

APPELLATE COURT CASE NUMBER A08-80 and A08-81
STATE OF MINNESOTA
IN COURT OF APPEALS

DENNIS E. OBERLOH, ET AL.
Respondents,

vs.

LOREN JOHNSON,
Appellant.

DENNY DEAN PRESCOTT,
Respondent,

vs.

LOREN JOHNSON,
Appellant

**BRIEF OF AMICUS LOWER SIOUX INDIAN COMMUNITY IN
SUPPORT OF APPELLANT LOREN JOHNSON**

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LEGAL ISSUES

I. Introduction

The lower court decision permitting Indian and non-Indian parties to sue one of the four highest ranking officers of the Tribe in State court for libel and defamation, for actions that officer took when clearly engaged in matters of tribal business, will have a crippling effect on our Tribal government if it is not reversed by this Court

II. The Crippling Effect the Lower Court Decision Will Have on the Ability of the Tribe's Executive Branch to Function

A. The Structure of the Tribal Government

B. The Answers to the Questions on Which the Lower Court Ordered an Evidentiary Hearing are Self-Evident, Such that a Hearing is Unnecessary and Inappropriate

1. Appellant was Clearly Serving in a Senior Executive Position
2. Appellant was Clearly Acting in His Official Capacity
3. Lower Court Decision Would Defeat the Purpose for Which Absolute Sovereign Immunity was Created and Discourage Tribal Members from Serving as Officers of the Tribe

III. The Lower Court Decision Undermines the Authority of the Tribal Court

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ARGUMENT

I. Introduction

The Lower Sioux Indian Community (“Tribe”), a Federally-recognized Indian Tribe, respectfully submits this *amicus* brief on behalf of the Appellant Loren Johnson. The Tribe appreciates the opportunity to present its views on the issues involved in these cases – issues that are critical to the future ability of the Tribe to govern itself and to effectively meet its responsibility to its members. As set out below, it is the Tribe’s view that the lower court decision permitting Indian and non-Indian parties to sue one of the four highest ranking officers of the Tribe in State court for libel and defamation, for actions that officer took when clearly engaged in matters of tribal business, will have a crippling effect on our Tribal government if it is not reversed by this Court. If it is permitted to stand, tribal members will be unwilling to seek positions on the governing body of the Tribe for fear of having to pay the fees and costs involved in defending lawsuits in State Courts for actions taken as officers of the Tribe. In the alternative, if the Tribe pays the costs of such suits, it will defeat the intent of sovereign immunity by creating a drain on the Tribal treasury. The lower court decision, if upheld, would also put the State courts in the inappropriate position of interpreting the Tribal Constitution and Bylaws, a position this Court has already held to be an inappropriate role for State courts.

Because Appellant's brief fully discusses the key legal issues in this case, the Tribe's brief will focus on the practical implications of the lower court decision, if it is upheld, on the ability of the Tribe "to govern itself", the single most important attribute of a tribal government and the principle that is at the heart of the Federal Government's 35 year old policy of Indian self-determination. *1975 Indian Self-Determination And Educational Assistance Act*, 25 U.S.C. 450 et. seq. In Section 450a of that Act, entitled "Congressional declaration of policy", Congress stated, "The United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments..." The lower court ruling, by imposing inappropriate burdens on tribal officials, will seriously undermine the ability of tribes to develop strong executive branch and judicial institutions, both of which are key to stable and effective tribal governments.

II. The Crippling Effect the Lower Court Decision Will Have on the Ability of the Tribe's Executive Branch to Function

A. The Structure of the Tribal Government

The Tribe has been Federally recognized since 1935 when its Constitution and Bylaws were recognized by the Secretary of the Interior pursuant to authority granted to him by the Indian Reorganization Act, codified at 25 U.S.C. 476. These two documents constitute the organic documents of the Tribe. (The lower court raised questions about the accuracy of the Bylaws because there was no affidavit accompanying them. However, that should not be an issue since both parties

submitted a copy of the Tribal Constitution and Bylaws as exhibits in their submissions to the lower court. In the alternative, Amicus asks that the Court take judicial notice of the Tribe's Constitution and Bylaws, just as it would take judicial notice of the laws of any other jurisdiction. A copy of those documents is available at the Tribe's website, www.lowersioux.com).

