

STATE OF MINNESOTA

IN COURT OF APPEALS

A-08-80

A-08-81

Dennis E. Oberloh, et al.

Respondents,

v.

Loren Johnson,

Appellant.

Denny Dean Prescott,

Respondent,

v.

Loren Johnson,

Appellant.

RESPONDENTS' BRIEF

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LEGAL ISSUES

1. Whether or not the District Court erred in converting Appellant's Motion to Dismiss into a Motion for Summary Judgment.

The District Court properly converted the Motion to Dismiss into a Motion for Summary Judgment pursuant to Rule 12.02 of the Minnesota Rules of Civil Procedure. There are no cases inapposite to this decision.

2. Whether or not the District Court erred in failing to dismiss the action based upon the Appellant's defense of sovereign immunity.

The District Court did not err when it did not dismiss the action against the Appellant based upon the defense of Sovereign Immunity. The decisions inapposite to the decision are *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700 (1998);

3. Whether or not the District Court erred in not dismissing the claims against Appellant based upon the Appellant's personal claim to sovereign immunity?

The District Court did not err in not dismissing the claims against the Appellant based upon his personal claim to sovereign immunity. The decisions inapposite to the decision are *Hegner v. Dietze*, 524 N.W.2d 731, 735 (Minn. App. 1994); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)

4. Whether or not the District Court erred in not dismissing the claims against Appellant based upon official or qualified immunity?

The District Court did not err when it did not dismiss the action against the Appellant based upon official or qualified immunity. The decisions inapposite to the decision are *Barr v. Matteo*, 360 U.S. 564, 3 L. Ed. 2d 1434, 79 S. Ct. 1335, (1959)

5. Whether or not the District Court erred in exercising concurrent jurisdiction?

The District Court did not err in exercising concurrent jurisdiction under Public Law 280. The decisions inapposite to the decision are *State v. Stone*, 572 N.W.2d 725 (Minn. 1997).

STANDARD OF REVIEW

On appeal a determination of whether a suit is barred by a tribe's sovereign immunity is an issue of law that the Court of Appeals must determine de novo. *Lemke v. Brooks*, 614 N.W.2d 242 (Minn. App. 2000); *Becker County Welfare Dep't v. Bellcourt*, 453 N.W.2d 543 (Minn. App. 1990).

STATEMENT OF FACTS AND CASE

Respondent, Oberloh and Associates, LTD is an accounting firm located in Redwood Falls, Minnesota. Dennis E. Oberloh, is an individual who is the President of Oberloh and Associates and is an individual resident of Redwood Falls, Minnesota. (A-456) (Hereinafter collectively referred to as Respondent Oberloh.) Respondent Oberloh provided accounting services to the Lower Sioux Indian Community or its entities for approximately 20 years. The Respondent, Denny Prescott, is a tribal member of the Lower Sioux Indian Community and an individual who resides in Redwood County, Minnesota. Respondent, Denny Prescott has been on the tribal council and has been employed by Jackpot Junction Casino. See paragraph 8 of Affidavit of Denny Prescott (A-336).

The Appellant is an individual resident of Redwood County, Minnesota. During the relevant periods of time from February through March of 2007 the Appellant asserts that he was the Treasurer for the Lower Sioux Indian Community.¹ On February 20,

¹Respondent is unable to determine whether Appellant was a legitimate officer as the Lower Sioux Indian Community has been fighting internally for the last two years regarding its

2007, the Appellant sent a letter to members of the Lower Sioux Indian Community indicating that Respondent Oberloh had a conflict of interest because it provides services to individual tribal members and the Lower Sioux Indian Community. (A-462). On March 5, 2007, the Appellant sent a letter to members of the Lower Sioux Indian Community indicating that he he would be reviewing past Community rackets and excessive contracts paid to vendors. (A-465). On March 12, 2007 the Appellant sent a letter to members of the Lower Sioux Indian Community advising them that Respondents had been involved in a “racket” in 1995. (A-467). On March 19, 2007, the Appellant sent another letter to members of the Lower Sioux Indian Community advising them that there was a conflict of interest with Respondent Oberloh and that Respondent Oberloh had refused to complete the accounting for the minor trusts. (A-472). On March 26, 2007 the Appellant sent an additional letter to members of the Lower Sioux Indian Community continuing to allege conflicts and financial improprieties by Respondents that allegedly occurred in 1995 to 1997. (A-475). All of this was done by Appellant even though he had clear information from the previous attorney for the Tribal Council and direct information from Municipal Capital Corporation that Respondents were not involved in any racket regarding Municipal Capital Corporation. (A-487, A-490, A- 493). In fact, the Appellant in support of his motion offered unauthenticated documents dated May 30, 1995 which purport to indicate that there was still a question regarding the ownership of Municipal

elections and elected officials. Their dysfunction extends to the Tribal Court who have failed to act on a number of petitions that have been brought before the Court regarding this very issue.

Capital Corporation. (A-359). The Appellant submitted the information to the District Court despite knowing that John Jacobsen, attorney for the Tribal Council had written a letter in 1997 in which he stated as follows:

“As you may recall, early in the summer of 1995, questions were raised with respect to whether a conflict of interest existed between the Community’s accountant, Dennis Oberloh, and Mr. Joseph O’Brien, the owner of Municipal Capital Corporation (“Municipal”). At that time and again in the summer of 1997, the Council received documents from Mr. Oberloh and from Mr. O’Brien, stating that Mr. Oberloh neither owns nor ever has owned any interest in Municipal.”

The Appellant proffered this information to the District Court despite also having a copy of a letter from John Jacobsen dated March 19, 2007 which indicated as follows:

“As you know, at the Lower Sioux Community’s request we transferred to the Community all of the paper files that our firm had, reflecting the work that we did as the Community’s legal counsel from 1975 to 2005.....

Having scoured those sources, I can tell you that twice in the mid-1990's the Lower Sioux Community Council asked our firm to investigate the possibility that Mr. Prescott and or Mr. Oberloh may have had a business connection with Municipal Capital.....

In summary, on two separate occasions our firm examined allegations of business connections between either Municipal Capital or Mr. O’Brien on the one hand and Messrs. Prescott and Oberloh on the other, and on both occasions we found no connection. On both occasions we reported those results in writing to the Lower Sioux Community Council; and those reports are included in the files that we forwarded to the Council in 2005.” (A-487-488).

The Appellant, despite having information to the contrary continued the defamatory statements in his letter of March 26, 2007. The letter provides in relevant part as follows:

“I have reviewed all files provided to me by the Tribe’s former legal counsel, as well as all financial information in our possession, and stand by the facts I have distributed to the Community.....

Although Mr. Prescott has stated this before, he has never provided the community any proof that was the case. The Tribe's former legal counsel investigated this issue in 1995 and was not given the documentation they requested. It should be noted that Theresa Oberloh notarized the lease agreements, further supporting a link between MCC, Mr. Oberloh and Mr. Prescott...

Please note that Denny Prescott failed to provide any hard evidence to back up his statements. What he gives us are statements from the memory of his past business partners and legal associates. Remember, Mr. Prescott did not deny his initial involvement in MCC. The facts speak for themselves, and to me they say Denny Prescott did not have the best interests of the Community at heart in starting this "racket".

