the maximum possible amount that can be awarded to the Petitioner under the guidelines is currently $1570. Respondent Prescott does not disagree with this analysis, and he arguably stated at oral

argument the he would not object to increasing the Petitioner's child support award from $1330 to $1570.

The real question in this case is whether Petitioner's award should exceed the amount spelled out in the guidelines. The new amendments make it clear that the Petitioner bears a high burden in demonstrating the necessity of an upward departure. Chapter III, Section 7(e) states:

> The above guidelines [in Section 7(a)] are binding on each case unless the Court makes express findings of fact as to the reason for departure below or above the guidelines. Such findings shall be express and shall address each of the areas of consideration.

Chapter III, Section 7(b) goes on to state:

> In addition to the child support guidelines, the Court shall take into consideration the following factors in setting or modifying child support:
>
> (1) The physical, mental and emotional needs of the child(ren) to be supported, as documented by medical professionals or experts working directly with the child(ren). Said services shall be necessary for the child(ren) to maintain a healthy existence and may include therapy; medical, psychological, behavioral or chemical dependency treatment; accommodations for special physical or mental needs and special educational requirements in excess of that which is covered by Tribal insurance or programs. Said services shall not include those items which affect the lifestyle of the child, including but not limited to private school attendance and extra-curricular activities . . .

That same section goes on to specifically state:

> The Court shall not consider the following factor(s):
>
> (1) The standard of living the child would have enjoyed had the marriage not been dissolved; had the parents resided together or continue to reside together.
>
> . . .

The wording or Chapter III, Section 7 indicates that there is a presumption that awards derived under the guidelines are sufficient to support a particular child, but that this Court may exceed the guidelines in a particular case, provided that the Petitioner is able to present concrete evidence of a physical, mental, or emotional need of the child that is not covered by Tribal insurance or programs, and which is not related to the child's lifestyle needs.

Consistent with the above sections, for the purposes of this case, Chapter III, Section 7(g)(2) states:

> The terms of a decree respecting child support may be modified upon a showing of one or more of the following, and of which makes the terms unreasonable and unfair:
>
> > (i) substantially increased or decreased earnings of a party;
> > (ii) substantially increased or decreased need of a child for which support is ordered;
> > . . .

Therefore, in order to demonstrate that the child support award should be modified, the Petitioner must demonstrate that one of the elements of Chapter III, Section 7(g)(2) are met in such a way as to render the present child support award unreasonable and unfair. The Domestic Relations Code also emphasizes that this Court is to "take into primary consideration the needs of the children . . ." See Chapter III, Section 7(g)(3)(i).

As noted above, the Respondent does not object to increasing the child support order to the maximum allowed under the Community's guidelines. That would reflect an increase from $1330 to $1570 a month. Beyond that, however the Respondent claims the Petitioner has failed to adequately support her motion to exceed the guidelines.

The Court is inclined to agree with the Respondent. Many of the expenses Petitioner claims are not clearly related to physical, mental or emotional needs that are documented by a medical professional or expert. For example, in her Affidavit in Support of Motion for Modification of Child Support, Petitioner states that her home is in need of additional maintenance, including "$800 for a new door, $9,000 for new carpeting, flooring and

painting and $7,700 for a new water heater, a furnace, refrigerator and washer dryer." In her monthly budget attached to one affidavit Petitioner list an expense for "music lessons" at $1200 a month. Petitioner has included absolutely no documentation to support these expenses (particularly the unusually high number for music lessons), and she does not explain how the home maintenance costs translate into the child support increase of $2,257 that she claims.

Even if she had supported these claims with evidence, or an explanation of the relationship of these claims to her child support budget, it is not clear these costs are properly considered support for her child. While the Court acknowledges that the child clearly needs a home to live in, the child is not the only occupant of this home, and therefore, not the only beneficiary of these home improvements. In addition, there is no way for the Court to evaluate the validity of the claimed home maintenance or music lessons expenses on the present record. The amendments to the Domestic Relations Code make it clear that items that affect the lifestyle of the child, presumably including such things as home improvements, and specifically including extracurricular activities, are not sufficient reasons to support an upward modification. See Domestic Relations Code, Chapter III, Section 7(b)(1).

The Petitioner had also not indicated what has changed to make the current support order unfair or unreasonable. She alleges that the child is in a special education program at school and that he has recently been diagnosed with "Pervasive Developmental Disorder, not otherwise specified." However, the Petitioner has not made it clear how any of the claimed child support increases are required because of this diagnosis. For example, the report from the Alexander Center for Child Development, in the last section entitled "Diagnostic Impressions", submitted by the Petitioner states:

> [C.] is a young man with documented ability in the above average range. . . . His achievement scores are commensurate with this ability. He did not display any significant weaknesses or strengths academically. It appears that his skills are evenly developed and he is making progress academically at school. This is consistent with the teacher reports as well.

> According to this team assessment, [C.] did meet criteria for Pervasive Developmental Disorder – No Otherwise Specified. At this time, this disorder is not affecting his ability to learn at school. However, it will affect his social skills and may, over time, affect academics as the work becomes more abstract and [redacted] is required to complete a greater amount of work. It would be appropriate for [redacted] to receive Special Education services under the category of Autism Spectrum Disorders.

The report then goes on to discuss specific recommendations that the Petitioner and special education professionals at school may want to undertake. However, none of these recommendations include any significant costs, nor do they appear to relate in any way to the home maintenance and musical instruction costs the Petitioner requests in her motion. The Petitioner, therefore, has failed to demonstrate how the needs of the child have changed such that the current child support award, at the guideline maximum, is unfair or unreasonable.

The only other basis for awarding an upward modification is a substantial increase or decrease in one party's earnings such that the current child support award is unfair or unreasonable. See Chapter III, Section 7(f)(2)(i). In her affidavits, Petitioner does not specifically allege that either her income has decreased or the Respondent's income has increased. Instead, she make undocumented and non-specific allegations that Respondent's per capita payments have increased significantly.

Even if the Petitioner in this case had presented conclusive evidence that Respondent's per capita payment have increased, which she has not, the Court concludes that this allegation would be insufficient to show the present child support award is unfair or unreasonable. First, it is not clear that General Council intended for this Court to exceed the child support guidelines solely on the basis of increased per capita payments. Presumably, when the General Council set the current support guidelines, it was aware of the Community's per capita program. If the General Council had wanted to increase the support guidelines every time per capita payments were increased, it could have done so in the statute. If the Court were to accept the Petitioner's argument, and exceed the support guidelines on the basis of increased per capita payments, the guidelines would

cease to apply for Community members. In other words, if Petitioner had her way, increasing per capita payments would become a *per se* reason to exceed the support guidelines, which would render the support guidelines meaningless for Community members. This result would defeat the purpose of the support guidelines in the first instance, which was presumably to provide an upper limit for financial exposure for child support for Community members who received per capita payments.

In any event, even if an increase in per capita payments was a sufficient reason to exceed the guidelines, Petitioner has not shown how Respondent's increase in income has rendered her present child support award unfair or unreasonable. While the Petitioner would obviously like to have the Respondent pay an increased amount to maintain her home, it does not follow that it is unfair or unreasonable if he does not. And based on the record before the Court, Petitioner's request for $1200 a month for musical lessons is simply not reasonable.[1] In addition, given the alleged disparities in income between the two parties, it seems reasonable that the Respondent pay 75% of uninsured medical costs, but it does not seem reasonable that he pay all of such costs.

As for Petitioner's other requests, the Respondent states that an automatic withdrawal system has already been established with the Community for his monthly support payments, so the issue is moot. The Court is willing to accept the Respondent's representations on this point, however Petitioner may renew her motion, on this point only, if such an automatic withdraw system has not in fact been established.