The Tribal Constitution creates a governing body called the Lower Sioux Community Council, ("Council") composed of five tribal members elected by tribal members 18 years and older. The Bylaws provide that certain of those Council Members also serve as officers of the Tribe. They are elected to those positions by the Council Members. The Officers include a President, Vice President, Secretary, and Treasurer. As provided in the Bylaws, the Officers perform executive branch functions in addition to their legislative functions as Council Members. For example, the President serves as the head of the executive branch of the Tribe as well as presiding over the Council. The Treasurer serves as the chief financial officer, comparable to a state Comptroller. Appellant, a member of the Council, was elected to the position of Treasurer by the other members of the Council. (He has since resigned from both positions.)

B. The Answers to the Questions on Which the Lower Court Ordered an Evidentiary Hearing are Self-Evident, Such that a Hearing is Unnecessary and Inappropriate

The lower court decision would require Appellant to incur the time and costs of an evidentiary hearing on two questions: (1) whether Appellant, in his

capacity of Treasurer, one of the four highest ranking officers of the Tribe, serving in a position that is specifically established by the Tribe's organic documents, was serving in a senior executive position that is entitled to absolute immunity; and (2) whether Appellant's communication to the Tribal Members in a newsletter entitled "Treasurer's Report", written on tribal letterhead and discussing contracts entered into between the Tribe and Appellees, constituted an official action in his capacity as Treasurer.

The Tribe believes that once the structure of the Tribe's government is understood, the answers to those questions are self-evident.

1. Appellant was Clearly Serving in a Senior Executive Position

The basic standard, as recognized by the lower court, is that persons serving in senior executive positions are entitled to the protection of absolute sovereign immunity. However, the lower court concluded that Appellant would have to undergo an evidentiary hearing to determine if he served in a senior executive position. Yet, there is not a single case in which an official holding a position created by a jurisdiction's organic documents – a "constitutional officer" – has been held not to be senior official entitled to absolute immunity.

The lower court relied on *Hegner v. Dietze* 524 N.W. 731 (Minn. App.1994) for its conclusion that fact questions remained

about Appellant's status as a protected official. However, it is inappropriate to compare the official in that case, an employee serving as Human Resources Manager, with Appellant, who was an elected official and served as one of the four senior executive officers of the Tribe, in a position created by the Tribe's founding Bylaws. In *Diver v. Peterson*, 524 N.W. 289 (Minn. App. 1994), this Court found that a tribal attorney was entitled to absolute immunity. Clearly an elected official who serves as a constitutional officer is also covered.

If the approach taken by the lower court were applied to the Minnesota state government, it would require the Governor (or the State Treasurer before that position was abolished by constitutional amendment in 2003) to participate in an evidentiary hearing to prove he serves in a senior executive position. Clearly no court would issue such a decision for such state constitutional officers. The lower court ruling denigrates tribal government and must be reversed.

2. Appellant was Clearly Acting in His Official Capacity

The alleged libel and defamation occurred in a newsletter that Appellant regularly sent to all tribal members to keep them informed about his activities as Tribal Treasurer. The newsletter was entitled "Treasurer's Report", was on Tribal letterhead, and discussed a contract between the Tribe and Appellees regarding the provision of

financial services to the Tribe. The lower court found that there were remaining questions about whether issuing reports to his constituents was an activity protected by sovereign immunity because issuing reports to the tribal membership was not a responsibility specifically set out in the section of the Tribal Bylaws that describes the duties of the Treasurer. This narrow interpretation of the category of functions that are covered by an official's sovereign immunity without the need for an evidentiary hearing is not supported by the case law or by the basic tenants of a democracy. There is not a single case that supports the proposition that a function must be listed in the government's organic documents in order to be covered by absolute sovereign immunity.

In fact, the case law goes in the opposite direction.

That Petitioner was not required by law ... to speak out cannot be controlling in the case of an [executive branch] official of policy-making rank, for the same conditions which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority. *Barr v. Matteo*, 360 U.S. 564, 575, 79 S.Ct. 1335, 1341 (1959).

Since Appellant is a senior policy-making official, the lower court was incorrect in limiting actions entitled to absolute immunity to those specified in the Tribal Constitution and Bylaws. Not only does *Barr* apply absolute immunity to discretionary acts, it further instructs that such immunity is to be given to “actions taken within the outer perimeters of their line of duty.” at 1341. Based on *Barr*, the courts have adopted “... a functional approach to determine the reach of *Barr* by looking at the need of immunity to forward the legitimate purposes of the official.” *McKinney v. Whitfield*, 736 F2d. 766, 770 (D.C. Cir. 1984)

The obligation of any elected official to keep his constituents informed of the activities of their government is essential to democracy and to the transparency that is critical to honest and effective government. As Treasurer, Appellant had a fiduciary duty to the Tribal members, since the monies he was managing belonged to them. An essential element of a fiduciary is to keep his beneficiaries informed of his activities on their behalf. For the Tribe, the issuance of newsletters by officials is one of the few ways they can provide information on the tribal government’s activities to the members. There is no tribal newspaper, radio station, television station, or any other media that reports on the activities of the tribal government and that can reach the tribal members, many of whom live outside of the reservation, both in the State of Minnesota and throughout the country.