Everyone of these statements is false and Appellant knew that when he distributed the information. If Appellant in fact had reviewed all of the information, why would he advise the community that documentation was not provided by Mr. Prescott? That statement is false and contrary to the letter received from John Jacobsen. What is interesting is Appellant knew that the Tribe paid its own attorney on two separate occasions to investigate the issues and they determined that the representations made by Mr. Oberloh and Mr. Prescott were true. They had no interest in Municipal Capital Corporation.

The false allegations continue in the Appellant's Brief despite knowledge to the contrary. See Page 7 of Appellant's Brief. Appellant had access to all of the records of the Tribe and knew or should have known that the statements he was making were completely false.

These letters were false and were intended to defame the Respondents. These defamatory letters were mailed to members of the Lower Sioux Indian Community all

over the country including an individual member of the tribe in Washington State. The defamation was published both on and off the reservation. On March 27, 2007, the Respondents commenced two separate actions against the Appellant for defamation. (A-1 and A-8). No answer to either complaint has been filed by the Appellant. Appellant made a motion to dismiss the complaint for lack of jurisdiction based upon sovereign and qualified immunity, pre-emption and failure to state a claim upon which relief can be granted by claiming that the lawsuit has been brought against the Lower Sioux Indian Community. (A-14 and A-149). In support of that motion, the Appellant submitted a Memorandum of Law which argued facts which were not supported by any affidavit testimony. (A-15 and A-150). The Appellant also attached "enclosures" to his Memorandum of Law which were not authenticated by any Affidavit. (A-44-148 and A-183-296). The factual information argued by Appellant and the enclosures were all outside of the record.

In opposition to the motion to dismiss the Respondents submitted responsive memorandums (A-297 and A-418) and affidavits from respondents (A-335 and A-455) and nine other tribal members (A-404-417), including Joseph Good Thunder who was a Tribal Council member at the time the defamatory statements were made by the Appellant. (A-406). The District Court issued an Order on December 12, 2007 and denied the motion for summary judgment indicating that there were genuine issues of material fact in dispute. (A-508). The District Court indicated as follows:

“...the Court cannot conclude based on the record presented at this state of the proceeding that the suit against the Defendant is effectively one against the tribe itself.... And

The Court finds that the present case is distinguishable from Diver in that disputed fact issues remain as to whether the Defendant was acting in his official capacity or within the scope of his authority when he made the alleged defamatory statements..... And

...the Defendant’s contentions are without evidentiary support and are contradicted by the affidavits presented by the Plaintiffs. The Court finds that the record as presented raises genuine questions of fact related to whether Loren Johnson qualifies as a top-level government executive and what type of relationship the statements contained in the Treasurer’s Reports had, if any, to his assigned job functions.”

The Appellant petitioned for review of the decision and the Minnesota Court of Appeals converted the petition into a direct appeal.

ARGUMENT I

THE TRIAL COURT DID NOT ERR IN CONVERTING THE MOTION TO DISMISS INTO A MOTION FOR SUMMARY JUDGMENT.

Respondents are unsure what error by the District Court the Appellant is alleging has occurred with respect to its motion to dismiss. The District Court went out of its way to hear the Appellant’s Motion to Dismiss when there were no supporting affidavits submitted in support of the motion.² The memorandum of law submitted by the Appellant

²Respondents acknowledge that Rule 56.01 allows a party to bring a motion for summary judgment without supporting affidavits. However, when such a motion is made without affidavits the moving party can only argue facts which are in the pleadings. In this case the Appellant didn’t file an Answer and argued facts outside of the pleadings. See Rule 56.05 of the Minnesota Rules of Civil Procedure.

in support of the Motion to Dismiss contains a number of factual assertions for which there is no supporting affidavit. For example, there is no Affidavit by Mr. Johnson in which he identifies himself and affirmatively states that the "Treasurer Reports" were sent in his capacity as the Treasurer of the Lower Sioux Indian Community. There is no information submitted by the Appellant that the defamatory statements had any relationship to the tribe's current financial operation. The alleged events occurred many years ago and would have no correlation or relationship to the current financial operation of the tribe. The Appellant's Memorandum of Law continuously made arguments regarding Appellant Johnson's conduct in this matter without any evidence being presented to the District Court in Affidavit format that would support those actions or the arguments.

In response to the Appellant's Motion to Dismiss, the Respondents submitted a memorandum of law and numerous Affidavits. In fact, the only evidence regarding the Appellant's conduct is the information submitted by the Respondent. Respondent's affidavits were the only documented evidence which were properly provided to the District Court. The District Court correctly treated the motion as one for summary judgment based upon the fact that Respondent submitted affidavits to the District Court which were outside the pleadings. Furthermore, one of the claims of the Appellant was that the complaint failed to state a claim upon which relief may be granted. (A-178) Rule 12.02 specifically provides that if such a motion is brought and matters outside the

pleadings are considered, the motion shall be treated as one for summary judgment.

Minn. R. Civ. P. 12.02. Likewise, the Courts in Minnesota have long held that:

If materials outside the pleadings are considered, the motion will be treated as one for summary judgment. Minn. R. Civ. P. 12.02. *V.H. v. Estate of Birnbaum*, 543 N.W.2d 649, 653 (Minn. 1996).

Respondent is unaware of what opinion the Appellant is relying on to support his position as there is no citation in the brief to any case other than the reference to *Miller v. Reddin*, 422 F. 2d 1264 (9th Cir. 1970). The Ninth Circuit Court of Appeals decision is not applicable as it involves the failure of a Court to recognize a dismissal submitted by a party and there is nothing in the opinion to support the Appellant's position that under Minnesota law the treatment of a Rule 12.02 motion as a motion for summary judgment was not warranted under the circumstances.

The District Court went out of its way, as has the Minnesota Court of Appeals, in allowing the Appellant to proceed despite that fact that Appellant and his attorney have not filed the proper documents.³ The procedure and analysis engaged in by the District Court is consistent with Minnesota Law and there was no error. The treatment of the Motion to Dismiss as a Motion for Summary Judgment is consistent with the Minnesota Rules of Civil Procedure and Minnesota case law.

³ Respondents have been notified that attorney Steven Sandven has been suspended from the practice of law in the State of Minnesota.

ARGUMENT II

THE DISTRICT COURT DID NOT ERR BY DENYING THE APPELLANT'S MOTION TO DISMISS BASED UPON THE DOCTRINE OF SOVEREIGN IMMUNITY. THE DISTRICT COURT PROPERLY DETERMINED THAT IT HAS JURISDICTION AND GENUINE ISSUES OF MATERIAL FACT EXISTED WHICH PREVENTED THE ENTRY OF SUMMARY JUDGMENT .

