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**IN THE COURT OF APPEALS OF NEBRASKA**

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**Case No. A-10-280**

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**STOREVISIONS, INC.,**

**Plaintiff/Appellee,**

**v.**

**OMAHA TRIBE OF NEBRASKA a/k/a/ OMAHA NATION,**

**Defendant/Appellant.**

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**APPEAL FROM THE DISTRICT COURT OF THURSTON COUNTY, NEBRASKA**

**The Honorable Darvid D. Quist, District Judge**

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**BRIEF FOR APPELLANT**

Ben Thompson, NE 22025  
THOMPSON LAW OFFICE, PC, LLO  
13906 Gold Circle, Suite 201  
Omaha, NE 68144  
(402) 330-3060, ext. 111  
litigation@thompson.law.pro  
Attorney for Omaha Tribe of Nebraska, Defendant/Appellant

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## **STATEMENT OF JURISDICTION**

Appellate jurisdiction in this case is based upon Sections 25-1911 and 25-1912 of the Nebraska Revised Statutes (Reissue 2010) and pertinent federal case law treating orders on motions to dismiss predicated on immunity grounds as immediately appealable. This is an appeal from a March 10, 2010, order of the District Court for Thurston County denying Defendant/Appellant Omaha Tribe's motion to dismiss the lawsuit on the basis of tribal sovereign immunity. The Omaha Tribe filed a notice of appeal on March 17, 2010, depositing a case surety bond and docket fee on the same date.

On April 19, 2010, the Court of Appeals entered its order dismissing the appeal, stating that the order of the trial court is not a final order. The Omaha Tribe filed a motion for rehearing of the April 19, 2010 order and supporting brief on April 29, 2010. On June 24, 2010, the Court of Appeals entered its order granting the Omaha Tribe's motion for rehearing, stating that the "[c]ase will proceed with the issue of this court's jurisdiction to hear the denial of the claim of sovereign immunity reserved for decision."

## **STATEMENT OF CASE**

### **A. Nature of the Case**

The Plaintiff/Appellee StoreVisions filed an action for damages against Defendant/Appellant Omaha Tribe of Nebraska, which is an Indian sovereign tribal government. The Complaint was filed in the District Court of Thurston Country, Nebraska on October 9, 2009, Case No. CI 09-116, alleging breach of contract. (T1).

### **B. The Issues Actually Tried in the Court Below**

The issue actually tried in the court below was whether the Omaha Tribe was immune from suit or whether that sovereign immunity had been waived.

### **C. How the Issues Were Decided**

On November 19, 2009, the Omaha Tribe filed a motion to dismiss for lack of jurisdiction on the basis of its tribal sovereign immunity. (T42). A hearing was held on January 13, 2010, and the trial court received evidence and heard oral arguments on the motion to dismiss. On March 10, 2010, the Honorable Darvid D. Quist entered an order denying the Omaha Tribe's motion to dismiss, finding that the tribal officers that purportedly signed a written waiver of sovereign immunity had apparent authority to do so. (T44).

### **D. Scope of Review**

The basis for the Omaha Tribe's motion to dismiss is an assertion of sovereign immunity, which implicates a jurisdictional question. In re *Prairie Island Dakota Sioux*, 21 F.3d 302, 305 (8th Cir. 1994) ("We find, therefore, that sovereign immunity is a jurisdictional consideration . . . ."); *Hagen v. Sisseton-Wahpeton Cmty. College*, 205 F.3d 1040, 1043 (8th Cir. 2000) ("Initially, we note in this circuit, 'sovereign immunity is a jurisdictional question.'"); *Oglala Sioux Tribe v. C & W Enters.*, 487 F.3d 1129, 1131 n.4 (8th Cir. 2007) ("[S]overeign immunity is jurisdictional in nature . . . ."). A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Midwest PMS & Federated Mut. Ins. Co. v. Olsen*, 279 Neb. 492 (2010). An appellate court reviews questions of law independently of the lower court's conclusion. *Neb. Pub. Advocate v. Neb. PSC*, 279 Neb. 543 (2010).

The Eighth Circuit will “review a trial court’s decision to deny or grant a motion to dismiss under a de novo standard of review.” *Prescott v. Little Six, Inc.*, 387 F.3d 753, 756 (8th Cir. 2004); see also *Polk County Rec. Ass’n v. Susquehanna Patriot Commer. Leasing Co.*, 734 N.W.2d 750, 757–58 (Neb. 2007) (“[A]side from factual findings, a ruling on a motion to dismiss pursuant to § 25-415 is subject to de novo review. Where the trial court’s decision is based upon the complaint and its own determination of disputed factual issues, we review the factual findings under the ‘clearly erroneous’ standard.”). In a de novo review, an appellate court reaches a conclusion independent of the trial court. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005).

Generally, whether an agency relationship exists presents a factual question. *Koricic v. Beverly Enters. - Neb.*, 278 Neb. 713, 773 N.W.2d 145 (2009). The scope of an agent’s authority is a question of fact. *Id.* Whether an agent has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction. *Id.*

The Court should review the trial court’s denial of the Omaha Tribe’s motion to dismiss de novo and reach an independent conclusion. That conclusion should be to reverse and vacate the decision of the trial court and remand the matter for further proceedings pursuant to common law principles of tribal sovereign immunity.