Petitioner also claims that the Respondent delayed in having their child admitted as a member of the Community and that either she or the child is therefore entitled to an

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[1] The Court has considered, on its own, that the costs for child care (at $60 a month) and music lessons (at $1200 a month) may have been reversed since they are next to each other on the budget chart. However, if this were the case, the $1200 request would be completely inconsistent with the Petitioner's recent representations to the state court that she is not incurring any child care expenses. See Order Terminating Child Care Contribution; Order for Bad-Faith Attorney's Fees, at 1. In the state court's May 29, 2002 order, it found that although the Petitioner did not incur child care expenses for several years, she continued to accept $400 a month in child care costs from the Respondent. The court concluded that the Petitioner was not incurring any child care costs and was liable for an award of bad faith attorney's fees under state law. It seems improbable, at best, that the Petitioner would be claiming to incur $1200 a month in child care expenses in this Court, when the state court had recently found her child care expenses were zero.

amount of damages equal to the retroactive tribal membership benefits the child missed from an unspecified time until he was enrolled. There are numerous problems with Petitioner's claim. First, she has not supported her claim with any evidence. The Court does not have before it any documentation or admissible evidence indicating that the Respondent engaged in any intentional delay, or the length of the delay, or the cause of the delay. In fact, there are not even any allegations as to when the child was admitted, or when, specifically, the Petitioner thinks he should have been admitted. The Court will not allow any relief to a party that proceeds solely on bare, non-specific, and unsupported allegations.

Second, even if the Petitioner had supported her claim with admissible evidence, this Court cannot provide the relief she seeks. This Court has noted in the past that under the Enrollment Ordinance, the Community is not required to make final enrollment decisions within any set timeframe. Clifford Crooks, Sr. v. SMS(D)C, No. 016-97 (SMS(D)C Ct. App. Jan. 30, 1998).

In Crooks, the Plaintiff claimed that the Community had impermissibly delayed a decision on this membership application. The Court of Appeals ruled that as an applicant for membership, Crooks lacked an interest in membership that could support a Due Process claim. The Court also noted that since the Community's Enrollment Ordinance did not require the Enrollment Committee or the General Council to act on an application within a certain timeframe, his claim for delay could not succeed. Id. at 5-6.

Since the Community is not required to act on an application within a set period of time, even if the Respondent had acted earlier, it would impossible to say with any certainty that an early application would have necessarily meant an earlier admission date for the child. And even if the Court were to assume that an earlier application, in general, would have resulted in an earlier admission date, it would be impossible to say exactly when the child may have been admitted. Petitioner's claim for damages resulting from Respondent's alleged delay is denied.

Lastly, Petitioner's request that the Respondent pay the child's naming ceremony expenses is not supported by any cause of action under the Community's law. A one-time, relatively modest expense for the naming ceremony does not render Respondent's present child support award unfair or unreasonable under the Domestic Relations Code. Petitioner has not identified any other legal theory for this expense. If the Court were to honor Petitioner's request, without any basis in law, there would be nothing to prevent the Petitioner, or future petitioners, from returning to this Court every time they incurred an unusual expense to seek compensation from the non-custodial parent.

Lastly, since Petitioner's claims for relief are denied, there is no basis to award her attorney's fees for bringing this motion.

**ORDER**

Petitioner's motion for an upward modification of her child support payments is denied.

Respondent's obligation under tribal law for child support is the maximum allowed under the Domestic Relations Code or $1570 a month. Respondent is not required to pay the entire amount of Petitioner's out of pocket dental and medical expenses. Instead, as decreed in state court and given full faith and credit under this Court's February 19, 2002 order, the Respondent is to bear 75% of such costs and Petitioner is to bear 25% of such costs. Petitioner's request for damages resulting from Respondent's alleged delay in enrolling the child is denied. Lastly, the parties to bear their own attorney's fees and costs for this litigation.

Dated: November 25, 2002

Henry M. Buffalo, Jr.
Judge

# IN THE TRIAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

| | | |
|---|---|---|
| Jill Marcia Wright, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Case No. 487-02 |
| | ) | |
| Leonard Prescott, | ) | |
| | ) | |
| Respondent. | ) | |

## MEMORANDUM OPINION AND ORDER

As with a similar case filed in this Court and heard at the same time, see Cannon v. Prescott, No. 486-02 (SMS(D)C Tr. Ct.), the procedural posture of this case is sufficiently complicated to warrant some explanation. Petitioner in this case filed an action in the Minnesota state courts seeking child support from the Respondent. On July 17, 1995, the Minnesota state court issued an order concluding that Respondent was the father of the child in question and ordering the Respondent to do the following:

> (1) to pay $1,331.25 a month in child support,
> (2) to maintain health insurance through the Community, and that the parties would each pay 50% of uninsured medical and health expenses,
> (3) to pay child care expenses.

On February 19, 2002, the Petitioner moved this Court for permission to enforce the July 17, 1995 Minnesota state court order in this Court. Respondent did not object, and the Trial Court issued an order granting full faith and credit to the July 17, 1995 order.

On April 10, 2002, the Minnesota state court issued a subsequent order in the same state court case. The order noted that with the cost of living increases under state law,

Respondent's monthly child support obligation had been increased to $1,597.50. In addition, the order concluded that the Petitioner had misrepresented her child care expenses, and it ordered that the Respondent be reimbursed for those expenses and at least part of his attorneys fees. Most significantly for the purposes of this case, the April 10, 2002 state court order also denied a motion by the Petitioner to have the child support award increased.

After the state court issued its April 10, 2002 order denying the Petitioner's request for an upward modification of her child support award, she filed a motion on June 14, 2002 in this Court largely repeating her request for an upward modification. Specifically, the Petitioner has asked for an increase of $2,145 to the monthly child support award allowed in state court of $1597.50. She has asked that the Respondent establish an automatic deposit system for his child support payments. In addition to the increase in child support, Petitioner has also asked that Respondent pay any out of pocket, uninsured medical and dental expenses associated with the child's dental and special education needs, and that she be awarded attorney's fees for this motion. Lastly, Petitioner has submitted a supplemental affidavit seeking reimbursement of $552.24 for the child's naming ceremony. Petitioner supported these requests with affidavits and exhibits.

**LEGAL DISCUSSION**

Respondent has argued that Petitioner's request should be denied before even reaching the merits of her claims. First, he claims the automatic deposit system has already been established, and therefore, the issue is moot. Second he claims since Petitioner's request for an upward departure is the same as her request in state court, it is barred by either the doctrines of full faith and credit and/or res judicata.

With this latter argument, the Respondent has essentially asked the Court to recognize and give effect to the state court's April 10, 2002 order denying Petitioner's request for an upward modification. Petitioner has responded that since there is nothing to prevent

her from going back to state court to request another modification, her request for modification in this Court should not be barred either.

In the past, this Court has granted full faith and credit to state court child support orders when there is no complaint that the state court proceedings were irregular in some way, or that the state court was without jurisdiction. McArthur v. Crooks, No. 067-96 (SMS(D)C Tr. Ct. Aug. 13, 1996). Petitioner claims, not that there was a flaw in the state court proceedings, but that she could return to state court with a new modification request at anytime, therefore, she should not be barred from seeking an upward modification in this case. In a sense, the Petitioner is correct – this Court cannot, on the basis of the April 10, 2002 order, forever bar her from seeking an upward modification in this Court if she has new arguments or evidence to present.

However, the key distinction is whether the present request for an upward modification is a "new" request, or whether it is simply a repeat of the request she made in state court. If it is the latter, then it looks like the Petitioner may simply be attempting to get from this court what the state court would not grant her – an upward modification based on the same facts.

A thorough review of the record reveals that Petitioner's request is largely identical to her recent request in state court. In both filings, she asks for an upward modification based on the cost of potential future dental and special education costs. According to the Petitioner, these costs include piano lessons, the purchase of a piano, and voice lessons.

However, whether this Court should grant full faith and credit to the state court decision to deny the upward modification is largely hypothetical. Without reaching the full faith and credit issue, a review of the record demonstrates that the Petitioner has failed to carry her burden on the merits, and her motion is denied on those grounds.

After the Trial Court granted full faith and credit to state court's July 17, 1995 order, the child support award in this case states that Respondent is to pay Petitioner $1,331.25 a month.

Petitioner has conceded that this amount may be increase to $1570 under the Domestic Relations Code guidelines. The question is whether Petitioner's award should exceed the amount spelled out in the guidelines. The new amendments make it clear that the Petitioner bears a high burden in demonstrating the necessity of an upward departure. Chapter III, Section 7(e) states:

> The above guidelines [in Section 7(a)] are binding on each case unless the Court makes express findings of fact as to the reason for departure below or above the guidelines. Such findings shall be express and shall address each of the areas of consideration.

Chapter III, Section 7(b) goes on to state:

> In addition to the child support guidelines, the Court shall take into consideration the following factors in setting or modifying child support:
>
> (1) The physical, mental and emotional needs of the child(ren) to be supported, as documented by medical professionals or experts working directly with the child(ren). Said services shall be necessary for the child(ren) to maintain a healthy existence and may include therapy; medical, psychological, behavioral or chemical dependency treatment; accommodations for special physical or mental needs and special educational requirements in excess of that which is covered by Tribal insurance or programs. Said services shall not include those items which affect the lifestyle of the child, including but not limited to private school attendance and extra-curricular activities . . .