The District Court properly concluded that it had jurisdiction over this action and the Appellant and at this time in the proceedings the doctrine of sovereign immunity does not protect him. Essentially, the District Court has concluded that the doctrine of sovereign immunity is to be utilized as a shield, not as a weapon. Furthermore, the District Court properly determined that there were a number of genuine issues of material fact which prevented the entry of summary judgment, including whether the Appellant was acting as an official within the scope of his authority and whether Appellant is entitled to absolute privilege or immunity. (A-518). On appeal a determination of whether a suit is barred by a tribe's sovereign immunity is an issue of law that the Court of Appeals must determine de novo. *Lemke v. Brooks*, 614 N.W.2d 242 (Minn. App. 2000); *Becker County Welfare Dep't v. Bellcourt*, 453 N.W.2d 543 (Minn. App. 1990); *Burlington N. R.R. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), cert. denied, 505 U.S. 1212, 120 L. Ed. 2d 887, 112 S. Ct. 3013 (1992).

Indian tribes and their governing bodies possess certain attributes of sovereignty over their members and territory. Indian Tribes have certain immunity from suit. They may not be sued absent express and unequivocal waiver of immunity by the tribe or

abrogation of tribal immunity by Congress. *Id.* In this case, the State of Minnesota is a Public Law 280 State and pursuant to congressional authority, the Courts in Minnesota have certain jurisdiction. The true status of American Indian tribes is discussed in *Cherokee Nation vs. State of Georgia* decided in 1831. See 30 U.S. (5 pet.) 1, 8 L. Ed. 25 (1831). As Judge Randall pointed out in *Cohen v. Little Six, Inc.*, 543 N.W. 2d 376 (Minn. App. 1996), *Cherokee Nation* sets out unequivocally that Indian tribes are not true sovereign states or nations. *Cherokee Nation* labeled the tribes "domestic dependent nations." *Cherokee Nation* at 17. *Cherokee Nation* is accurate when it used the term "domestic" as, American Indian tribes are in the U.S., not a foreign country. *Cherokee Nation* describes the tribes as "dependent". The federal government has made Indian tribes wards of government since this country was founded right up to the present. This acknowledged dependency is not compatible with any claim of true sovereignty. See *Id.* (stating "their relation to the United States resembles that of a ward to his guardian.")

ARGUMENT III

THE DISTRICT COURT DID NOT ERR WHEN IT REFUSED TO DISMISS BASED UPON APPELLANT'S PERSONAL CLAIM TO SOVEREIGN IMMUNITY

In this case, the Appellant argues that he is entitled to sovereign immunity because he is a tribal official. However, sovereign immunity only extends to tribal officials who are

acting

within their scope of authority. *Hegner v. Dietze*, 524 N.W.2d 731, 735 (Minn. App. 1994); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985).

Furthermore, the Appellant's position of Treasurer is not equivalent to an officer in a state or municipal government. The Lower Sioux Indian Community Constitution specifically provides that the Community Council has certain enumerated powers not individual officers. See *Constitution of the Lower Sioux Indian Community in Minnesota Article V-Powers*. The officers of the Lower Sioux Community are not even elected by the members of the Tribe. See *Constitution of Lower Sioux Indian Community Article IV, Subsection 2A and Amendment II of the Constitution of the Lower Sioux Community Council*.

This action is against the Appellant and not the Lower Sioux Indian Community or Tribe. As noted above, Indian tribes have certain immunity from suit and may not be sued absent an express waiver of immunity by the tribe or Congress. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978).

However, tribal sovereign immunity extends only to tribal officials acting in their official capacity and within their scope of authority. *Hegner v. Dietze*, 524 N.W.2d 731, 735 (Minn. App. 1994). The Constitution of the Lower Sioux Indian Community provide the Community Council with the power to act on behalf of the Tribe, not individual officers. See *Article V Constitution of Lower Sioux Indian Community*.

Appellant's conduct and actions are not protected under the doctrine of sovereign immunity. See Gavle I v. Little Six, Inc., 555 N.W.2d 284 (Minn. 1996); Lemke v. Brooks, 614 N.W.2d 242 (Minn. Ct. App. 2000). A similar issue was considered by the court in Gavle v. Little Six, Inc., 2000 Minn. App. LEXIS 42, (A-322). In Gavle (2000) one of the defendants Ross moved for summary judgment based on the defense of sovereign immunity. The district court ruled that Little Six, Inc.'s tribal immunity extends to tribal officials acting within the scope of their authority and in a representative capacity, but concluded that whether Ross is immune from suit depends on the resolution of a fact question. In its decision, the Supreme Court held explicitly that "state courts have jurisdiction of Gavle's claims, including those arising within Indian country." Gavle I at 290-91. Ross was an official of the tribe and the courts on three separate occasions determined that the Minnesota Courts had jurisdiction.

The district court in Gavle I determined that a question of fact existed as to whether Ross was acting in a representative capacity when she engaged in the activities challenged by Gavle and whether she was acting within the scope of her authority. The same issues are present in the action now pending before the court. Specifically, Ross also argued as has the Appellant in this case that she was protected by official immunity. Ross asserted that her discretionary function, as a casino official is "to protect the integrity and security of casino administration, operations, and facilities." Ross claimed that because the casino industry is susceptible to "inherent evils" that her position as a

casino administrator is not a "common occupation" and should therefore be granted qualified immunity.

The Court determined as follows:

Although casino gaming is highly regulated, casino management activities do not fall within the limited category of necessary government functions that are protected by official immunity. Her position as casino administrator, and specifically her interactions with Gavle, do not require the same type of quick decision-making that is involved in a police officer deciding whether to engage in a high-speed chase or whether to stop a suspicious vehicle. *See, e.g., State ex rel Beaulieu v. City of Mounds View*, 518 N.W.2d 567 (Minn. 1994); *Elwood v. County of Rice*, 423 N.W.2d 671 (Minn. 1988).

In addition, the Court determined that even if Ross were performing a protected discretionary function, official immunity does not protect officials who willfully violate a known right. *Gleason v. Metro. Council Transit Operations*, 582 N.W.2d 216, 220 (Minn. 1998). The court specifically determined that "Qualified immunity does not protect officials whose conduct is beyond the scope of their discretionary authority." *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997). The Court in Gavle went on to say that "In determining whether Ross committed a malicious wrong, subject to exception from the doctrine of official immunity, this court need only find that Ross intentionally committed an act and that she had reason to believe her actions were prohibited by statute or Constitution." *Kalia v. St. Cloud State University*, 539 N.W.2d 828, 832 (Minn. App. 1995). Gavle alleged that Ross committed assault, battery, and intentional infliction of emotional distress; by their very nature these actions are intentional and violate Minnesota tort laws. The Respondents are alleging claims of defamation, libel and slander. In *Gavle*

II, the court determined that intentional infliction of emotional distress, and harassing and belittling comments are not discretionary acts protected by official immunity. See also Gleason, 582 N.W.2d at 221. There is no question that making defamatory statements would not be discretionary acts protected by official immunity.

When conduct occurs outside of the reservation sovereign immunity under the common law and since enactment of the Indian Reorganization Act as to tribal business corporations has begun to further erode because "tribal activities conducted outside the reservation present different considerations." Mescalero Apache Tribe, 411 U.S. at 148, 93 S. Ct. at 1270. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." 411 U.S. at 148-49, 93 S. Ct. at 1270. There is no law that protects or allows the Appellant to legally make defamatory statements on or off the reservation about the Respondents.