### **STATEMENT OF FACTS**

The Omaha Tribe of Nebraska is a federally recognized Indian tribe. See *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 74 Fed. Reg. 40218 (Aug. 11, 2009). The Omaha Tribe is organized pursuant to a written constitution and bylaws adopted with the approval of the federal

government under the Indian Reorganization Act of June 18, 1934. The Constitution of the Omaha Tribe of Nebraska provides the Omaha Tribal Council with various enumerated powers. (E1,6–7:4,v.II). The Bylaws of the Omaha Tribe of Nebraska impose various duties on the officers of the Tribal Council. (E1,14:4,v.II). Neither the constitution nor the bylaws provide any officers of the Tribal Council with authority to exercise the Tribal Council's powers except as they may be delegated by the Tribal Council.

The complaint describes a number of transactions between StoreVisions and the "Tribe" and suggests that the actions of individual council members represent the actions of the Omaha Tribe. (T1). Numerous documents are attached to the complaint purportedly bearing the signature of the chairman or vice-chairman of the Omaha Tribal Council. Plaintiff does not reference or include any resolutions or ordinances showing where the Omaha Tribal Council authorized either the chairman or vice-chairman to enter into any contracts, let alone waive the Omaha Tribe's sovereign immunity from suit. Indeed, such an authorization does not exist. (E1:1,2:4,v.II).

According to the principals of StoreVisions, in January 2008, the Chairman and Vice Chairman of the Omaha Tribe signed a one-page document that StoreVisions intended to represent a waiver of the Omaha Tribe's sovereign immunity with respect to any contracts with StoreVisions. (5:14–18; T13). The authenticity of this document or these signatures has not been confirmed by the Omaha Tribe. (5:14–18). Both now and at the time these signatures were allegedly obtained, the Omaha Tribe's constitution and bylaws did not provide any tribal officers with actual authority to waive the Omaha Tribe's sovereign immunity. (4:25; 5:1–6, 14–22; 6:22–25; 7:1–6; E1,1–36:4,v.II).



Neither the constitution nor the bylaws provide any officers of the Tribal Council with authority to exercise the Tribal Council's powers except as they may be delegated by the Tribal Council. (6:22–25; 7:1–6; E1,1–2, 6–7:4,v.II).

The Omaha Tribe's constitution gives enumerated powers to a seven-member Tribal Council. (6:22–25; 7:1–6); (E1,6–7:4,v.II). These powers include negotiating with federal, state, and local governments; approving the disposition of tribal assets; managing the Omaha Tribe's economic affairs; and regulating trade and commerce. (E1,6–7:4,v.II). The Tribal Council also has the power "[t]o adopt resolutions regulating the procedure of the Tribal Council itself . . . and tribal officials [and] . . . [t]o delegate to subordinate boards, or tribal officials . . . any of the foregoing powers, reserving the right to review any actions taken by virtue of such delegated powers." (E1,7:4,v.II). While the constitution does not list the specific protocol for waiving the Tribe's sovereign immunity, it does give the *Tribal Council* the power to approve, manage, and regulate the disposition of tribal assets and economic affairs. *Id.*

The Omaha Tribe's constitution also indicates that *resolutions* adopted by the *Tribal Council* regulate procedures that the Tribal Council and tribal officers must adhere to. *Id.* The Tribal Council did not adopt any resolutions delegating the authority to waive the Tribe's sovereign immunity to tribal officers. (4:25; 5:1:6; 7:3–6; E1,1–2:4,v.II). Nor did the Tribal Council adopt any resolutions allowing tribal officers to waive the Omaha Tribe's sovereign immunity via contract with StoreVisions. (7:3–6; E1,1–2:4,v.II). The Tribal Council body was neither aware of the terms of purported contracts with StoreVisions, nor did the Tribal Council itself approve contracts with StoreVisions

by resolution. (E1,1–2:4,v.II). Indeed, no formal action was taken by the Tribal Council to waive the Tribe’s sovereign immunity with respect to StoreVisions. (E1,1–2:4,v.II).

In 2009, StoreVisions filed suit against the Omaha Tribe for breach of contract. (T1–12). The Omaha Tribe moved to dismiss the case because the Omaha Tribe was protected from suit pursuant to tribal sovereign immunity. (T42). The Omaha Tribe provided StoreVisions with notice that affidavits would be used at the hearing for the motion to dismiss. (T42). StoreVisions, however, provided no such notice of any affidavits or their contents to the Omaha Tribe before the hearing, which the Tribe’s counsel objected to. (7:13–25; 8:1–6). At the hearing, StoreVisions claimed, based on the contents of its affidavits, that tribal officers misrepresented their authority to waive the Tribe’s immunity or that it would be unjust not to subject the Tribe to suit. (12:2–13). StoreVisions’ substantive arguments at the hearing rested primarily upon the contents of affidavits that the Omaha Tribe had never seen before and had no notice of. (7:17–25; 8:1–6, 12–25; 9:1–25; 10:1–2; 12:2–13). Despite the Omaha Tribe’s objection, the trial court admitted StoreVisions affidavits into evidence at the hearing and relied on their contents in denying the Tribe’s motion to dismiss. (8:7–8; T44–47). The Omaha Tribe now appeals the trial court’s denial of its motion to dismiss.

### **ASSIGNMENTS OF ERROR**

1. In denying the motion to dismiss, the trial court erred in relying on theories of agency to find a waiver of the tribal government’s sovereign immunity.
2. In denying the motion to dismiss, the trial court erred in failing to consider the legal significance of the Tribal Council’s constitutional enumerated power to delegate authority to tribal officials.

3. In denying the motion to dismiss, the trial court erred in finding that something less than formal action by the Tribal Council itself may waive the tribal government's sovereign immunity.
4. In denying the motion to dismiss, the trial court erred in failing to find that tribal officials did not have the authority to individually waive the tribal government's sovereign immunity.
5. In denying the motion to dismiss, the trial court erred in finding that the apparent authority of two tribal members waived the tribal government's sovereign immunity.
6. In denying the motion to dismiss, the trial court erred in failing to find that tribal officials acting outside of the scope of their delegated authority cannot subject an entire tribal government to suit.
7. The trial court erred in admitting affidavits into evidence at the hearing on a motion to dismiss, when notice and the contents of the affidavits had not been shared with opposing counsel prior to the hearing.
8. The trial court erred in finding that the evidence was sufficient to support the conclusion that apparent authority existed.