That same section goes on to specifically state:

> The Court shall not consider the following factor(s):
>
> (1) The standard of living the child would have enjoyed had the marriage not been dissolved; had the parents resided together or continue to reside together.
>
> . . .

The wording or Chapter III, Section 7 indicates that there is a presumption that awards derived under the guidelines are sufficient to support a particular child, but that this Court may exceed the guidelines in a particular case, provided that the Petitioner is able to present concrete evidence of a physical, mental, or emotional need of the child that is not covered by Tribal insurance or programs, and which is not related to the child's lifestyle needs.

Consistent with the above sections, for the purposes of this case, Chapter III, Section 7(g)(2) states:

> The terms of a decree respecting child support may be modified upon a showing of one or more of the following, any of which makes the terms unreasonable and unfair:
>
> > (i) substantially increased or decreased earnings of a party;
> > (ii) substantially increased or decreased need of a child for which support is ordered;
> > . . .

Therefore, in order to demonstrate that the child support award should be modified, the Petitioner must demonstrate that one of the elements of Chapter III, Section 7(g)(2) are met in such a way as to render the present child support award unreasonable and unfair. The Domestic Relations Code also emphasizes that this Court is to "take into primary consideration the needs of the children . . ." See Chapter III, Section 7(g)(3)(i).

It is not clear, however, in this case what has changed to make the current support order unfair or unreasonable.

If Petitioner claims under Chapter III, Section 7(g)(2)(ii) that it is the needs of the child that have changed, she has not adequately supported that claim. For example, although the Petitioner alleges that the child is in a special education program at school, this has been true since at least 1997, and there is no new evidence of a significant increase in expenses, or changes in the child's circumstances, at least as they relate to the child's

educational needs. In fact, the report the Petitioner attached to her affidavit indicates that in the most recent school year (2001-2002), the child declined to receive special education services from her local school district, despite steady progress in those programs. Rather, the Petitioner had decided to pursue private tutoring instead. For example, there is a budget item for $200 a month for special education, and yet there is no documentation concerning why the special education services of the local school district were so inadequate at to require private tutoring. The new amendments to the Domestic Relations Code also make it clear that expenses related to private education are not to be considered in modifying a child support award. See Chapter III, Section 7(b)(1).

In addition to a lack of any significant change in circumstance, the budget Petitioner submitted has very large expenses that are simply not supported by any evidence of need, either new or old. The budget includes $625 dollars a month (or nearly $10,000 a year) for out of pocket dental expenses, and yet there is no evidence in the record that these expenses have been incurred, or if they are future expenses, how this total was derived or why these expenses are not covered by the child's insurance.

Petitioner's budget also includes nearly $350 a month (or over $3000 a year) for household furnishings, $125 a month for a new washer and dryer and new carpeting, and nearly $100 a month for a computer and computer games. These are not costs that show there has been a change in the child's circumstance justifying modification. Instead, these appear to be expenses associated with the child's lifestyle, which are not factors to be considered in modifying an award. See Chapter III, Section 7(b)(1).

In addition to the $200 a month for private tutoring, Petitioner claims that the child's special education needs justify private music and dance lessons. These costs are reported on the budget at nearly $450 a month (or over $5000 a year). While Petitioner has included in her affidavits two letters from teachers at the child's school suggesting piano lessons would be a good idea for the child, the only receipt for piano lessons amounts to less the $75 a month. It is not at all clear how the Petitioner arrives at the $450 a month

figure for private lessons, or how that amount is related to a documented changed need in the circumstance of the child.

Simply put, a majority of the expenses listed in the Petitioner's budget have nothing to do with a change in the child's need, and even if they did, the Petitioner has failed to adequately document the changed need or the amount of the expenditures.

The only other basis for awarding an upward modification is a substantial increase or decrease in one party's earnings such that the current child support award is unfair or unreasonable. See Chapter III, Section 7(g)(2)(i). In her affidavits, Petitioner does not specifically allege that either her income has decreased or the Respondent's income has increased. However, in a related case with a different Petitioner, unsupported allegations have been made that Respondent's per capita payments have increased significantly.

Even if the Petitioner in this case had presented conclusive evidence that Respondent's per capita payment have increased, which she has not, the Court concludes that this allegation would be insufficient to show the present child support award is unfair or unreasonable. First, it is not clear that General Council intended for this Court to exceed the child support guidelines solely on the basis of increased per capita payments. Presumably, when the General Council set the current support guidelines, it was aware of the Community's per capita program. If the General Council had wanted to increase the support guidelines every time per capita payments were increased, it could have done so in the statute. If the Court were to accept the Petitioner's argument, and exceed the support guidelines on the basis of increased per capita payments, the guidelines would cease to apply for Community members. In other words, if Petitioner had her way, increasing per capita payments would become a per se reason to exceed the support guidelines, which would render the support guidelines meaningless for Community members. This result would defeat the purpose of the support guidelines in the first instance, which was presumably to provide an upper limit for financial exposure for child support for Community members who received per capita payments.

In any event, even if an increase in per capita payments was a sufficient reason to exceed the guidelines, Petitioner has not shown how Respondent's increase in income has rendered her present child support award unfair or unreasonable.

Lastly, Petitioner's request that the Respondent pay at least half of the child's naming ceremony expenses is not supported by any cause of action under the Community's law. A one-time, relatively modest expense for the naming ceremony does not render Respondent's present child support award unfair or unreasonable under the Domestic Relations Code. Petitioner has not identified any other legal theory for this expense. If the Court were to honor Petitioner's request, without any basis in law, there would be nothing to prevent the Petitioner, or future petitioners from returning to this Court every time they incurred an unusual expense and seeking reimbursement from the non-custodial parent.

**ORDER**

Petitioner's motion for an upward modification of her child support payments is denied.

Respondent's obligation under tribal law for child support is the maximum allowed under the Domestic Relations Code guidelines or $1570 a month. Respondent is not required to pay the entire amount of Petitioner's out of pocket dental and medical expenses. As decreed in state court and given full faith and credit under this Court's February 19, 2002 order, the parties are to each bear 50% of those expenses. Lastly, the parties to bear their own attorney's fees and costs for this litigation.

Dated: November 25, 2002

Henry M. Buffalo, Jr.
Judge

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

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Jeanette Van Zeeland, an individual,
and Terrance Van Zeeland, an individual,

Plaintiffs,

vs.

Little Six, Inc., d/b/a Mystic Lake Casino,
And Does 1 through 10, inclusive,

Defendants.

Court File No. 505-02

MEMORANDUM OPINION

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Defendant Little Six, Inc. brought a motion to dismiss this action pursuant to Shakopee Mdewakanton Sioux (Dakota) Community ("SMS(D)C" or "the Community") Rule of Civil Procedure 12(b). For the reasons explained below, this lawsuit is dismissed in its entirety for lack of subject matter jurisdiction on grounds of Indian tribal sovereign immunity.

## I. FACTS

Plaintiffs' alleged facts may be summarized as follows. Plaintiffs Jeanette and Terrance Van Zeeland are husband and wife who live in Wisconsin. Complaint ¶ 3. On January 24, 2000, Plaintiffs attended a show presented by Curtis and Michael Production at Mystic Lake Casino. Complaint ¶ 6. During the course of the show, an entertainer named Doug Stark "negligently struck and injured plaintiff Jeanette Van Zeeland, and caused her to suffer great pain and permanent injury" and caused Mr. Van Zeeland to suffer loss of companionship and other related losses as a result. Complaint ¶ 6.

Plaintiffs submitted a claim against Mystic Lake Casino's insurance, which "declined coverage on grounds that Curtis and Michael Production were solely responsible for the stage production and liable for all injuries caused therefrom." Complaint ¶ 7. Plaintiffs further claim that an "obligation" existed between Curtis and Michael Production and Mystic Lake Casino in which the former was required to carry liability insurance for injuries occurring in connection with its shows. Complaint ¶¶ 5, 10. Plaintiffs claim that Mystic Lake Casino did not enforce the requirement, however, and allowed the January 24, 2000 show to proceed without evidence of liability insurance coverage. Complaint ¶ 10. Plaintiffs allege that Defendant concealed this fact from Plaintiffs. Complaint ¶ 11.