Sovereign immunity only extends to tribal officials acting within their scope of authority. Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985). Tribal immunity, however, is not a bar "to actions which allege conduct that is determined to be outside the scope of a tribe's sovereign powers." Snow v. Quinault Indian Nation, 709 F.2d 1319, 1321 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214, 81 L. Ed. 2d 362, 104 S. Ct. 2655 (1984). The Lower Sioux Indian Community does not have the power or authority to defame individuals. There is no statutory authority provided by Congress to

allow these entities to trample the rights of other citizens of this country.

ARGUMENT IV

DEFAMATION CLAIMS ARE NOT PROTECTED BY OFFICIAL OR QUALIFIED IMMUNITY.

Appellant contends that the defamatory letters were sent in his capacity as Treasurer of the Tribe. There were no affidavits provided to the District Court to support this contention. These defamatory letters were not sent in the scope of the Treasurer's authority. The Lower Sioux Community Constitution provides that communications are handled by the Secretary not the Treasurer. No defamatory letters were ever sent by any previous Treasurer and no letters have been sent after these defamatory letters were published about the Respondents.

Appellant asserts that examples of "facts" should have demonstrated that the Appellant was acting within his scope of authority. See Appellant's Brief Page 26. However, there were no affidavits providing these "facts" to the District Court. Furthermore, Respondents dispute the "facts" as alleged by Appellant. Just because information is set forth on Lower Sioux letterhead does not mean that they were sent within the scope of the Treasurer's authority. Furthermore, the Respondents have never owned or had an interest in Municipal Capital Corporation as falsely and continuously alleged by Appellant. The defamatory letters have been referred to as the slam Denny and Dennis letters and contain no information that would be considered as a "Treasurer's Report". Furthermore, the claim that the reports deal with financial status of the Tribe is

without merit and another example of making a factual allegation without any support affidavit. Making up a story about financial transactions that never occurred between the Respondents and Municipal Capital Corporation would have no effect on the Tribe. Clearly a fact dispute exists as to whether the defamatory letters were sent within the scope of the Treasurer's authority.

The argument that similarly situated individuals have been provided with immunity is without merit. The cases cited by the Appellant deal with officers involved in judicial proceedings or state entities that have absolute privileges. This case is distinguishable because there is no public interest in allowing an officer of a dependent nation to defame other individuals even if they are an executive officer. In Barr v. Matteo, 360 U.S. 564, 3 L. Ed. 2d 1434, 79 S. Ct. 1335, (1959) the United States Supreme Court recognized absolute privilege in the executive branch. The officer an Acting Director of the Office of Rent Stabilization, issued a press release announcing his intention to suspend certain employees because of the part they had played in formulating a controversial plan for the use of certain agency funds. The employees sued the Acting Director for libel, alleging malice. The United States Supreme Court, by a split decision, held that the statements in the press release were absolutely privileged.

The rationale behind that decision was as follows:

“Rather, the rationale is that unless the officer in question is absolutely immune from suit, the officer will timorously, instead of fearlessly, perform the function in question and, as a result, government--that is, the public--will be the ultimate loser.” Barr v. Matteo, 360 U.S. at 571.

There is no similarity between an officer like in Barr and the Appellant. Appellant was not elected Treasurer by members of the Tribe, he was elected by the Tribal Council. The Minnesota Supreme Court discussed this in greater detail in Carradine v. State, 511 N.W.2d 733 (Minn. 1994).

In Carradine the Supreme Court indicated as follows:

Whether an executive officer is absolutely immune from defamation liability depends on many factors, including the nature of the function assigned to the officer and the relationship of the statements to the performance of that function.

The issue in this case, therefore, is not whether police officers have absolute immunity from civil suit for all allegedly defamatory statements made in the performance of their duties. Instead, we address two much more specific issues: (a) whether Trooper Chase has absolute immunity from civil suit for allegedly defamatory statements made in an arrest report; and (b) whether this officer has absolute immunity from civil suit for allegedly defamatory statements made in response to press inquiries about the arrest. We believe that the proper answers are "yes" to the first question and "no, with qualification" to the second.

The Court in Carradine specifically determined that absolute immunity from civil suit for defamatory statements made in response to press inquiries did not apply. The Court determined as follows:

Plaintiff Carradine argues that Chase's statements to the press did not merely amount to a substantial repetition of the statements in the arrest report. We believe that the trial court is in a better position at this time than we are to determine whether this is so. If it is so and if a jury properly might find that the additional statements significantly added to any injury sustained by plaintiff over and above any injury sustained as a result of the absolutely privileged statements, then plaintiff should be allowed to proceed to trial against Chase; otherwise, not.

In this case no information was presented regarding the Appellant's duties as an executive officer of the Tribe. Given the Constitution of the Lower Sioux Indian Community it is

difficult to understand how the similarity could be made since the Community Council acts on behalf of the Tribe. Appellant's obligations to the Tribe are not the same as the officer in Carradine.

Appellant's reliance on Diver v. Peterson, 524 N.W.2d 288 (Minn. App. 1994) is misplaced at best. The Court indicated in Diver that it lacked jurisdiction because the complaint arose out of an intra-tribal matter where the tribe's sovereign immunity extended to Peterson, its attorney. This is not an intra-tribal matter, and as set forth later, the Tribe's sovereign immunity does not apply to the Defendant's conduct in making false and defamatory statements. The Plaintiffs in Diver were members of the tribe and commenced action against the tribal attorney. The Court specifically found as follows:

The Divers are members of the tribe and were employed as custodians in the tribal school on the reservation. The tribe has inherent sovereign authority to regulate tribal members' conduct and the tribe's employment relationship with the Divers. Id. at 290.

While Respondent Prescott is a member of the tribe, he is also a resident and citizen of the State of Minnesota and the United States. This action was commenced against the Appellant because of his conduct in publishing and distributing false and defamatory statements about the Respondents throughout the United States.

Additional Minnesota case law, including Hegner v. Dietze, 524 N.W.2d 731 (Minn. App. 1994) supports the District Court decision that this matter is properly before the District Court. In Hegner the Court reviewed the doctrine of Executive immunity. Executive immunity is extended to tribal officials acting in their official capacity and

within their scope of authority. The Court specifically noted as follows:

“...we discern no error in the district court’s determination that a factual dispute remains over whether Dietze’s position in the community is sufficient to provide him with immunity and/or an absolute privilege to make the alleged defamatory statement.” *Id* at 735.

The Respondents contend that the defamatory statements made by the Appellant are outside the scope of his duties as Treasurer of the Lower Sioux Indian Community. No other Treasurer has ever provided these reports to the members and just because the Appellant calls them a Treasurer Report does not mean that they are a Treasurer’s Report. Normally a Treasurer’s Report will provide financial information about incomes and expenses. Furthermore, the Appellant has no personal knowledge regarding any of the statements he has made. Appellant wasn’t even on the Tribal Council in 1995-1997. The Appellant had information in his possession that proved the statements were false before he published them. These reports were made for the sole purpose of defaming the Respondents. The statements were not made in good faith reliance on any information. Appellant acted with malice in make the defamatory statements.