#### **PROPOSITIONS OF LAW**

1. Indian tribes, as sovereign powers possess common law immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).
2. Sovereign immunity cannot be waived without a clear waiver from tribe or congressional abrogation. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998).

3. The requirement that a waiver of tribal immunity be 'clear' and 'unequivocally expressed' is not a requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved. *Ute Distributing Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998).
4. Agreements with Indian tribes should be interpreted liberally in favor of the tribes. *Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943).
5. Apparent authority for which a principal may be liable exists only when the third party's belief is traceable to the principal's manifestation and cannot be established by the agent's acts, declarations, or conduct. *Koricic v. Beverly Enters. - Neb.*, 278 Neb. 713, 773 N.W.2d 145 (2009).

### SUMMARY OF ARGUMENT

Under the common law, "sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of the Fort Berthold Reservation v. World Eng'g, P.C.*, 476 U.S. 877, 890 (1986); see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (recognizing that tribal sovereign immunity is analogous to immunity enjoyed by sovereign powers). The trial court, however, abrogated the Omaha Tribe's common law right to sovereign immunity by finding that the apparent authority of two tribal officials may waive this long-standing common law immunity that belongs to the tribal government. Compare (T45-47) to *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58 ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."). In reaching this conclusion, the trial court relied—in error—on a single Colorado case, essentially giving teeth to misguided non-binding precedent that

severely undercut the scope of tribal sovereign immunity that the federal common law has closely guarded. (T45).

In its review, the Court must make three inquiries: (1) whether the Tribe clearly and unequivocally expressed a waiver of sovereign immunity; (2) whether apparent authority meets the clear and unequivocal expression standard; and (3) whether StoreVisions may rely on principles of equity or public policy to subject the Tribe to suit. The Court should reverse and vacate the decision of the trial court and remand the matter for further proceedings because a de novo review of the record reveals that the trial court erred by misinterpreting the authority under which the Omaha Tribe was denied sovereign immunity.

## **ARGUMENT**

### **I. THE TRIAL COURT ERRED IN RELYING ON RUSH CREEK TO FIND THAT APPARENT AUTHORITY IS SUFFICIENT TO WAIVE A TRIBAL GOVERNMENT'S SOVEREIGN IMMUNITY.**

In reaching its decision to deny the Omaha Tribe's motion to dismiss on the basis of tribal sovereign immunity, the trial court was persuaded by theories of agency presented in a single Colorado state court case, *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. App. 2004). (T45–47). *Rush Creek Solutions, Inc.*, however, not only departs from a long line of well-established federal precedent regarding tribal sovereign immunity, but has also drawn sharp criticism from practitioners. See Paula M. Yost, *Rush Creek v. Ute Mountain Ute Tribe: A Death Knell for Settled Tribal Immunity Law?*, Indian L. Newsl., Jan. 2006. It was subsequently distinguished by the United States District Court for the District of Colorado. See *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 2007 U.S. Dist.

LEXIS 67422, at \*11–12 (D. Colo. Sept. 12, 2007). No Nebraska or Eighth Circuit courts have cited or followed *Rush Creek Solutions, Inc.* prior to the trial court in the case at bar.

It is essential for this Court to consider (A) the limited ways Congress or a tribe may waive sovereign immunity, (B) the inapplicability of circumstances requiring less than a resolution of the Tribal Council to waive sovereign immunity in this case, and (C) the inapplicability of public policy or equitable considerations in deciding whether a tribe has waived its sovereign immunity. When these points are considered, the conclusion is inescapable that the Court should reverse and vacate the decision of the trial court and remand the matter for further proceedings.

**A. Only an Act of Congress or an Express Waiver by the Tribe May Waive Tribal Sovereign Immunity.**

Indian tribes, as sovereign powers possess common law immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). It is well settled that an Indian tribe is not subject to suit unless (1) an act of Congress has authorized the suit, or (2) the tribe itself has waived its sovereign immunity. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 753 (1998); *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58; *Puyallup Tribe, Inc. v. Dep't of Game of Washington*, 433 U.S. 165, 172–73 (1977); *Warburton/Buttner v. The Superior Court of San Diego County*, 127 Cal. Rptr. 2d at 715; see *Three Affiliated Tribes*, 476 U.S. at 890 (suggesting that the federal government is firmly committed to Indian self-governance). An implied waiver is insufficient to waive sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

Congress has not acted to abrogate tribal sovereign immunity where a tribe or tribal entity enters into a commercial contract with a non-tribal entity. *Kiowa Tribe of Oklahoma*, 523 U.S. at 758–60; see Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of tribal Sovereignty*, 51 B.C. L. Rev. 595, 598 (2010) (suggesting that tribal immunity is a particularly “potent and widely useful tool” in light of the promulgation of tribal gaming enterprises). Therefore, the Omaha Tribe of Nebraska itself would need to waive its tribal sovereign immunity in order to be subject to suit in a commercial contract dispute. *Kiowa Tribe of Oklahoma*, 523 U.S. at 758–60.