If Tribal officials are denied the protection of absolute sovereign immunity when providing information on the activities of the tribal government, (in this

case, on contracts entered into by the Tribe) to tribal members, the transparency essential to the democratic process on the reservation will be severely handicapped. Therefore, the issuance of a newsletter reporting on activities by the Tribal government involving its finances does not begin to approach the “outer perimeters” of Appellant’s line of duty as Treasurer. Rather, it was a function squarely within his responsibility and line of duty.

The importance of ensuring senior officials are free to speak out without fear of libel suits was addressed by the Minnesota Supreme Court in *Johnson v. Dirkswager*, 315 N.W.2d 215, 220 (Minn. 1982). The Court’s reasoning in that case is directly applicable here:

But in instances like this one, it would seem government can best be held accountable by assuring that its top-level representatives have no excuse not to speak out in the performance of their duties. If they speak out falsely and from ill motives, it is expected that their remarks will be exposed for what they are worth. It seems to us that the same policy considerations that warrant an absolute privilege for those in the legislative and judicial branches of government apply to the executive branch.

We do not have before us the nature or extent of any privilege for inferior governmental officers. We are dealing, it must be remembered, only with top-level, cabinet-equivalent executives and, as to them, the observations of the United States Supreme Court in *Barr v. Matteo* are pertinent:

It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of their duties – suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. 360 U.S. 564, 571

What is involved here, of course, is the difficult and sensitive task of balancing the public's right to know with a defamed individual's right to redress. In this instance, we conclude the balance is to be struck in favor of the public's right to know. at 221.

As indicated *supra*, Appellant is a top-level, cabinet-equivalent, executive official and constitutional officer of the Tribe. He and all similarly situated Tribal officials must have the same right to speak out fearlessly in carrying out their official responsibilities and the Tribal members have the same right to be assured that their senior officials have no excuse not to speak out in the performance of their duties, as was provided to the State and Federal officials in *Dirkswager* and *Barr*. As a result, it was inappropriate for the lower court to require an evidentiary hearing on this issue.

3. The Lower Court Decision Would Defeat the Purposes for Which Absolute Sovereign Immunity was Created and Discourage Tribal Members from Serving as Officers of the Tribe

To put Tribal officials in the position of facing the time and expense of an evidentiary trial on the two questions discussed above would defeat the very purpose for which the courts have created and upheld the doctrine of sovereign immunity, and therefore would discourage tribal members from running for positions on the Council and as officers of the Tribe. Members of the Council and Officers receive no salary or other remuneration for their services, even though those positions can require as much time as a full-time job. As a result, Tribal Members are making a sacrifice when they choose to run for a Council position, or once on the Council, to be considered for a position as an Officer.

The Tribe believes the negative effect on tribal officials such as Appellant if the lower court ruling is upheld was appropriately summarized by Judge Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579, 581 (D.C. Cir. 1949):

The justification for [absolute immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the discharge of their duties.

The impact on the Lower Sioux Community Council would be even more devastating because, as indicated, Council Members are not compensated for their

service on the Council or as Officers of the Tribe. If the Lower Court ruling is permitted to stand, any person, tribal member or non-tribal member, who wants to retaliate against a Council Member for actions that the Member took in his official position, need only file a libel or defamation suit against that Member in State Court. Even if there is no basis for the suit, under the Lower Court's inappropriately narrow reading of the scope of absolute immunity, it is likely that the Council Member will be forced to defend himself in an evidentiary hearing and incur the costs of attorneys' fees and costs.

If the Lower Court decision is upheld, tribal members would justifiably refrain from running for these unpaid positions as Council Members. This could lead to a situation in which no Member is willing to serve on the Council, causing the tribal government to collapse. The other possibility is that the Council Members will refrain from aggressively carrying out their fiduciary responsibilities in order to avoid being sued. In particular, it will discourage Tribal officials from communicating with their members in writing. Since a large percentage of the Tribal membership lives off of the Reservation, these members, who are eligible to vote in Tribal elections, will be denied the information they need to make informed decisions when voting – a critical element of a democracy. Either way, the effect on the Tribe's ability to govern itself will be devastating. (If the Tribe assumed some or all of the costs of evidentiary hearings against Tribal officials, it would cause the drain on the governmental treasury that sovereign immunity is intended to protect.)