As to official immunity, summary judgment would not be proper because, under *Bauer v. State*, 511 N.W.2d 447, 449 (Minn. 1994), official immunity does not extend to allegedly defamatory statements. *Id.* at 449. "Either the statement is true or it is not, and there is no discretionary conduct for official immunity to cover and protect." *Id.* In *Bauer v. State*, 511 N.W.2d 447 (Minn. 1994) the Minnesota Supreme Court stated as follows:

“Defamation, which is another name for libel and slander, is an intricate tort with

its own set of special rules. The statement must be defamatory. It must be false. And it must be published. Even then, assuming no constitutional or other problems, the statement is qualifiedly privileged if made upon a proper occasion, from a proper motive, and based upon reasonable or probable cause. Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 256-57 (Minn. 1980); *see also* Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 380-81 (Minn. 1990). To defeat this qualified privilege, the plaintiff must prove actual malice. Actual malice means what it says: ill-will and improper motive or wishing wantonly and without cause to injure the plaintiff. *Id.* at 257; McKenzie v. William J. Burns Int'l Detective Agency, Inc., 149 Minn. 311, 312, 183 N.W. 516, 517 (1921). *Id.* at 449.

The determination of actual malice is a fact issue. The fact that Appellant was attempting to influence an upcoming election involving the Respondent Prescott is further evidence that the statement was made by the Appellant personally and not in his representative capacity as Treasurer of the Tribe. In Stuempges, the court said that actual malice is "generally" a question of fact. 297 N.W.2d at 257. The District Court was correct that a question of fact exists which precludes entry of summary judgment. In Frankson v. Design Space Int'l, 394 N.W.2d 140, 144 (Minn. 1986), the court indicated that actual malice "is a jury question," and this was not an abstract proposition to be taken literally. The test for actual malice is whether the defamatory statement was made "from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff." 297 N.W.2d at 257 (quoting McKenzie, 149 Minn. at 312, 183 N.W. at 517). Malice can be shown, of course, by direct proof of personal spite, but not every personality conflict, where the parties simply in exasperation trade insults, suffices in this regard. In Frankson, malice can also be shown by "intrinsic evidence," including "the exaggerated language of the libel, the character of the language used, the mode and extent

of publication, and other matters in excess of the privilege." 394 N.W.2d at 144 (quoting *Friedell v. Blakely Printing Co.*, 163 Minn. 226, 231, 203 N.W. 974, 975 (1925)).

In this case the evidence establishes that the Appellant made false and defamatory statements knowing that the statements were false. The accuracy of the information had already been reviewed by the previous attorney for the Lower Sioux Indian Community on two occasions. See Exhibit G of the Affidavit of Denny Prescott. (A-382). The Appellant even after being provided with current information continued to make the defamatory statements. None of the defamatory statements involved current financial information and contained completely false information. The information was used to assist the Appellant in falsely claiming that Respondents were involved in an illegal racket. At the time that the defamatory statements were made Respondent Prescott, a tribal member who was running for election to the tribal council. The Appellant also published the defamatory statements in an attempt to punish the Respondent Oberloh for not turning over documents improperly demanded by the Tribe's legal counsel.⁴ It should be evident from the brief and the motion that the Appellant continues to make false allegations in the pleadings regarding Municipal Capital Corporation. There is no evidence before this Court in sworn affidavit that Municipal Capital Corporation benefitted from transactions with the Tribe at the expense of individual Tribal members. Furthermore, the evidence is conclusive that Respondents had nothing to do with

⁴It should be noted that the Appellant's counsel at the time was also the attorney for the Lower Sioux Indian Community, who made the improper requests.

Municipal Capital Corporation and have never owned any shares in that company. The Appellant asserted that Respondents were issued stock in the corporation when in fact it was verified that they never owned any stock in Municipal Capital Corporation. Furthermore, the fact that this information involves information from over fifteen (15) years ago, is additional evidence that the false and defamatory statements were made with malice by the Appellant.

It is interesting to note that the Tribe, unlike the Tribe in *Diver*, has never retroactively approved the Treasurer's Reports. There is no dispute that these statements were made. Appellant is attempting to hide behind the sovereign immunity of the Tribe when he asserted that the District Court has no jurisdiction. He apparently contends, although we cannot be sure as no Affidavit was introduced to support the assertion that these defamatory statements were made as the Treasurer of the Lower Sioux Indian Community and as a result he has immunity for these actions. The Defendants assertion is factually and legally incorrect.

The duties of the Treasurer are set forth in the Bylaws of the Lower Sioux Indian Community. Specifically, Article I, Section 4 provides as follows:

SEC. 4. The Treasurer shall be the custodian of all funds in the possession of the Community from any source. At such time as the Community Council or the Secretary of the Interior shall deem necessary, he shall give a bond with a surety company of recognized standing in an amount to be determined by the Community Council, such surety and bond to be approved by the Commissioner of Indian Affairs.

He shall keep an accurate record of all community funds and shall disburse the

same in accordance with the vote of the Community Council. The books of the Treasurer containing the financial status of the Community shall be open to audit and examination by duly authorized officers of the Secretary of the Interior at all times, and shall be open to inspection by members of the Community Council and its officers.

The evidence from members of the Tribe indicates that these “Treasurer Reports” are not something that they are familiar with nor were they done in the ordinary course of his duties. The “Treasurer Reports” are defamatory statements about the Respondents. The statements made by the Appellant were not authorized by the Lower Sioux Indian Community or its Council. The statements were made by the Appellant. The February 20, 2007 letter specifically provides as follows:

“It is my plan to give you written reports regarding the Community’s financial business and promote transparent government where everyone knows how our money is being spent.”

Unfortunately, making false and defamatory statements about transactions that never occurred or occurred with individuals other than the Respondents is not a report about the “Community’s financial business”, it is a false and defamatory statement made with malice.

The Appellant also alleges that he is entitled to qualified immunity. The Treasurer of the Lower Sioux Indian Community is not an official that is entitled to qualified immunity. The Appellant erroneously cites *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Minnesota Supreme Court in *Johnson v. Northside Residents Redevelopment Council*, 467 N.W.2d 826 (Minn. App. 1991) clearly has rejected application of *Harlow v.*

Fitzgerald immunity to state tort claims. In so doing the Supreme Court has reasserted the vitality of the common law defense of official immunity in this state. Elwood v. County of Rice, 423 N.W.2d 671, 676-77 (Minn. 1988). The Treasurer of the Lower Sioux Indian Community is not a government official to which official immunity would apply.

The courts have determined that qualified privileges does not act as an immunity from suit, but rather as an immunity from liability for damages. A qualified privilege provides a defense to suit rather than the immunity from suit afforded by absolute privilege. See Bego v. Gordon, 407 N.W.2d 801, 812 (S.D. 1987) (question of whether public official abused qualified privilege not appropriate for summary disposition). Further, a qualified or conditional privilege may be defeated by a showing of common law malice. This introduces a subjective element into the District Court's determination of a motion for summary judgment, raising the question whether the statement was made "from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff." Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257 (Minn. 1980) (quoting McKenzie v. William J. Burns Int'l Detective Agency, Inc., 149 Minn. 311, 312, 183 N.W. 516, 517 (1921)). The courts have indicated that this issue is one normally resolved by the jury. Stuempges, 297 N.W.2d at 257 (citing W. Prosser, *Handbook of the Law of Torts* § 115 at 796 (4th ed. 1971)). This subjective element renders the conditional privileges available to the Appellant inherently different from the immunity provided

under Harlow v. Fitzgerald, which has been "purged * * * of its subjective components." Mitchell, 472 U.S. at 517, 105 S. Ct. at 2810.