The Court must consider what standard to apply in determining whether a tribe has waived its sovereign immunity. If Congress has not abrogated a tribe’s immunity in a particular circumstance, “the requirement that a waiver of tribal immunity be ‘clear’ and ‘unequivocally expressed’ is not a requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved.” *Ute Distributing Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998); see *Native Am. Distrib. v. Seneca-Cayuga Tobacco, Co.*, 491 F. Supp. 2d 1056, 1069 (N.D. Okla. 2007) (“[T]he ‘unequivocally expressed’ standard for waiver of immunity is not to be flexibly applied . . .”).

The inflexible requirement that a tribe’s waiver of immunity must be clear and unequivocally expressed in order to be effective cuts against allowing apparent authority alone to waive a tribe’s immunity. Indeed, the clear and unequivocal expression standard is so ingrained in our common law tradition that “[it] is true even if application of sovereign immunity leaves a party without any judicial remedy.” *Native Am. Distrib.*,

491 F. Supp. 2d at 1069. For this reason, the *Native American Distributing* court rejected the notion that a tribe could waive its immunity based on a reasonable belief or inequity of misrepresentation standard. *Id.* Likewise, this Court must reverse and vacate the trial court's finding that a tribal official may waive a tribe's sovereign immunity based on apparent authority alone and remand the matter for further proceedings.

**B. Even if Some Jurisdictions Allow Something Less Than a Resolution of the Tribal Council to Waive Tribal Sovereign Immunity, Such an Allowance Cannot Apply in This Case.**

Given the broad scope of tribal sovereign immunity, it is important to consider the contours of the inflexible general rule that a tribe's own waiver of immunity is only effective if it is clear and unequivocally expressed. See Florey, *supra*, at 597–98 (“In sharp contrast to the aggressive curbs it has placed on tribal territorial powers, the Court has left the traditionally robust doctrine of tribal immunity more or less intact, and Congress has likewise rejected calls to use its plenary power over Indian affairs to narrow the doctrine.”) (footnote omitted).

StoreVisions argues—and the trial court essentially found—that a waiver of sovereign immunity based on the apparent authority of two tribal officials is enough to meet this standard. (T44–45). In truth, the Omaha Tribe has not waived its immunity because (1) such a waiver must be accomplished by a resolution of the tribal government's governing body, the Omaha Tribal Council, and (2) individual tribal council members acting beyond the scope of their authority cannot subject the Omaha Tribe itself to suit.

**1. Only a Resolution of the Tribal Council May Waive Tribal Sovereign Immunity.**



The trial court relied on theories of agency because it did not find authority in the Omaha Tribe's constitution or bylaws that counseled otherwise or offered guidance on the protocol for waiver of sovereign immunity. (T47). Essentially, the trial court read the silence in the constitution and bylaws as indicating that no limits on individual authority to waive the Tribe's sovereign immunity exist. However, in reaching this conclusion, the trial court failed to consider that neither the constitution nor the bylaws provide any members of the Tribal Council with authority to exercise the *Tribal Council's* powers *except as they may be delegated by the Tribal Council*. (T47); see Const. Omaha Tr. Neb. art. IV, § 1 (listing the enumerated powers of the Tribal Council).

The one decision relied upon by the trial court is distinguishable. In *Rush Creek Solutions v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. App. 2004), the purported waiver of sovereign immunity was included as a clause within a contract for services. The Colorado Court of Appeals ruled that general rules of agency governed where the constitution was silent on the issue of authority to waive immunity and found apparent authority for a waiver executed by the tribe's CFO. However, in that case the tribe conceded that the CFO had authority to enter into contracts; the dispute was whether that authority extended to waiving the tribe's sovereign immunity in such contracts. The court stated that, "[w]hen, as here, a person has authority to sign an agreement on behalf of a sovereign, it is assumed that the authority extends to a waiver of immunity contained in the agreement." 107 P.3d at 407.

In this case, the waiver of sovereign immunity presented by Plaintiff is a document separate from the purported agreements. It is a one page document prepared on Plaintiff's letterhead with the sole purpose of waiving the Omaha Tribe's

sovereign immunity. It is not presented as part of a larger agreement that had been validly executed, as in the *Rush Creek* case in which the tribe's CFO had authority to enter into contracts.

Another distinguishing point is that there is nothing in the constitution and bylaws of the Omaha Tribe, the Omaha Tribal Code, or in any resolutions or minutes of the Omaha Tribal Council that would give blanket authority to any person to execute contracts on behalf of the Omaha Tribe. The Omaha Tribal Council is the governing body of the Omaha Tribe and is provided with various enumerated powers, which may be delegated. However, there is no evidence that the Omaha Tribal Council delegated any authority to execute any of the various alleged agreements attached to its complaint, let alone the document waiving the Omaha Tribe's sovereign immunity. Even if such a delegation took place, it must be by resolution or ordinance in order to be valid under tribal law.

Persuasive authority from other jurisdictions indicates that the waiver of immunity by a tribal official without actual authority is insufficient to waive the sovereign immunity of the tribe and does not constitute an express waiver of sovereign immunity by the tribe. These same authorities suggest that apparent authority is insufficient to create a waiver of sovereign immunity. Therefore, the trial court erred when it did not attempt to address the legal significance of the Tribal Council's power to delegate authority. (T47).

The trial court accurately stated that the Omaha Tribe's constitution and bylaws were silent as to the specific "protocol" for waiving tribal sovereign immunity. (T47). However, the constitution and bylaws provide important mandates regarding the Tribal Council and its powers that lend guidance on the issue of delegation of authority.