In 2001, Plaintiffs sued Curtis & Michael Production and other defendants in United States District Court, District of Minnesota, Case No. 01-1107, "naming Mystic Lake Casino a non-defendant third party." Complaint ¶ 8. Defendants in that case failed to respond, and the District Court entered default judgments against certain defendants. Plaintiffs allege that the District Court "ordered Mystic Lake Casino to provide the insurance information," Complaint ¶ 9, but the court docket shows that the District Court dismissed the suit with respect to Little Six, Inc. for failure to state a claim. Van Zeeland et al. v. DiCasta et al., No. 01-CV-1107 (Order dismissing Amended Complaint with respect to Little Six, Inc., D. Minn., October 29, 2002).

Plaintiffs assert that, on October 29, 2002, Defendant's attorney advised Plaintiffs' attorney for the first time that Mystic Lake Casino's management had allowed Curtis and Michael Production to perform the stage show without liability insurance coverage. Complaint ¶ 9. Plaintiffs do not allege that Defendant was in any way responsible for Jeanette Van Zeeland's injuries on January 24, 2000. Instead, Plaintiffs' lawsuit against Defendant is based on their

assertion that Defendant's failure to enforce the liability insurance coverage requirement resulted in Plaintiffs' inability to collect damages from the alleged tortfeasors. Complaint ¶ 12.

## II. ANALYSIS

Rule 12(b) of the SMS(D)C Rules of Civil Procedure provides that certain defenses may be made by motion, including lack of jurisdiction over the subject matter. Defendants have brought a motion to dismiss for lack of subject matter jurisdiction on grounds of Indian tribal sovereign immunity.

Plaintiffs concede that the Community is "a sovereign Indian tribe" and bring this action pursuant to the Community's Tort Claims Ordinance. Complaint ¶ 1. The Tort Claims Ordinance waives the Community's sovereign immunity from suit under certain conditions. Section 4, Subsection (A) of the Ordinance provides:

> The Community hereby expressly waives its sovereign immunity from suit for the limited purpose of permitting claims made against the Community pursuant to this Ordinance to be brought in Tribal Court, and to permit damages to be awarded against the Community to the extent provided in Section 5 herein, provided the damages are payable from the proceeds of an insurance policy. The Community will pay, from the proceeds of an insurance policy, compensation for injury to or loss of property, or for personal injury or death, caused by an act or omission of an employee of the Community while acting within the scope of office or employment, under circumstances where the Community, if a private person, would be liable to the claimant.

Section 9 of the Ordinance sets forth a Statute of Limitations requiring that all claims brought against the Community under the Ordinance shall be brought within two years of the date of the act or omission giving rise to the claim, "or on the date a reasonable person under similar circumstances would have known of the injury, loss or other damages incurred as a consequence of the act or omission of the employee of the Community."

To the extent any of the conditions in the Tort Claims Ordinance are not met, the Community's sovereign immunity is preserved, and a Court would, therefore, lack subject matter jurisdiction to adjudicate civil claims against the Community.

The facts that Plaintiffs allege give rise to a cause of action fall into three separate theories of liability. First, Plaintiffs claim, or appear to claim, that the Community is secondarily liable for damages caused by the tortfeasors. Second, Plaintiffs claim that they are third-party beneficiaries to a contract between the Community and the tortfeasors, and that they may bring an action for breach of that contract against the Community. Third, Plaintiffs claim they may sue the Community for negligence on the theory that the Community's failure to enforce a liability insurance coverage requirement caused Plaintiffs' inability to collect damages from the tortfeasors. Each of these theories of liability fails to state a cause of action covered by the Community's Tort Claims Ordinance, as described below. Failing to meet these requirements, the Community's sovereign immunity is thus preserved, and Plaintiffs' Complaint must be dismissed for lack of subject matter jurisdiction.

A. Secondary liability theory

Plaintiffs' secondary liability claim against Defendant fails for two reasons. First, the Complaint does not contain any allegations supporting this theory. According to the Restatement (Second) of Torts,

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

Rest.2d Torts § 319 (1965). Plaintiffs, therefore, must have alleged in their Complaint that the Community knew or should have known that the tortfeasor was likely to cause bodily harm to others if not controlled, that the Community failed to control the tortfeasor, and further that such failure resulted in the tortfeasor's injuries to Plaintiff Jeanette Van Zeeland and her husband.

Plaintiffs' Complaint contains no such allegations, but rather frames its cause of action around Defendant's alleged concealment of its failure to enforce an obligation to require evidence of liability insurance coverage.

Second, even if Plaintiff's Complaint could be construed to contain allegations to support a theory of secondary liability, Section 9 of the Community's Tort Claims Ordinance contains a two-year statute of limitations for claims arising from the Community's actions or omissions under the Ordinance. Plaintiffs' claims against the Community for injuries caused at the show on January 24, 2000, if any, expired on January 24, 2002. Plaintiffs did not bring this action until October 2002. Plaintiffs' secondary liability claim against the Community is thus barred by the Statute of Limitations in Section 9 of the Tort Claims Ordinance and, therefore, is not covered by the limited waiver of immunity in the Ordinance.

B. Third-party beneficiary contract theory

To the extent Plaintiffs would attempt to bring their claim on the theory that they are third-party beneficiaries to an alleged contract between the Community and the tortfeasors, such a claim would not be covered by the waiver of immunity in the Tort Claims Ordinance. The Ordinance applies only to tort claims, namely, for "compensation for injury to or loss of property, or for personal injury or death." Tort Claims Ordinance § 4(A). The Ordinance does not extend its waiver of immunity to contract claims against the Community. The Court, therefore, lacks subject matter jurisdiction over this claim.

C. Negligence theory

Plaintiffs cannot sustain their claim that Defendant's failure to enforce a liability insurance coverage requirement against the alleged tortfeasor caused Plaintiffs' inability to collect damages from the tortfeasor. This alleged cause of action fails to satisfy the essential

element of causation between Defendant's act or omission and the alleged injury to Plaintiffs. Simply put, there is no set of facts Plaintiffs could prove which would establish that the Community's failure to require liability insurance coverage for Curtis and Michael Production caused Plaintiffs to suffer a compensable loss.

Under elementary principles of liability for negligence, Plaintiff must establish a prima facie case "by alleging facts sufficient to demonstrate (1) that Defendant owed him a duty, (2) that Defendant breached that duty, (3) that Defendant's breach was the proximate cause of plaintiff's injuries, and (4) that Plaintiff suffered actual injury." Famularo v. Little Six, Inc., No. 350-99 (SMS(D)C Tr. Ct. October 20, 2001), at 3 (citing Kostelnik v. Little Six, Inc., No. 019-97 (SMS(D)C Ct. App. March 17, 1998), at 5). Reflecting this standard, the Community's Tort Claims Ordinance permits claims for damages only to the extent they are *caused* by an act or omission of an employee of the Community. Tort Claims Ordinance § 4(A).

The only allegation of causation set forth in Plaintiffs' Complaint is this statement: "But for the actions and omissions of defendant Mystic Lake Casino as stated above, Curtis and Michael Productions would have been insured against the liability judgments in U.S. District Court and Plaintiffs would have been compensated for their injuries." Plaintiffs' audacious assertion is fundamentally illogical. Trying to assess the actual consequences of Defendant's enforcement of the liability insurance requirement amounts to a purely speculative inquiry. "But for" Defendant's failure to enforce the requirement, the tortfeasor might have carried liability insurance, but that is impossible to demonstrate as a matter of historical fact or even of probability. Furthermore, even if the tortfeasor had carried insurance, Plaintiffs would not necessarily have collected damages. They still would have had to establish the validity of their claim. The fact that Plaintiffs have obtained a default judgment for damages against the

tortfeasor(s) does not inform the necessary inquiry as to whether a claim existed in the first place. From the purely speculative standpoint taken by Plaintiffs, if the tortfeasor(s) had been required to carry insurance, they might simply have declined to perform on the date the injuries occurred. They might have carried insurance, and had the accident still occurred, then they might have simply tendered the claim to their insurer for defense. In that case, Plaintiffs might have settled with the insurer, they might have gone to trial, they might have won, or they might have lost their suit altogether. But Plaintiffs can neither show causation nor quantify their damages to any credible degree of probability. Such a speculative inquiry is entirely improper for the purpose of determining whether Plaintiffs have established a prima facie case for negligence by merely alleging that failure to enforce an insurance coverage requirement actually *caused* Plaintiffs' inability to collect damages from the tortfeasor(s). *See, e.g.,* Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995) (holding that nonmoving party "cannot preserve his right to a trial on the merits merely by referring to unverified and conclusionary allegations in his pleading or by postulating evidence which might be developed at trial"). *See also* Faimon v. Winona State Univ., 540 N.W.2d 879, 884 (Minn. Ct. App. 1995) (affirming principle that plaintiffs may not recover damages that are too speculative, and the determination of whether damages are too speculative or remote "should usually be left to the judgment of the trial court") (quoting Jackson v. Reiling, 311 Minn. 562, 563, 249 N.W.2d 896, 897 (1977)).