Official immunity, as it is understood in this state, requires determination of the same subjective element considered in qualified privilege. It is settled law in Minnesota that a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong. Susla v. State, 311 Minn. 166, 175, 247 N.W.2d 907, 912 (1976) (pre-Tort Claims Act case). If an official of an Indian Tribe is entitled to qualified immunity then the qualified immunity may be lost if he acted with willful or malicious wrong. Thus, this immunity is subject to a factual determination of malice, which is generally a jury question. See Erickson v. County of Clay, 451 N.W.2d 666, 669 (Minn. App. 1990) (only claim of absolute prosecutorial immunity amenable to interlocutory appeal under Anderson v. City of Hopkins)(citation omitted); Restatement (Second) of Torts § 895D comment c (the limited immunity of legislative officials usually may not extend to improper motive). The burden of proving qualified immunity is on the official seeking protection from suit. Rehn v. Fischley, 557 N.W.2d 328, 333 (Minn. 1997).

The courts in Minnesota have defined "malice" as "the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right." Gleason v. Metro. Council Transit Operations, 563 N.W.2d

309, 317 (Minn. App. 1997). In the context of official immunity, "malice" does not require a showing of "ill will" or "improper motive," but if a party alleges that an official has acted with such "'actual malice' . . . in carrying out his or her duties, that allegation may support the court's determination that the official's conduct was not legally reasonable." *Gleason*, 563 N.W.2d at 317, 318. The courts in Minnesota acknowledging that the malice exception is one of the "least easily understood aspects of immunities law," have concluded that an official defeats a malice claim when the official can show that his conduct meets any one of the following three tests:

(1) that the conduct was "objectively" legally reasonable, that is, legally justified under the circumstances; (2) that the conduct was "subjectively" reasonable, that is, taken with subjective good faith; or (3) that the right allegedly violated was not clearly established, that is, that there was no basis for knowing the conduct would violate the plaintiff's rights. See *Davis v. Hennepin County*, 559 N.W.2d 117, 122 (Minn. App. 1997), review denied (Minn. May 20, 1997); *Armstrong v. State of Minnesota Department of Corrections*, 2007 Minn. App. Unpub. LEXIS 689 (A-329).

The Appellant cannot meet any of the three tests. There is no legal justification for distributing false and defamatory statements under any circumstances. The Appellant knew that the information he was sending to various members throughout the country was false. Appellant's conduct was not subjectively reasonable nor was it done in good faith. The action was taken to defame the Respondents for reasons that were not legitimate.

There is no factual or legal authority for making the statements and even when presented with irrefutable evidence the Appellant continued to make the false and defamatory statements. The Respondents' rights to their reputation and good name were known to the Appellant. The Appellant thought he could hide behind the sovereign immunity of the Tribe in making defamatory statements. The Appellant's actions were clearly made with malice.

Official immunity protects government officials who must exercise discretion on an operational level. *Bauer v. State*, 511 N.W.2d 447, 449 (Minn. 1994). "Official immunity protects public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties." *Terwilliger v. Hennepin County*, 561 N.W.2d 909, 913 (Minn. 1997). Generally, official immunity is reserved for those who must perform important government functions that result in a certain level of necessary public danger. *See Pletan v. Gaines*, 494 N.W.2d 38, 43 (Minn. 1992) (holding that police officers who engaged in a high-speed car chase of a fleeing suspect were protected by official immunity). In order to determine if immunity is appropriate it is necessary to determine "the precise governmental conduct at issue." *Hanson ex rel Watson v. Metropolitan Transit Comm'n*, 553 N.W.2d 406, 415 (Minn. 1996). In this case, the evidence establishes that Appellant made false and defamatory statements about the Respondents for a purpose that was not even related to the operation of the tribe. Appellant is not entitled to official immunity.

ARGUMENT V

THE DISTRICT COURT PROPERLY CONCLUDED THAT IT HAS JURISDICTION OVER THE APPELLANT AND THE CLAIMS OF THE RESPONDENTS PURSUANT TO PUBLIC LAW 280.

The Respondents commenced two separate defamation actions against the Appellant for making and publishing false and defamatory statements about the Respondents to members of the Lower Sioux Indian Community by mailing documents titled "Treasurer Reports". The Respondents contend that the Appellant sent the "Treasurer Reports" outside the scope of his official duties. This is a factual dispute and constitutes a genuine issue of fact which cannot be handled by a motion to dismiss or summary judgment. According to the affidavits submitted by the Respondents, no member of the tribe has ever received these types of reports in the past, but more importantly no Treasurer has ever sent these types of reports in the past. The Respondents contend that Appellant sent these defamatory statements and is personally liable for the publication. This is not an action against the Tribe.

These letters were not authorized by the Tribal Council. The Appellant contends that they were authorized and approved by the Council but no affidavit or resolution was ever offered to the District Court to support this contention. See Appellant's Brief at pages 17 and 20. These defamatory statements were published outside the scope of the authority of the Treasurer. The tribe's own bylaws specifically provide that the Secretary, not the Treasurer, is "responsible for the prompt and efficient handling of all

correspondence pertaining to the business of the Community Council and the Community.” (A-52) The evidence before the District Court from other members of the Lower Sioux Indian Community specifically indicate that these “Treasurer Reports” were not sent in the normal course of business of the tribe as part of the normal duties of the Treasurer. (A-404). These defamatory statements were sent to members of the Lower Sioux Indian Community in the State of Minnesota (both on and off of the reservation) and to others throughout the United States, including Washington State. See Affidavit of Dennis E. Oberloh. (A-456). The District Court has jurisdiction over the Appellant as he is a resident of Redwood County. Under federal law, the District Court and this Court have jurisdiction over this matter. Jurisdiction exists by the adoption of Public Law 280 and 28 U.S.C. § 1360.

Minnesota is a "Public Law 280" state, the District Court has jurisdiction over civil causes of action to which Indians are parties, and "those civil laws of such State * * * that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State." 28 U.S.C. § 1360 (1988). Congress enacted Public Law 280 out of concern for lawlessness on some reservations, inadequate tribal law enforcement, and the state court's lack of jurisdiction over Indians. *Bryan v. Itasca County*, 426 U.S. 373, 379, 96 S. Ct. 2102, 2106, 48 L. Ed. 2d 710 (1976). Public Law 280 waives sovereign immunity of Indians in that it gives Minnesota courts limited civil jurisdiction over actions "between Indians or to which

Indians are parties" and "which arise in the areas of Indian Country." 28 U.S.C. §

1360(a); See also *Gayle v. Little Six*, 534 N.W.2d 280 (Minn. Ct. App. 1995).