The constitution lists the Tribal Council's enumerated powers. Const. Omaha Tr. Neb. art. IV, § 1 (E1,6-7:4,v.II). These powers include negotiating with federal, state, and local governments; approving the disposition of tribal assets; managing the Tribe's economic affairs; and regulating trade and commerce. Const. Omaha Tr. Neb. art. IV, § 1(a), (c), (f), (j) (E1,6-7:4,v.II). The Tribal Council also has the power "[t]o adopt resolutions regulating the procedure of the Tribal Council itself . . . and tribal officials [and] . . . [t]o delegate to subordinate boards, or tribal officials . . . any of the foregoing powers, reserving the right to review any actions taken by virtue of such delegated powers." Const. Omaha Tr. Neb. art. IV, § 1(m), (q) (E1,6-7:4,v.II). Thus, while the constitution does not list the specific protocol for waiving the Tribe's sovereign immunity, it does give the *Tribal Council* the power to approve, manage, and regulate the disposition of tribal assets and economic affairs. *Id.*

The constitution also indicates that *resolutions* adopted by the *Tribal Council* regulate procedures that the Tribal Council and tribal officers must adhere to. Const. Omaha Tr. Neb. art. IV, § 1(m) (E1,6-7:4,v.II). The Tribal Council did not adopt any resolutions delegating the authority to waive the Tribe's sovereign immunity to tribal officers. (E1,1–2:4,v.II). Nor did the Tribal Council adopt any resolutions allowing tribal officers to waive the Tribe's sovereign immunity via contract with StoreVisions. (E1,1–2:4,v.II). Therefore, any tribal officer purporting to waive the Omaha Tribe's sovereign immunity via contract with StoreVisions without a resolution by the Tribal Council was acting outside of the scope of his delegated authority. Thus, the trial court erred in applying theories of agency where the Omaha Tribe's constitutional language compels a different result.

In *In re Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.*, the Court of Appeals of New York addressed the issue of whether a tribe had consented to a waiver of sovereign immunity. 658 N.E.2d 989, 993 (N.Y. 1995). The *In re Ransom* court noted that “preserving tribal resources and tribal autonomy are matters of vital importance . . .” *Id.*

Importantly, to be valid, waivers of tribal sovereign immunity ‘must be traceable to an official government action (statute, ordinance, resolution) that expressly and unequivocally waives immunity or empowers particular officers to waive immunity’. Additionally, waivers of immunity ‘are to be strictly construed in favor of the Tribe’.

*Id.* (quoting *Rupp v Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995); William V. Vetter, *Doing Business with Indians and the Three “S”es: Secretarial Approval, Sovereign Immunity and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169, 193 (1994)). In the case at bar, there was no official government action—that is, no resolution adopted by the Tribal Council as required by the tribal constitution—that empowered particular officers to waive the Tribe’s immunity. Const. Omaha Tr. Neb. art. IV, § 1(m), (q); (E1,1–2:4,v.II). Therefore, the Omaha Tribe never validly waived its sovereign immunity.

In *Hydrothermal Energy Corp. v. Fort Bidwell Indian Cmty. Council*, the California Court of Appeals addressed the issue of a tribal chairman’s authority. 216 Cal. Rptr. 59, 63 (Cal. Ct. App. 1985). The party purporting to contract with the tribe “had been informed that tribal procedure for contract approval required participation by a quorum of the Council.” *Id.* at 61. The *Hydrothermal Energy Corp.* court found that the tribal

chairman “could not waive the tribe’s immunity, unless the Tribe had expressly delegated that duty to her. Nothing in the Tribe’s constitution and bylaws gave her such authority.” *Id.* at 63. Significantly, the *Hydrothermal Energy Corp.* court correctly found that the *absence* of delegated authority in the tribe’s constitution and bylaws to waive the tribe’s sovereign immunity indicated that *no such authority had been granted* to the tribal chairman. It did not interpret a lack of an explicit grant of authority as giving the court license to apply theories of agency to determine if the chairman had waived the tribe’s immunity. *Id.*

The *Hydrothermal Energy Corp.* court noted that “[i]t is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it would subject the Government to suit in any court in the discretion of its responsible officers. This is not permissible.” *Id.* (quoting *United States v. U.S. Fidelity Co.*, 309 U.S. 506, 513 (1940)).

As in *Hydrothermal Energy Corp.*, the Omaha Tribe never expressly delegated the authority to waive the Tribe’s sovereign immunity to the two council members who allegedly signed a waiver of sovereign immunity in favor of StoreVisions. (T47; E1,1–2:4,v.II). Therefore, the trial court erred in applying theories of agency to find a grant of authority where none existed and the Court should reverse and vacate the decision of the trial court and remand the matter for further proceedings.

Similarly, the California Court of Appeals decision in *Sharp Image Gaming, Inc. v. Big Sandy Rancheria* supported the position that tribal officials cannot waive the tribe’s sovereign immunity without express delegated authority. 2002 Cal. App. Unpub. LEXIS 11120, at \*2 (Cal. Ct. App. Nov. 25, 2002) (unpublished). The court noted that sovereign

immunity of the tribe is not waived by the execution of a document by a tribal official unless the authority to waive immunity had been expressly delegated to that official. *Id.* The burden to show that the authority to waive sovereign immunity has been expressly delegated to an official is on the party challenging the claim of sovereign immunity. *Id.*

StoreVisions has not shown that the Omaha Tribe's constitution or corresponding resolutions adopted by the Tribal Council expressly delegated the power to waive sovereign immunity to tribal officials. Indeed, no such delegation of authority existed. (E1,1–2:4,v.II).