Plaintiffs have failed to state a cause of action for negligence, and their failure to set forth facts sufficient to establish the element of causation bars their claim under the Tort Claims Ordinance. Plaintiffs' proposed Amended Complaint does not cure the defect in the original Complaint because it merely alleges that the tortfeasors have no assets to satisfy a judgment. It does not, and cannot, establish by mere speculation that the Community's act or omission caused

the tortfeasors to have no assets or otherwise to be judgment-proof. This claim is not covered by the Community's waiver of sovereign immunity, and therefore, it must be dismissed for lack of subject matter jurisdiction.

## III. CONCLUSION

In consideration of the foregoing, Plaintiffs' Motion to Amend the Complaint is DENIED, Defendant's motion to dismiss for lack of subject matter jurisdiction is GRANTED, and Plaintiff's Complaint is hereby dismissed with prejudice.

IT IS SO ORDERED.

Date: 2/12, 2003

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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This memorandum memorializes rulings made on this date from the bench following a hearing on a Motion to Quash or, in the Alternative, Modify Deposition Subpoenas Directed to Nonparty Witnesses, filed on March 17, 2003 by Douglas A. Kelley, Esq., Ms. Kitty Gamble, and Steven E. Wolter, Esq. (collectively, "the Non-Party Witnesses").

Mr. Kelley and Mr. Wolter are attorneys working for the law firm of Douglas A. Kelley, P.A. ("the Kelley Law Firm"), and Ms. Gamble is the person in the Kelley Law Firm that is in charge of billing the firm's work. During the period at issue in this litigation, the Kelley Law Firm performed legal work for the Plaintiff, Little Six, Inc. ("LSI"), and also, with the consent of LSI, performed legal work for the Defendant, Leonard Prescott. During the discovery process in this litigation, LSI sought an affidavit from Mr. Kelley that described the legal work that the Kelley Law Firm performed for LSI and the Defendant. Counsel for LSI prepared a draft

affidavit that contained a number of legal conclusions; upon reviewing that document, Mr. Kelley responded by modifying the affidavit to, *inter alia*, eliminate those conclusions. Dissatisfied with the modified product, LSI subpoenaed the Non-Party Witnesses; and they, in turn, filed the Motion that was the subject of today's hearing.

In the materials filed in support of their motion, the Non-Party Witnesses contended (i) that all three subpoenas should be quashed because the information sought by LSI could be obtained from other sources; (ii) that if all subpoenas were not quashed, then only one subpoena should be allowed, since LSI had made no showing that all requisite information from the Kelley Law Firm could not be obtained from any one of the three Non-Party Witnesses; and (iii) that if Mr. Wolter or Mr. Kelley were required to testify, they should be entitled to fees as expert witnesses, under Rule 27 of this Court, which incorporates the provisions of Rule 45 of the Federal Rules of Civil Procedure.

After reviewing briefs and supporting materials and hearing argument from the parties, the Court quashed two of the three subpoenas, and denied the motion to allow expert fees for any of the Non-Party Witnesses, for the following reasons.

This Court's Rule 27 incorporates the provisions of Federal Rule of Civil Procedure 45(c)(3)(A)(iv), which permits the Court to quash or modify a subpoena that "subjects a person to undue burden". The facts before the Court indicate that the billings of the Kelley Law Firm – and the identity of the client for whom the billings were generated – is a central issue in litigation; and it seems unlikely that any person outside the Kelley Law Firm would be as familiar with those matters as any of the three Non-Party Witnesses. Therefore, it does not seem to create an undue burden to require testimony from a responsible person in that firm, to clarify any questions that may arise from the billing documents themselves. However, there has been

no need demonstrated, on the face of the materials before the Court, for such testimony to be solicited from more than one of the Non-Party Witnesses. See generally, In re Tutu Water Wells Contamination, 184 F.R.D. 266 (D.V.I. 1999). LSI itself, when it originally sought affidavit testimony from the Kelley Law Firm, sought only one affidavit – from Mr. Kelley. Accordingly, the Court will direct that only one of the subpoenas may be enforced – the choice of witnesses to be made by LSI. If, but only if, events prove that that witness is unable to provide critical testimony, and that the testimony of another Non-Party Witness is absolutely essential, will the Court consider a motion to permit the issuance of additional subpoenas to the Non-Party Witnesses.

This Court's Rule 27 also incorporates the provisions of Federal Rules of Civil Procedure 45(c)(3) which states, *inter alia*, that if a subpoena –

> ...requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not a the request of any party...

then the party must insure that the witness is "reasonably compensated". The Non-Party Witnesses contend that this Rule describes their situation: they point out, correctly, that in the aforementioned exchange of draft affidavits, LSI sought legal opinions as well as factual statements. LSI now has responded by arguing that the legal opinions of Mr. Kelley or Mr. Wolter would have no standing as expert testimony in this litigation, and by conceding that the portions of the affidavit which LSI had provided to Mr. Kelley that called for legal opinions were inappropriate.

In this regard, the Court agrees with LSI. Federal Courts are nicely split over the question of whether, under FRCP Rule 45, a non-party professional that is subpoenaed to testify concerning facts that the professional is familiar with (e.g., non-party physicians that have

treated a party in litigation, who are called to describe the party's treatment and condition) should receive expert witness fees. *Compare*, Hoover v. United States, 2002 WL 1949734 (N.D. Ill. Decide Aug. 22, 2002)(holding that expert fees were payable), *with* Demar v. United States, 199 F.R.D. 617 (N.D. Ill. 2001)(holding that expert fees were not payable). But no counsel has cited a case in any Federal Court dealing with testimony of a non-party attorney that provided services to a party, and the Court has been unable to locate one. In the Court's view, this void may well exist because the testimony of an attorney, as to matters of law, in all likelihood would not qualify as expert testimony under Rule 702 of the Federal Rules of Evidence – that is, it is highly unlikely that such testimony would "assist the trier of fact to understand the evidence or to determine a fact in issue". Hence, I conclude that the "expert compensation" provisions of Rule 45 simply are inapposite to the facts here at issue, and that the witness selected by LSI should be compensated only by the fee normally paid to non-expert witnesses.

For the foregoing reasons, it herewith is ORDERED:

1. That LSI shall be entitled to enforce, after reasonable notice, one of the three subpoenas it issued to the Non-Party Witnesses, and that the remaining two subpoenas are herewith quashed; and

2. That the motion of the Non-Party Witnesses to be compensated as expert witnesses, under this Court's Rule 27, is denied.

Dated: April 7, 2003

John E. Jacobson
Judge

# IN THE TRIAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

IN RE: Conservatorship of Dean Brooks

Case No. 401-99

## MEMORANDUM OPINION AND ORDER

In this action, Conservator Larry Nerison requests this Court to overturn the Business Council's rejection of a privately negotiated Settlement Agreement in a state court wrongful death proceeding. Because the Settlement Agreement requires the approval of the Community and such approval was not obtained, no enforceable contract exists and thus, the Community can not be compelled to fund the agreement. Accordingly, Nerison's Approval Petition is denied. In addition, since the trust created by the Community to hold per capita funds for Dean Brooks was established under the Community's Gaming Revenue Allocation Amendments to Business Proceeds Distribution Ordinance, both the Community's request for relief pursuant to Rule 60 and Conservator Nerison's request for a competency hearing are unnecessary and are both denied.

## BACKGROUND

Dean L. Brooks (Brooks) is an adult enrolled member of the Shakopee Mdewakanton Sioux (Dakota) Community (Community). Brooks and Kinscem Teta (Teta) are the parents of a minor child, [redacted] (Child). In December 1997, Brooks shot and killed Teta on the Shakopee reservation. In November 1998, Brooks pled guilty to second-degree murder in Scott County District Court and was sentenced to 36 years in prison. Brooks petitioned for post-conviction relief, contending that he was incompetent to stand trial and enter a guilty plea by reason of mental illness.