Federal law 28 U.S.C. §1360 provides as follows:

§ 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	Indian country affected
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin.....	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

©) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of

the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Clearly the District Court properly determined that it had jurisdiction over an action involving two residents of Redwood County, even when one of the residents is a member of an Indian tribe.

State courts may assume jurisdiction over disputes arising from commercial transactions between Indians and non-Indians if the transaction is not confined to the Indian Reservation. *Crawford v. Roy*, 176 Mont. 227, 577 P. 2d 392 (1978); *Indian Oasis School Dist. No. 40 v. Zambrano*, 22 Ariz. App. 201, 526 P. 2d 408 (1974). In *Little Horn State Bank v. Stops*, 170 Mont. 510, 555 P. 2d 211 (1976), certiorari denied, 431 U.S. 924, 97 S. Ct. 2198, 53 L. ed. 2d 238 (1977), a bank sought to levy upon certain property owned by private Indians, who had borrowed money from the bank. The bank was located and the transaction occurred outside of the reservation. The Montana Supreme Court held that the state court had jurisdiction. In so holding, the court said (170 Mont. 510, 555 P. 2d at 214):

"The crucial fact of this appeal is that the subject matter jurisdiction lies with the state court, not the tribal court. In this case the tribal members elected to leave the reservation and conduct their affairs within the jurisdiction of the state courts. When they do so they are submitting themselves to the laws of this state. They cannot violate those laws and then retreat to the sanctuary of the reservation for protection."

See also *Duluth Lumber and Plywood Company v. Delta Development, Inc.*, 281 N.W.2d 377 (Minn. 1979).

The Appellant is attempting to do the same thing. Appellant made defamatory statements

about

the Respondents and published those statements both on and off the reservation. The Appellant made the choice to publish the defamatory statements and cannot hide behind a claim of sovereign immunity.

The cases which indicate that a state has no jurisdiction over commercial disputes involving Indians and non-Indians can be distinguished. In *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. ed. 2d 251 (1959), the Supreme Court held that a non-Indian owner of a store on a Navajo Indian reservation could not invoke state court jurisdiction to collect a debt owed by a Navajo Indian, but instead must seek relief through tribal institutions. *Lee* is distinguishable because the transaction occurred entirely on the reservation and the state had not acquired jurisdiction under Public Law 280. The courts have drawn a distinction and have distinguished other cases involving torts or transactions which occurred entirely on the reservation. See *Sigana v. Bailey*, 282 Minn. 367, 164 N.W. 2d 886 (1969) (tribe excepted from Public Law 280); *Security State Bank v. Pierre*, 162 Mont. 298, 511 P. 2d 325 (1973) (business transaction entirely on reservation).

The Appellant erroneously argues that Public Law 280 does not allow an action for defamation against him. Minnesota recognizes defamation actions. The elements of a common law defamation action are well settled. In order for a statement to be considered defamatory it must be communicated to someone other than the Respondent, it must be false, and it must tend to harm the Respondent's reputation and to lower him in the

estimation of the community. Rouse v. Dunkley & Bennett, P.A., 520 N.W.2d 406, 410 (Minn. 1994); Restatement (Second) of Torts §§ 558-559 (1977); W. Prosser, *Handbook of the Law of Torts* § 111 at 739 (4th ed. 1971). Slanders affecting the Respondent in his business, trade, profession, office or calling are slanders *per se* and thus actionable without any proof of actual damages. Anderson v. Kammeier, 262 N.W.2d 366, 372 (Minn. 1977); W. Prosser, *supra*, § 112 at 754.

A statement is defamatory "if it causes enough harm to a person's reputation to lower the community's estimation of the individual or to deter others from associating or dealing with the individual." *Id.* (citations omitted). Epithets or adjectives can rise to the level of defamation if they imply a specific kind of reprehensible conduct. Stuempges v. Parke, Davis, & Co., 297 N.W.2d 252, 255 (Minn. 1980); Kuechle v. Life's Companion P.C.A., Inc., 653 N.W.2d 214, 218 (Minn. App. 2002); Restatement (Second) of Torts §§ 558-559 (1977).

It is undisputed that the Appellant sent out letters to members of the Lower Sioux Indian Community (both on and off the reservation) which contained information about the Respondent that were false and would harm the Respondent's reputation by lowering the community's estimation of Respondents or to deter others from associating with or dealing with Respondents. The letters allege that Respondent Oberloh had a conflict of interest and was engaged in a "racket". The Appellant has asserted that Respondent had a conflict of interest because he had other clients who had contracts with the Lower Sioux

Indian Community. Specifically, the Appellant stated that a conflict of interest existed because Respondent represented the Iyanka bus company and Denny's Quick Stop at the same time that he represented the Lower Sioux Indian Community. In addition, the Appellant stated that Respondents were shareholders of Municipal Capital Corporation and that Respondents received substantial amounts of money from Municipal Capital Corporation without the knowledge of the Lower Sioux Indian Community and at the expense of the members of the community.

The Respondents, Oberloh and Associates and Dennis Oberloh, are independent contractors and not employees of the Lower Sioux Indian Community. The Appellant knew or should have known that Respondent provided services to individual members of the Lower Sioux Indian Community and in particular as to those companies or individuals (i.e. Denny Prescott and Iyanka Bus Company) and that a conflict of interest did not exist simply by Respondent doing the accounting for these entities. It is not uncommon for a person to provide accounting services to a number of entities that may or may not be related. There is nothing illegal about providing services to individual members of the Lower Sioux Indian Community. In fact, the Lower Sioux Indian Community knew that Respondent was providing accounting services to Denny Prescott and in the terms of the lease it specifically requested that Respondent provide the Lower Sioux Community with detailed certification as to the computation of gross revenues. See Affidavit of Denny Prescott. (A-336) The statements made by the Appellant were false and untrue. The

statements were made for the purpose of lowering the Respondent's reputation or to deter others from associating with or doing business with the Respondent.

The second area of defamatory statements made by the Appellant involved the ludicrous claim that the Respondent was involved in a "racket." This statement is completely false and Appellant knew this when he sent the letters in February and March of 2007. Municipal Capital Corporation was an entity which was incorporated in Pennsylvania in 1995. This entity was solely owned by Joe O'Brien. No shares were ever issued to the Respondents. Respondent never did business as Municipal Capital Corporation and never received any money as a shareholder or officer of Municipal Capital Corporation. These facts were all known to the Appellant as the same issues had been raised and fully investigated by the Lower Sioux Indian Community in 1995 and 1997. The Appellant had access to the files of the Lower Sioux Indian Community and deliberately made the statements knowing that the same issue had been investigated and determined not to be factually correct. The Appellant was provided with information from Denny Prescott and Joe O'Brien which clearly documented that Respondent had no interest in Municipal Capital Corporation. Despite this information, the Appellant continued to make false statements about the Respondent. These statements were intended to harm the Respondent's reputation and deter others from associating with or doing business with the Respondent. The Respondent, Oberloh and Associates and Dennis Oberloh, are involved in accounting by trade and allegations like the one's made

by the Appellant are per se libel. Anderson v. Kammeier, 262 N.W.2d 366, 372 (Minn. 1977); W. Prosser, *supra*, § 112 at 754. Because the false statements made by Appellant are slanderous *per se* as defamations of one's business reputation, general damages are presumed. Froslee v. Lund's State Bank of Vining, 131 Minn. 435, 438-39, 155 N.W. 619, 620-21 (1915); Beek v. Nelson, 126 Minn. 10, 12, 147 N.W. 668, 669 (1914); W. Prosser, *supra*, § 112 at 754.