In *Smith v. Hopland Band of Pomo Indians*, a tribe challenged a claim that a contract signed by the tribal chairperson was sufficient to waive the tribe's sovereign immunity. 115 Cal. Rptr. 2d 455 (Cal. Ct. App. 2002). The tribe argued "that in accordance with the tribal sovereign immunity ordinance, . . . the tribal chairperson who signed the contracts [at issue], did not have the authority to waive the Tribe's sovereign immunity in the absence of an ordinance, or resolution pursuant to such ordinance, explicitly waiving sovereign immunity." 115 Cal. Rptr. 2d at 458. Moreover, the tribe contended "that, even if the contract [did] explicitly waive sovereign immunity, in accordance with the Tribe's sovereign immunity ordinance, in the absence of an ordinance or resolution of the tribal council explicitly waiving sovereign immunity, [the tribal chairperson] did not have actual authority to waive it." *Id.* at 460.

Ultimately, the *Smith* court disagreed, concluding "that the Tribe, through [the tribal chairperson], and by resolution of the tribal council, entered into a contract . . . that clearly and explicitly waived the Tribe's sovereign immunity." *Id.* at 463–64. In addition, the *Smith* court found that the tribal agent signed the contract at issue with the Tribe's

authority because the agent “had the authority to negotiate the contracts . . . , and to execute the final versions . . . , and . . . the tribal council, by resolution, approved the contracts.” *Id.* at 460.

The facts in the case at bar, however, are distinguishable from *Smith* and require an opposite result. In *Smith*, the court found that the tribal council had ratified the actions of its chairperson because the council was aware of the terms of the contract and subsequently approved it by resolution. *Id.* at 461. Because of this ratification, the *Smith* court found that the purpose of the tribal sovereign immunity ordinance “to ensure that no waiver of sovereign immunity is made by a single tribal officer, and that instead such waivers be made only by formal action of its governing body, the tribal council. . . . [was] served . . . .” *Id.* at 462.

Significantly, here, unlike *Smith*, the Tribal Council did not approve any contracts with StoreVisions by resolution or even by motion. (E1,1–2:4,v.II). Indeed, the “meeting” that StoreVisions contends was held on January 7, 2008 (E2,1–2:7-8,v.II), if it was held at all, was not a valid meeting because there is no official record of any such meeting in the tribal records. (E1,1–2:4,v.II). The seven-member Council body cannot be said to have been aware of the terms of the waiver of sovereign immunity, let alone to have approved it by resolution. *Id.* No formal action was taken by the Tribal Council to waive sovereign immunity. *Id.* These facts compel the Court to hold that the trial court erred in finding the apparent authority of two tribal council members to waive the Tribe’s sovereign immunity.

In *Meyer & Associates, Inc. v. Coushatta Tribe of Louisiana*, tribal law dictated that the tribe’s “sovereign immunity could only be waived by means of a tribal

Resolution or ordinance . . . .” 992 So. 2d 446, 450 (La. 2008). Although the tribal chairperson had purportedly waived the tribe’s immunity via contract, the tribe argued that the chairman did not have the authority to waive sovereign immunity because no resolution or ordinance was passed by the tribal council. *Id.* Tribal law in the case at bar is similar to the tribal law in *Meyer & Associates, Inc.*, as a resolution of the entire Tribal Council is required in order to waive tribal sovereign immunity. *Id.* at 450–51 (quoting Coushatta tribal law); see Const. Omaha Tr. Neb. art. IV, § 1(a), (c), (f), (j), (m), (q) (E1,6-7:4,v.II) (giving the Tribal Council enumerated powers including negotiating with governments, approving disposition of tribal assets, managing economic affairs, regulating commerce, adopting resolutions regulating procedure of Tribal Council and tribal officials, and delegating powers to tribal officials.).

The Louisiana Supreme Court found in *Meyer & Associates, Inc.* that the tribal council had passed a resolution which authorized its chairman to negotiate and execute all agreements with the opposing contracting party. 992 So. 2d 446 at 451. Because the contracts subsequently executed by the chairman included immunity waivers that were “necessary to induce the contracting entities to do business with and make substantial financial commitments to the Tribe[,]” the court found that “the Tribe validly executed waivers of sovereign immunity and expressly subjected itself to the jurisdiction of the trial court . . . .” *Id.*

Conversely, in the case at bar, the Tribal Council did not pass such a resolution. (E1,1–2:4,v.II). Therefore, this Court must reach the opposite conclusion and find that the Tribe did not validly and expressly subject itself to suit. The Court should reverse and vacate the decision of the trial court and remand the matter for further proceedings.



**2. If Individual Tribal Members Act Beyond the Scope of Their Authority, They Place Themselves—Not the Tribe—Outside of the Tribe's Sovereign Immunity.**

As discussed *supra*, *Rush Creek, Inc.*—and now the decision of the trial court—is an outlier in a body of well developed and longstanding tribal sovereign immunity jurisprudence. Compare *Breakthrough Mgmt. Group, Inc.*, 2007 U.S. Dist. LEXIS 67422, at \*11–12 (distinguishing *Rush Creek*); Yost, *supra* (criticizing the *Rush Creek* court for adopting theories of agency to abrogate tribal sovereign immunity) to (T45–47) (adopting *Rush Creek's* analysis). The Eighth Circuit has not applied theories of apparent authority to subject an entire tribe to suit. Cf. *N. States Power Co. v. The Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 462 (8th Cir. 1993) (suggesting that tribal council members were subject to suit when they acted beyond the scope of their authority, but the tribe's sovereign immunity remained intact).