III. The Lower Court Decision Undermines the Authority of the Tribal Court

In the alternative, Amicus requests that the Court divest itself of jurisdiction by dismissing the cases and directing Respondent to bring them in the Lower Sioux Tribal Court. This Court set out the principles to be applied in regard to state court divestiture in *Granite Valley Hotel v. Jackpot Junction Bingo*, 559 N.W. 2d 135 (Minn. App. 1997).

When both a state court and a tribal court have jurisdiction to entertain a dispute involving questions central to the governance of an Indian tribe, the doctrine of comity generally divests state courts of jurisdiction as a matter of federal law if retention of jurisdiction by the state court would interfere with matters of tribal self-government. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15, 107 S. Ct. 971, 975-76, 94 L. Ed. 2d 10 (1987); see *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57, 105 S. Ct. 2447, 2454, 85 L. Ed. 2d 818 (1985) (reversing exercise of jurisdiction on grounds that exhaustion of tribal remedies is required before claim can be entertained by federal court).

Deferral to a tribal court for exhaustion of remedies is not based on whether a trial court properly has jurisdiction over an action. *Klammer v. Lower Sioux Convenience Store*, 535 N.W.2d 379, 380 (Minn. App. 1995).

Rather, it is grounded in the federal policy of promoting tribal self-

government. *Id.*; see also Iowa Mut. Ins., 480 U.S. at 16, 107 S. Ct. at 976 (holding that federal policy supporting tribal self-government ‘directs a federal court to stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction.’) (citation omitted). *Thus, the question before us is whether the facts and legal theories underlying this case require analysis of issues central to the governance of an Indian tribe, which must be heard by a tribal court.* (at 140; emphasis added).

In *Jackpot Junction*, this Court found no grounds for divestiture because it involved interpretation of contracts and general principles of law, rather than interpretation of essential tribal laws. In contrast, in the cases at bar, the lower court decision indicates that it would be required to interpret the provisions in the Tribal Constitution involving the scope of authority of the Tribal Treasurer and whether those documents make the Treasurer a “Senior Governmental Official”. These are “issues central to the governance” of the Tribe that must be heard by the Lower Sioux Tribal Court.

Further, as this Court found in *Klammer v. Lower Sioux Convenience Store*, and contrary to the opinion in the lower court, the fact that P.L. 280 gives the State Courts jurisdiction does not in any way change the divestiture analysis required by *Jackpot Junction*. Finally, unlike *Jackpot Junction*, the primary activity at issue in the cases now before the Court occurred on the Reservation. It was an act of governance by a Tribal official whose office was on the Reservation, where he prepared the newsletter and from where it was distributed. The fact that some of

the recipients were located off of the Reservation was incidental, caused by the fact that the Reservation is so small that a majority of the members are compelled to live off of the Reservation in order to obtain housing and employment.

* * * * *

CONCLUSION

Amicus Lower Sioux Indian Community is deeply concerned about the ramifications of this case. If the lower court decision is not reversed, it will make it much more difficult for our Tribe and for all of the other tribes in the State of Minnesota to accomplish the goal of self-governance. While tribes have been working towards this goal for many years, it is just within the past 30 years or so, since the enactment of the Indian Self-Determination Act, (25 U.S.C. 450, et. seq.) in 1976, that they have been able to make significant progress. The lower court decision, if upheld, would set back much of this progress because tribal members would be unwilling to become Tribal Officials out of fear of facing the costs and other burdens involved in defending libel and defamation lawsuits in state courts following their communications to their constituents. There would be no way for them to avoid this danger without abdicating their fiduciary responsibilities to keep Tribal members informed of the Tribal government's activities. Also, tribal sovereignty would be significantly harmed if state courts were authorized to interpret the Tribal Constitution and Bylaws, as the lower court in this case is intending to do if its decision is upheld. For these reasons, Amicus requests that

this Court either find that elected tribal officials are entitled to absolute immunity when sharing information with their constituents about activities within their area of responsibility, or, in the alternative, divest the Minnesota State Courts of jurisdiction for these two cases, under the principles set out in *Jackpot Junction*.

Respectfully submitted,



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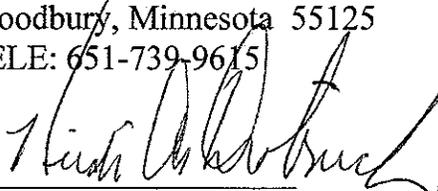
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a proportional font. The length of this brief is 4,118 words. This brief was prepared using Microsoft Word 2003.

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