The suggestion that this matter should only proceed in Tribal Court is equally without merit. The Respondent Oberloh is not a tribal member, but more importantly is allowed under the current state of the law to commence action against the Appellant under Public Law 280. Respondent Prescott is a resident of Redwood County and the State of Minnesota and is entitled to the protections afforded other citizens of the state. In fact, the Judicial Code of the Lower Sioux Indian Community would not allow this proceeding in Tribal Court as Lower Sioux Community has deemed this an action against the Tribe. See Rule 109 (I) (A-105). Likewise, it should not go unnoticed that the Amicus Party is the same one who has continuously argued that it is not subject to the jurisdiction of the Court. See Granite Valley Hotel Ltd. Pshp. v. Jackpot Junction Bingo & Casino, 559 N.W.2d 135; (Minn. App. 1997); McCarthy & Assoc. v. Jackpot Junction Bingo Hall, 490 N.W.2d 156 (Minn. App. 1992); Klammer v. Lower Sioux Convenience Store, 535 N.W.2d 379 (Minn. App. 1995). They are one of the Tribes that Judge Randall was referring to in his concurrence in Granite Valley Hotel when he said:

“The recent flow of Minnesota cases, trial and appellate, have had nothing to do with cultural preservation. They have to do with money and a tribal government’s continued insistence on the right to be unaccountable to anyone, Indian or non-Indian, in any state court, unless they choose to go to state court. Otherwise, they try to force parties into their own hired tribal courts....

To any knowledgeable observer of tribal reservation courts and of how they are controlled by tribal government, any trial in a tribal court involving these defendants would have been a meaningless sham. You see, tribal governments such as appellant here, claim the power to isolate and immunize themselves even from their own tribal courts.”

Granite Valley Hotel at 148.

The District Court did not err when it exercised jurisdiction over this matter under Public Law 280. The suggestion that Respondents need to exhaust tribal remedies is without merit. This is one of those cases that fit in the exception that are motivated by desire to harass or is conducted in bad faith and would be futile given the lack of opportunity to make the claim in Tribal Court. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 105 S.Ct. 2247, 85 L. Ed. 818 (1985). Furthermore, the exhaustion requirement concerns comity rather than subject matter jurisdiction. Klammer v. Lower Sioux Convenience Store, 535 N.W.2d 379 (Minn. App. 1995). Public Law 280 specifically provides that state civil laws of general application to private persons have the same force and effect throughout the state. Lemke v. Brooks, 614 N.W.2d 242 (Minn. App. 2000). Clearly, the District Court has jurisdiction over this matter.

The Amicus Brief submitted by the Tribe is interesting in that it continues to argue

facts which are not in evidence. On page six of the Amicus Brief the Amicus alleges that the Appellant resigned as Treasurer and as Council Member when it is Respondents understanding that he was removed. The Amicus Brief suggest that the Tribes sovereign immunity is being threatened in two ways. First, it alleges that there would be a crippling effect on the ability of the Tribe's Executive Branch to function. Despite the fact that this action has been commenced, the Tribe's Executive Branch has continued to operate outside of its Constitution and Bylaws. See Department of Interior Letter. More importantly, holding an individual who was not acting within the scope of his authority, accountable for defamation will not cripple the Tribe's Executive Branch. Tribal officials, first are protected only when they act within the scope of their authority. This is nothing new, it is the law today. As individuals they simply will need to stop defaming people and attempting to use the doctrine of sovereign immunity as a weapon and not as a shield. Again nothing new as it is already the law. Essentially, the Tribe is arguing that its members should not be held accountable in State Court for defamation and libel because they have the right to defame and libel people because they apparently are elected by the members of the Tribe. The Respondents are residents of the State of Minnesota and the United States and are entitled to the protections of the Minnesota Constitution, the Federal Constitution and the laws against defamation. Public Law 280 allows them to hold individuals accountable for their actions.

Secondly, the Amicus Brief suggests that the decision to allow this matter to

proceed and determine whether the actions of the Appellant were within the scope of his authority would discourage tribal members from serving as officers of the Tribe. Nothing could be further from the truth. Requiring that individuals act within the scope of their authority would not place a chilling effect on members. What the Amicus is really suggesting is they want to continue to operate unchecked so that they can to defame individuals without any checks and balances as allowed by Public Law 280. The Amicus has suggested that this may lead to the collapse of the Tribal Government. At no time have individuals not come forward to serve on the Tribal Council. The way the Tribe and members run their affairs they tend to have elections at least two times a year because they have removed members and appeals are not heard by the Tribal Court. Respondents are not aware of any instance in which someone has not run for the position. It can hardly be argued that making people responsible for their defamatory conduct will stop honest and forthright members from serving on the Tribal Council.

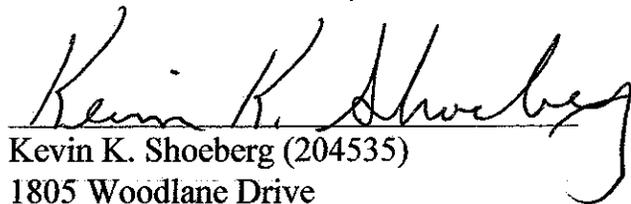
CONCLUSION

The District Court properly determined that summary judgment or dismissal was not appropriate, at this time, as genuine issues of material fact exist which preclude summary judgment. Public Law 280 provides the District Court with jurisdiction to hear this matter as promulgated by the United States Congress.

Dated this 3rd day of August, 2008

Respectfully submitted,

KEVIN K. SHOEBERG, P.A.

A handwritten signature in cursive script that reads "Kevin K. Shoeberg". The signature is written in black ink and is positioned above a horizontal line.

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STATE OF MINNESOTA

IN COURT OF APPEALS

APPELLATE COURT CASE NUMBERS: A-08-80 and A-08-81

Dennis E, Oberloh, et al,
Respondents,

v.
Loren Johnson,

Appellant

CERTIFICATION OF BRIEF LENGTH

Denny Dean Prescott,
Respondent

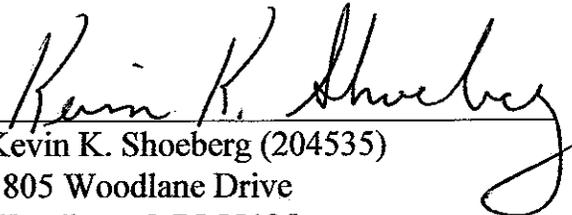
v.
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Appellant

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 13 point Times
New Roman font. The length of this brief is 1142 lines and 11987 words. This brief was
prepared using Wordperfect 10.0.

DATED: August 3, 2008

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