A number of other courts have also supported the position that apparent authority of a tribal official is insufficient to waive sovereign immunity. See *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 922 (6th Cir. 2009) (“[U]nauthorized acts of tribal officials are insufficient to waive tribal-sovereign immunity.”); *Native Am. Distrib. v. Seneca-Cayuga Tobacco, Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (finding that contracting party's subjective beliefs and misrepresentations by tribal officials are not enough to waive tribal sovereign immunity); *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1288 (11th Cir. 2001) (rejecting argument that Chief had apparent authority to voluntarily waive the tribe's sovereign immunity); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271, 276 (N.D.N.Y. 2000) (finding apparent authority to bind tribe to commercial undertakings insufficient to waive tribe's sovereign

immunity); *Danka Funding Co. v. Sky City Casino*, 747 A.2d 837, 843 (N.J. Super. Ct. Law. Div. 1999) (suggesting that a sovereign official may only waive the sovereign's immunity where specifically authorized to do so by the sovereign's constitution, statutes, or decisions).

In *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, the Eight Circuit Court of Appeals considered whether the trial court had jurisdiction over tribal council members in an action to enforce a tribal ordinance. 991 F.2d 458, 462. In doing so, the court addressed the scope of the tribal council's authority to act. *Id.* The court concluded "[t]he Council members acted beyond the scope of their authority and placed themselves outside of the tribe's sovereign immunity[]" and found that the trial court had jurisdiction over the *individual council members. Id.*

Like the actions of the council members in *Northern States Power Co.*, the two tribal council members who are alleged to have waived tribal sovereign immunity in the case at bar acted beyond the scope of their delegated authority. *Id.* (finding that tribal council members acted outside the scope of their authority); Const. Omaha Tr. Neb. art. IV, § 1(a), (c), (f), (j), (m), (q) (giving the Tribal Council the enumerated power to adopt resolutions and delegate authority to tribal officials) (E1,6-7:4,v.II); (E1,1-2:4,v.II) (stating that the Tribal Council did not adopt any resolutions that would have authorized a waiver of sovereign immunity in transactions with StoreVisions). The actions of these two tribal members placed them "outside of the tribe's sovereign immunity." *Northern States Power Co.*, 991 F.2d at 462; *see also Native Am. Distrib. v. Seneca-Cayuga Tobacco, Co.*, 491 F. Supp. 2d 1056 (N.D. Okla. 2007) ("[S]overeign immunity does not

extend to an official when the official is acting . . . outside the scope of those powers that have been delegated to him.”) (quoting *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Okla.*, 725 F.2d 572, 576 n.1 (10th Cir. 1984)). Such a tribal member may subject himself individually to suit, but does not waive the tribe’s sovereign immunity. See *Northern States Power Co.*, 991 F.2d at 462.

Thus, the trial court erred in finding that the apparent authority of two tribal members waived the Tribe’s sovereign immunity. The Court should reverse and vacate the decision of the trial court and remand the matter for further proceedings.

**C. StoreVisions Cannot Rely on Principles of Equity or Public Policy to Support the Notion that Apparent Authority Alone May Waive Tribal Sovereign Immunity.**

The trial court found that “[b]ecause nothing in the [Tribe’s] constitution or bylaws speaks to the issue or refutes or prohibits it . . . general laws of agency govern here.” (T47). The trial court analyzed two tribal officers’ words, actions, and conduct and concluded that StoreVisions reasonably believed that the Tribe had waived its sovereign immunity. (T47). This conclusion, however, is a flexible application of sovereign immunity that has been repudiated by the common law. *Native Am. Distrib.*, 491 F. Supp. 2d at 1069 (N.D. Okla. 2007). The Court cannot rely on equitable, discretionary, or policy rationales to allow the apparent authority of two tribal members to waive a tribe’s sovereign immunity. *Warburton/Buttner*, 127 Cal. Rptr. 2d at 715; see *Native Am. Distrib.*, 491 F. Supp. 2d at 1069 (“[C]ourts may not find a waiver of immunity based on ‘perceived inequities arising from the assertion of immunity, or the unique context of a case.’”).

In *Native American Distributing*, the court refused to recognize a tribal waiver of immunity based on the “reasonable belief” of a contracting party and alleged misrepresentations by a manager at a tribal enterprise. 491 F. Supp. 2d at 1068–69. The court upheld the tribe’s sovereign immunity where the party contracting with the tribal enterprise “was highly aware of the possible application of tribal immunity, inquired about it, and was told by [a tribal enterprise manager] that [the opposing contracting party] did not need additional waivers of sovereign immunity beyond those in the Corporate Charter.” *Id.*

In doing so, the *Native American Distributing* court aligned itself with precedent set forth by the U.S. Supreme Court, which commands tribal sovereign immunity to be upheld, even in the face of equitable or policy rationales that might counsel otherwise. *Id.* at 1068; see *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. at 758 (“In [an] economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter . . .”).

Finally, in light of the cumulative evidence . . . Plaintiffs make several policy arguments against a finding of waiver of immunity in this case. (See, e.g., Plfs.’ Resp. to SCTC’s Mot. to Dismiss (“Th[e] purpose [of tribal immunity] is not served, however, when a sophisticated, multi-million dollar tobacco company cynically uses tribal sovereign immunity as a shield to protect itself from prosecution for illegal business conduct, rather than a shield to protect limited . . . tribal resources.”). *While Plaintiffs make some compelling arguments that tribal immunity is not, in this case, furthering the policy goals . . . The Court has no authority to find a waiver*

*of immunity based on policy concerns* regarding whether Congress' intent is being furthered in a given case.

*Native Am. Distrib.*, 491 F. Supp. 2d at 1070 (emphasis added). Therefore, the equities of a particular situation—in which a party purporting to contract with a tribe believed or was misled to believe that the tribe had waived its immunity—are immaterial in determining whether the tribe's immunity has *actually* been waived.