In February 1999, Teta's mother, Wanda Lemke (Lemke) acting as trustee for the heirs and next of kin of Teta, initiated a wrongful death action in Hennepin County District Court to recover damages against Teta's wrongful death.

On October 21, 1999, Brooks' father, Larry Nerison (Nerison), petitioned this Court for the appointment of a conservator of Brooks' estate (Conservator Petition). Nerison alleged that Brooks' was an incapacitated person due to his mental illness and chemical dependency and thus, was unable to make or communicate responsible decisions concerning his financial affairs or estate. The Court entered an Order on November 12, 1999, naming Nerison as special conservator pending a hearing to be held on December 13, 1999.

On December 13, 1999, the Community, by and through its Business Council (Business Council or Community Council), filed a Motion to Intervene in the conservator proceeding. The Business Council stated that the Community had an interest in protecting the per capita payments of its members who are declared incompetent by a court of competent jurisdiction. The Community then stated that the protection of that

interest was mandated by the *Gaming Revenue Allocation Amendments to Business Proceeds Distribution Ordinance*, No. 10-127-93-2002, Section 14.5 (D)(1) (Ordinance), to establish a trust for any adjudicated incompetent.

The Court held a hearing on December 13, 1999, to address Nerison's Conservator Petition and the Community's Motion to Intervene. On December 20, 1999, the Court entered an Order Appointing Conservator Over the Financial Estate of Dean Brooks (Conservator Order), which granted the Community's Motion to Intervene and concluded that Brooks was an incapacitated person lacking the ability to make financial decisions and that a limited conservator should be appointed. The Court, through its Order, appointed Nerison and the Community as joint co-conservators with Nerison controlling a limited monthly sum and the Community, through its Business Council, controlling the balance of any monthly payments made to Brooks. The Court also appointed Brooks' mother, Mary Brooks, as an alternate conservator in the event of Nerison's incapacitation.

On January 5, 2000, the Community, as co-conservator, enacted Business Council Resolution 01-05-00-001, Authorization to Establish Dean Brooks Trust Fund pursuant to the Court's December 20 Conservator Order. On April 5, 2000, Nerison petitioned the Court for an allocation of funds beyond those entrusted to Nerison under the Conservator Order and an order compelling the Business Council to distribute funds (First Allocation Request) for Brooks' attorneys' fees. The Community's April 10, 2002, response stated that the Community had no objection to this request being presented to the Court for its decision and that the Community believed a decision and order from the Court was necessary to remove the funds protected in the trust account. On April 20, 2000, the

Court denied the First Allocation Request for failure to provide adequate notice to alternate conservator Mary Brooks and failure to provide sufficient background information in justification of any disbursements. Nerison filed a Revised Petition for Allocation of Trust Funds (Revised Petition) on May 12, 2000. The Court granted the Revised Petition on June 8, 2000, authorizing the expenditure of funds, and ordering the Community Council to make the necessary distribution.

Nerison filed a second Petition for Allocation of Trust Funds (Second Allocation Request) requesting additional funds for attorneys' fees and expert witnesses on January 26, 2001. The Community did not object to this request and the Court granted the Second Allocation Request, authorizing the expenditure of funds and ordering the Community Council to make the necessary distribution.

Nerison filed a third Petition for Allocation of Trust Funds (Third Allocation Request) requesting additional funds for attorneys' fees and expert witnesses on October 5, 2001. The Community did not object to this request and the Court granted the Third Allocation Request on October 17, 2001, authorizing the expenditure of funds and ordering the Community Council to make the necessary disbursement.

While the conservator proceedings continued before this Court, the wrongful death action proceeded in Hennepin County District Court. In the fall of 2001, Lemke and Nerison, as the representative for Brooks, agreed to binding mediation with retired Hennepin County Judge Richard Solum. The mediation continued through the winter of 2001-2002 and culminated in the parties executing a Binding Mediation Settlement Agreement on March 18, 2002. The parties next negotiated a more thoroughly detailed settlement agreement with Nerison and Lemke executing the Settlement Agreement of

April 16 and 17, 2002, respectively. The Hennepin County District Court approved the Settlement Agreement on April 18, 2002. On that same day, Nerison filed a Motion asking this Court to approve the Settlement Agreement and for an order for the distribution of funds. There is no indication that this Motion was served on all interested parties. Notwithstanding, the Court approved the Settlement Agreement on April 18, 2002.

On May 8, 2002, Nerison filed a Petition for Allocation of Trust Funds (Approval Petition I) with the Court requesting that the Business Council approve the Settlement Agreement and allocate trust funds as outlined in the Settlement Agreement. In his Approval Petition I, Nerison noted that he should have presented this petition for Business Council approval prior to asking the Court to enter an order domesticating the Settlement Agreement. On May 8, 2002, the Business Community denied Nerison's approval request and rejected the Settlement Agreement, determining that the use of the monies entrusted to the Community did not comply with the Ordinance's limitation on expenditures.

Because the Community denied Nerison's request to fund the Settlement Agreement, there were no funds available for Nerison to make any payments under the Settlement Agreement. On May 17, 2002, Lemke served a Notice of Default on Brooks and Nerison.

On May 28, 2002, Nerison again filed a Petition to Approve Settlement of the Wrongful Death Case (Approval Petition II) wherein he requested judicial review of the Business Council's adverse determination not to allocate trust funds pursuant to the Settlement Agreement.

On May 31, 2002, Lemke filed a Motion for Right of Trustee to Appear and Right to Intervene to Protect Interests (Lemke Motion to Intervene). Lemke alleged that this Court's consideration of Nerison's Approval Petition II seeking to overturn the Business Council's decision might adversely affect her interest in the Settlement Agreement. The Community filed two responses on June 3, 2002: 1) a Response to Motion to Appear and to Intervene (Response to Lemke Motion to Intervene); and 2) a Response to "Petition to Approve Settlement" (Response to Approval Petition II). In the Response to Lemke Motion to Intervene, the Community argued that Lemke has not demonstrated how Nerison is unable to adequately protect her interest in the Settlement Agreement. In the Response to Approval Petition II, the Community argues that the petition does not provide adequate notice of the issues presented, the Community is immune from judicial review, and does not demonstrate an abuse of discretion by the Business Council.

At the June 4, 2002, hearing, Nerison withdrew his Approval Petition II and subsequently, Lemke withdrew her Motion to Intervene. The Court granted both motions for withdrawal of the respective parties.

On September 10, 2002, Lemke filed an Affidavit of Default, Identification, Non-Military Status and Amount Due (Affidavit of Default) in Hennepin County District Court. Lemke alleged that Nerison was in default of the Settlement Agreement, had failed to cure said default, and sought judgment against Brooks. Brooks filed Defendant's Motion to Strike Plaintiff's Affidavit of Default and Stay Any Proceedings to Enforce Default Judgment (Motion to Strike Affidavit of Default) in Hennepin County on September 12, 2002. The Motion to Strike Affidavit of Default alleged that the

Settlement Agreement was unenforceable due to failure to meet a condition precedent, impossibility, and frustration of purpose.

Lemke responded by filing: 1) a Notice of Motion and Cross-Motion to Enforce Settlement; and 2) Plaintiff's Memorandum in Opposition to Defendant's Motion to Strike Affidavit of Default and in Support of Motion to Enforce Settlement, on October 21, 2002 in Hennepin County. Lemke alleged that all conditions precedent have been satisfied, Brooks' performance is not impossible, and there has been no frustration of purpose. Brooks in turn filed Defendant's Reply Memorandum in Support of Defendant's Motion to Strike Plaintiff's Affidavit of Default and Reply Memorandum in Opposition to Plaintiff's Motion to Enforce Settlement on October 24, 2002 in Hennepin County.

While the state court action progressed in Hennepin County, Nerison filed a Notice of Motion and Motion for Expedited Hearing, and Other Relief (Approval Petition III) asking this Court to override the Business Council's adverse determination not to allocate trust funds pursuant to the Settlement Agreement. The Community responded to Approval Petition III on November 25, 2002, by renewing their earlier Response to Approval Petition II and arguing that the petition does not provide adequate notice of the issues presented, does not demonstrate an abuse of discretion by the Business Council, and the Community is immune from judicial review.

On November 26, 2003, Nerison filed a Petition to Approve Settlement of the Wrongful Death Case (Approval Petition IV) asking the Court to approve the Settlement Agreement and overrule the Business Council's adverse determination.

On December 3, 2002, the Court held a hearing to address Nerison's Approval Petitions III and IV, which essentially request the same remedy – overturning the Business Council's decision. At the hearing, the Court noted that entry of the April 18, 2002, Order approving the Settlement Agreement occurred before the Court could undertake a full analysis of the legal status of the Settlement Agreement itself, and the Community's input on its role under the Settlement Agreement. The Court entered an Order the same day rescinding the April 18, 2002, approval of the Settlement Agreement and ordered briefing by the parties on issues with respect to paragraph 7's contingency language requiring Community approval and the appropriateness of the Settlement Agreement terms and conditions.

On December 20, 2002, Nerison filed a Memorandum in Support of his Approval Petition. Alternate conservator Mary Brooks filed her Response of Co-Conservator Mary Brooks to Motion to Approve Wrongful Death Settlement and Distribution of Funds (Mary Brooks' Response) on January 3, 2003.[1] The Mary Brooks' Response argued that Approval Petition IV should not be granted due, in part, to the failure to meet a condition precedent. On January 15, 2003, the Court set a hearing on this matter for January 29, 2003, to consider the Approval Petitions and to provide the parties with an opportunity to present any additional arguments not contained within their December briefings.

The Court held a hearing on January 29, 2003 to consider this matter, and after the hearing, on January 31, 2003, the Community filed a Motion for Relief From Order with the Court for an order changing the Conservator Order language from

[1] The Court entertains Ms. Brooks' objections because as Brooks' mother, she is an interested party in this matter. Ms. Brooks, however, is not a co-conservator. The Conservator Order named Ms. Brooks as an alternate conservator in the event Nerison is unable to continue functioning in that capacity. To date, Nerison continues to act a co-conservator and Ms. Brooks remains an alternate.

"incapacitated" to "incompetent." The Community argues that such an order would conform the language to the actual evidence provided at the initial conservatorship hearing, the necessary examination of the nature of the conservatorship would constitute an undue examination of the intent of the Community's laws, and this examination would disturb the sovereign's good faith attempt at cooperation with the Court. Nerison filed a Notice of Motion and Motion requesting a formal hearing on the issue of Brooks' incompetence. The Community responded to the Nerison motion on February 5, 2003.

## DECISION

### I. Nature of the Conservatorship

On December 20, 1999, this Court ordered the Community to establish a trust for Dean Brooks, and that a limited amount of trust funds go to a conservator each month for the care of Mr. Brooks. The Court appointed Larry Nerison as conservator, and Mary Brooks as an alternate conservator. The Court also permitted the Community to intervene in this action because of its interest in safeguarding the per capita payments of the conservatee under the Ordinance.

The Court made specific factual findings that Dean Brooks "suffers from a major mental illness, schizophrenia, with mixed paranoid and disorganized features and suffers the effects of long term chronic alcohol and drug abuse", and that he "is incapable of exercising his rights and powers to possess and manage his estate, collect all debts and claims in his favor or compromise them, to invest all funds not needed for current debts and charges."

At the request of counsel for Dean Brooks, the Court used the word "incapacitated" to refer to Mr. Brooks, rather than "incompetent" so as not to impact his criminal proceedings in state court.

Despite the use of the word "incapacitated" rather than "incompetent" all parties understood that the trust formed as a result of that order would be under the terms of the Ordinance. At the conservator hearing, attorney Tyler, representing Brooks, stated that Brooks had no objection to "the funds being held in trust under sort of the same conditions that they would have been if he had been declared incompetent." December 13, 1999 Hearing Transcript at 7. Moreover, Attorney Small, representing the Community, stated that "[e]ssentially [the Community would] be following the ordinance in Section D-1, which allows for the tribe to set up the trust. Obviously, there wouldn't be a declaration of incompetency, but if the court were to order the tribal government to do that, they would do that and set it up as they do minor trusts or anything else to protect the money." Id. at 15-16. After the order entered, no party filed an appeal challenging the nature or basis of that trust.

The trust established by the Community was under the Ordinance. The payment of per capita payments is carefully regulated by the Community and under federal law. The parties have not brought to the Court's attention any other body of law that would permit this Court to order the Community to pay out its per capita payments outside of the context of a properly approved revenue allocation plan. In addition, the record is clear that every party to the hearing that resulted in the December 20, 1999 order understood that the Community's interest in this matter was pursuant to the Ordinance, and that the resulting trust would be a creature of that statute.

The Community has requested that the Court substitute the word "incompetent" for "incapacitated" in its December 20, 1999 order. This Court's holding that this per capita trust was formed under the Community's Gaming Revenue Allocation Ordinance mitigates a need for the relief the Community requests. Its motion is denied.

Nerison, on the other hand, has moved for a formal competency hearing over three years after the trust was created. However, at the December 13, 1999 hearing, it was Nerison himself who requested that this Court refrain from entering a formal order of incompetency in order to assist Mr. Brooks with his criminal proceeding. The Court and the Community acquiesced in Nerison's request. He is now estopped from challenging the formation of the trust, and his motion for a competency hearing is denied.

## II. Condition Precedent to the Settlement Agreement

Nerison has asked that this Court enforce the settlement agreement he agreed to in state court by overturning the Business Council's decision to not approve the settlement agreement. Putting aside the issue of the Business Council's decision for a moment, the settlement agreement in this case is not enforceable in this Court.

A settlement agreement is contractual in nature and subject to the principles of contract law. Beach v. Anderson, 417 N.W.2d 709, 711-712 (Minn. App. 1988). The Minnesota Supreme Court has defined a condition precedent as follows:

> A condition precedent, as known in the law, is one which is to be performed before the agreement of the parties becomes operative. A condition precedent calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which its obligation is made to depend.

Lake Co. v. Molan, 269 Minn. 490, 498-99 (1964) (quoting Chambers v. Northwestern Mutual Life Ins. Co., 64 Minn. 495 (1896). When a contract contains a condition precedent, a party to the contract does not acquire any rights under the contract unless the condition occurs. Aslakson v. Home Savings Association, 416 N.W. 2d 786, 789 (Minn. Ct. App. 1987).

Furthermore, a breach of contract does not occur when a contract is conditioned on third-party approval and the approval is not received. If the event required by the condition does not occur, there can be no breach of contract, since the contract is unenforceable. Id.

The Settlement Agreement provides at paragraph 7:

> Approval: The foregoing settlement is contingent upon approval of the Community and approval of the District Court. ... The parties will use their best efforts to obtain such approvals on or before April 17, 2002.

The Settlement Agreement further provides at paragraph 12:

> Entire Agreement: This Agreement, including the foregoing "Whereas" clauses and Exhibits hereto, contain the entire understanding of the parties hereto in respect of the transactions contemplated hereby and supersedes all prior agreements and understanding between the parties with respect to such matters.

The Community approval provision of the Settlement Agreement injects a condition precedent. Cf. Hehl v. Estate of Klotter, 277 N.W. 2d 660, 662-63 (Minn. 1979) (stating use of language "subject to" indicates condition precedent).

Lemke contends that "the Settlement Agreement was...approved by the Community and the Community's Tribal Court." Aff. of Default at ¶4. Lemke argues that the Settlement Agreement does not require the written approval of the Community's

Business Council and that attorney Hardacker, the Community's counsel, orally approved the Settlement Agreement at the time of execution. Finally, Lemke argues that this Court's approval of the Settlement Agreement satisfies the requirements of paragraph 7.

Brooks alleges that the Settlement Agreement's definition of Community means the Business Council, that the Business Council explicitly disapproved the Settlement Agreement, and that attorney Hardacker did not approve the Settlement Agreement nor did he have authority to find the Community.

As set forth in Settlement Agreement WHEREAS clause 5, "Community" is defined as the Shakopee Mdewakanton Sioux Community. Thus, in order for paragraph 7's contingent approval requirement to be met, the Settlement Agreement must have been approved by the Shakopee Mdewakanton Sioux Community. While Lemke correctly contends that the term Community" is not defined as the Business Council, she does not provide this Court with an interpretation of what she believes the term Community means. Lemke asserts that the Shakopee Mdewakanton Sioux Community's approval is satisfied by the Tribal Court's approval of the Settlement Agreement and by attorney Hardacker. Nerison argues that the Shakopee Mdewakanton Sioux Community means the Business Council and therefore, it is the Business Council's approval that is necessary, not the Court's or in-house counsel.

A fundamental principle of contract law is that when contract language is reasonably susceptible of more than one interpretation, judged by its language alone and without resort to extrinsic evidence, it is ambiguous. Current Tech. Concepts, Inc. v. Irie Enter., Inc., 530 N.W.2d 539, 543 (Minn. 1995); Metro Office Park Co. v. Control Data Corp., 295 Minn. 348, 351 (1973). The meaning of the "Shakopee Mdewakanton Sioux

Community" at issue here is, at best, ambiguous as to whether "Community" means the entire tribal membership, the delegated governmental body, or the tribal court. In these circumstances, approval could possibly be effectuated by a tribal membership referendum vote, a Business Council resolution, or by order of the Tribal Court. The plain language, however, favors neither party. In attempting to ascertain the meaning of an ambiguous term, the Court is guided by extrinsic evidence and the principle that ambiguous contract terms must be construed against the drafter -- here Lemke. See Deutz & Crow Co. v. Anderson, 354 N.W.2d 482, 486 (Minn. App. 1984). This principle favors the position advanced by Nerison -- that Community means the Business Council. In addition to this principle of construction and interpretation, the Court also finds support for this conclusion in the December 20, 1999, Conservator Order and the Business Council's continued involvement as a co-conservator.

Prior to the Court entering the Conservator Order, the Community, by and through the Business Council, sought to intervene in the conservatorship proceedings in order to safeguard a tribal member's assets. After granting the Community's Motion to Intervene, the Court through its Conservator Order stated that certain funds, particularly those attempting to be reached by the Settlement Agreement, "shall be held in trust by the Shakopee Mdewakanton Sioux (Dakota) Community, *by and through its Business Council* ..." Conservator Order at paragraph 9 (emphasis added). At the time the Court established the conservatorship, it is clear that the Court designated the Business Council as a co-conservator to administer the trust on behalf of the general council's interest. Moreover, in granting Nerison's First, Second, and Third Allocation Requests, the Court specifically ordered the Community Council to make funds available to fulfill the

allocation requests. At all time during the administration of the conservatorship, the Business Council was the entity that ultimately controlled a significant portion of the trust assets. Given the Business Council's pervasive role in administering the trust, it stands to reason that in seeking to access trust assets, the parties would have required the approval of the Business Community, not any other entity. Therefore, the Court resolves the ambiguity by interpreting the phrase "Shakopee Mdewakanton Sioux Tribe" to mean, in this instance, the Business Council. Therefore, in order to have an enforceable Settlement Agreement, Lemke must demonstrate that the Business Council approved the Settlement Agreement.

Lemke argues that the Community, and ostensibly the Business Council, approved the Settlement Agreement because "the Settlement Agreement was actually approved by counsel to the Community, William Hardacker, at the time it was executed." Pl's. Memo. in Opp. to Def's. Mot. to Strike at 10. In support of this proposition, Lemke offers the affidavit of her attorney, Daniel Boivins (Boivins Affidavit). At no time, however, does the Boivins Affidavit allege that attorney Hardacker actually approved the Settlement Agreement. The Boivins Affidavit states:

> During the mediation, the parties called William Hardacker, general counsel for the Mdewakanton Sioux (Dakota) Community ("Community"). The Community, through its semi-monthly payments to its members such as [Brooks], is the sole source of [Brooks'] monies to fund any settlement or satisfy any judgment. The purpose of the call to Mr. Hardacker was to determine the Community's position on the proposed settlement and to determine the amount of monies being held in [Brooks'] trust account to be used as a down payment pursuant to the settlement.

Boivins Affidavit at paragraph 5. The Boivins Affidavit next states that:

> During the course of the winter, additional concerns were raised by the parties that needed to be addressed. Mediator Solum was concerned that a formal settlement agreement had not yet been signed so he called for another mediation session which was held on March 18, 2002. Besides the parties and their attorneys, Mr. Hardacker was also present because of the previous settlement condition that the agreement had to be subject to the approval of the Community. Pl's. Memo. in Opp. to Def's. Mot. to Strike at 10.

Id. at paragraph 7. The only other support offered by Lemke regarding attorney Hardacker's approval of the Settlement Agreement is the allegation that "[t]he Community took an active role in the settlement discussions and [Brooks] had every opportunity to discuss the settlement with the Community prior to execution of the same." Lemke attempts to parlay attorney Hardacker's and the Community's active participation in the settlement negotiations, attorney Hardacker's presence at the time Lemke and Nerison executed the Settlement Agreement, and the fact that the Community had ample time to review the Settlement Agreement prior to Lemke and Nerison's execution into approval on behalf of the Business Council. Lemke does not provide this Court any evidence that attorney Hardacker made any express verbal or written statement approving the Settlement Agreement.

**III. The Community did not violate the Gaming Revenue Allocation Ordinance in its consideration of the settlement agreement.**

Although the settlement agreement is unenforceable due to the failure of a condition precedent, Nerison urges this Court to overturn the Community's decision to not approve the agreement. Presumably, if this Court were to overturn the Community's decision to not approve the settlement agreement the failure of a condition precedent would be remedied. The Community responds that it is immune from suit on this issue,

and that even if it is not immune it complied with the Ordinance and its decision should not be disturbed.

This Court has the power to review the actions of the Business Council under Section 14.5(D)(1). See, e.g., In the petition of Paula Sutton, No. 316-98 (SMS(D)C Tr. Ct. Nov. 5, 1998) Section 14.5D(1) states that the Business Council "shall consider placing into trust the per capita payment of any individual declared incompetent" by a court of competent jurisdiction. Section 14.5(D)(4) states that "[a]ny qualified recipient adversely affected by this paragraph shall have the right to judicial review" in this Court. Section 14.5(D)(5) allows an adversely affected individual (on in this case his legal representative) to seek redress from this Court. Sovereign immunity does not bar judicial review under this section because Section 14.5(D)(5) represents an express and unequivocal wavier of the Community's immunity, consistent with Section 14.8 of the Ordinance.

However, the actions which this Court can review appear to be limited. Section 14.5(D)(1) only requires that the Business Council "consider" placing funds into trust for an individual declared incompetent. There is nothing in the record that supports the idea that the Business Council failed to consider whether to establish the trust in this case, and Nerison concedes that the Community did in fact consider his request to approve the settlement. See Notice of Motion and Motion for Expedited Hearing and Other Relief (Nov. 15, 2002), Exhibit A. Indeed, as Nerison himself notes, as a result of this Court's hearing in December, 1999 a trust was in fact established by the Community. See Nerison's Reply to Mary Brooks' Memorandum of January 3, 2003 (Jan. 27, 2003).

Therefore, the Court cannot find any error on the Community's part under Section 14.5(D)(1) of the ordinance.

But Nerison wants this Court to go a step further and to review the substance of decisions the Community makes in its role as trustee of trusts created under the Ordinance. The legal basis for this Court to do so is not clear. However, even assuming without deciding that this Court has the power to review discretionary decisions of the Community as trustee under the Ordinance, Nerison has failed to demonstrate that the Community abused its discretion in denying his request to approve the settlement agreement. See, e.g., In re Matter of Campbell's Trust, 258 N.W.2d 856, 866 (Minn. 1977) (actions of trustee reviewed for an abuse of discretion).

Reasonable people may disagree about whether the terms of the settlement agreement are in the best interests of Dean Brooks. In addition, Nerison seems to acknowledge that given paragraph 7 in the settlement agreement, he should have brought the agreement to the Community before formally agreeing to its terms. Had the Community been involved earlier there may have been a way to fashion an agreement that was acceptable under paragraph 7. But that was not the case, and it was not an abuse of discretion for the Community to decline its approval of the agreement.

Absent some stronger evidence of overt malfeasance or incompetence on the Community's part, the Court is not prepared to overturn the Community's decision. The effect of overturning the Community's decision would be to nullify Section 7 of the settlement agreement by substituting this Court's approval for that of the Community. The Court denies Nerison's petition to overturn the Business Council's decision and to enforce the settlement agreement.

**ORDER**

Accordingly, Conservator Nerison's Motion for Expedited Hearing and Other Relief and Petition to Approve Settlement of the Wrongful Death Case are denied. The Community's Motion for Relief from Order is denied. Conservator Nerison's Motion and Request for a Hearing is denied.

Dated: April 30, 2003

Henry M. Buffalo, Jr.
Judge