The Court *may not* rely on StoreVisions' claims that tribal officers misrepresented their authority to waive the Tribe's immunity or that it would be unjust not to subject the Tribe to suit. (12:2–13); see *Native Am. Distrib.*, 491 F. Supp. 2d at 1068–70 (finding reasonable belief of contracting party and misrepresentation of tribal enterprise irrelevant to the question of whether tribal immunity had been waived). To the extent that the trial court relied on such conduct by tribal officers, its ruling was in error. (T47); see *Native Am. Distrib.*, 491 F. Supp. 2d at 1070 ("The Court has *no authority* to find a waiver of immunity based on policy concerns.") (emphasis added).

There was no waiver of the Omaha Tribe's sovereign immunity in the case at bar. Const. Omaha Tr. Neb. art. IV, § 1(a), (c), (f), (j), (m), (q); (E1,1–2:4,v.II). The trial court erred in allowing StoreVisions to rely on the representations of two tribal members and conclude the Tribe had waived sovereign immunity. *Native Am. Distrib.*, 491 F. Supp. 2d at 1068–69. Therefore, the Court should reverse and vacate the decision of the trial court and remand the matter for further proceedings.

**D. Contracts with Indian Tribes Are to Be Interpreted Liberally in Tribe's Favor**

A long-standing canon of construction within the body of Indian law is that agreements with Indian tribes should be interpreted liberally in favor of the tribes. See, e.g., *Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *Worcester v. Georgia*, 31 U.S. 515, 551-557 (1832). This canon of construction arose originally in the context of interpreting treaties, statutes and executive orders, but courts have extended them to agreements as well. See, e.g., *Winters v. United States*, 207 U.S. 564 (1908).

The purported waiver of sovereign immunity is on StoreVision's letterhead and was clearly drafted by StoreVisions. (E2:7;7,7:v.II). The evidence presented by StoreVisions, if true, shows that the Omaha Tribal Council played no role in negotiating or preparing the document. There is no evidence that the document was ever discussed by StoreVisions with the full Omaha Tribal Council or subject to any official deliberations by the Tribal Council. In analyzing whether the Tribal Council provided any kind of authority for its execution, the Court should be mindful of this canon of construction and give the Omaha Tribe the benefit of any ambiguity.

## **II. THE DISTRICT COURT ERRED IN ADMITTING STOREVISIONS' AFFIDAVITS INTO EVIDENCE.**

Assuming *arguendo* that apparent authority was a plausible basis for finding an unequivocal and express waiver of sovereign immunity, the trial court erred in admitting two StoreVisions affidavits into evidence at the January 13, 2010 hearing on the motion to dismiss. (8:7-11). StoreVisions did not share either affidavit with the Tribe before offering the affidavits as exhibits in the trial court. (7:17-25; 8:1-6). Counsel for the Tribe objected to the admission of these affidavits into evidence on the grounds that the Tribe had no notice of their contents or StoreVisions' corresponding substantive

arguments before the hearing. Neb. Rev. Stat. § 27-103(1)(a) (2010); (7:24–25; 8:1–6). Despite this objection, the trial court admitted the affidavits at the hearing and relied on their contents in denying the motion to dismiss. (8:7–8; T44–47).

Under certain circumstances, a motion to dismiss will be treated as a motion for summary judgment. Neb. Ct. R. Pldg. § 6-1112(b). If a motion to dismiss is based on failure of the pleading to state a claim upon which relief may be granted, then “the motion shall be treated as one for summary judgment . . . .” *Id.* The Omaha Tribe’s motion to dismiss was essentially based on StoreVisions’ failure to state a claim upon which relief may be granted because the Tribe had not waived its sovereign immunity—an insuperable bar to relief. *Crane Sales & Serv. Co. v. Seneca Ins. Co.*, 276 Neb. 372, 375; 754 N.W.2d 607 (Neb. 2008); (T42).

[Section] 6-1112(b) provides that when matters outside of the pleadings are presented by the parties and accepted by the trial court under § 6-1112(b)(6), the motion ‘shall be treated’ as a motion for summary judgment. *Matters outside the pleadings can include written or oral evidence either in support of or in opposition to the pleading which provides some substantiation for and does not merely reiterate what is said in the pleadings.*

*Crane Sales & Serv. Co.*, 276 Neb. at 376 (emphasis added). StoreVisions’ affidavits constituted written evidence in support of its complaint which provided substantiation for statements in its complaint, not mere reiteration of the complaint. (8:12–25; 9:1–17); see *Crane Sales & Serv. Co.*, 276 Neb. at 376 (interpreting the standard for treating a motion to dismiss as a motion for summary judgment).

In such case, “all parties shall be given reasonable opportunity to present all material made pertinent to such a motion . . . .” Neb. Ct. R. Pldg. § 6-1112(b). Therefore, the trial court should have treated the Tribe’s motion to dismiss as a motion for summary judgment and should have given the Tribe a “reasonable opportunity” to review StoreVisions’ affidavits before hearing. *Crane Sales & Serv. Co.*, 276 Neb. at 376 (“Matters outside the pleadings can include written or oral evidence either *in support of or in opposition to* the pleading . . . .”) (emphasis added); see Neb. Ct. R. Pldg. § 6-1112(b) (requiring all parties be given a reasonable opportunity to present materials pertinent to a motion for summary judgment).

The reasonable notice standard is reiterated by Neb. Rev. Stat. Section 25-910 (Reissue 2010). Notice of a motion must state “if affidavits are to be used on the hearing . . . .” Neb. Rev. Stat. § 25-910 (2010). Furthermore, notice must be “served a reasonable time before the hearing.” *Id.* When the Tribe notified StoreVisions of its motion to dismiss, the Tribe provided StoreVisions with ample notice that affidavits would be used in support of its motion. (T42). However, StoreVisions never indicated to the Tribe that StoreVisions would be using affidavits to support its substantive arguments at the hearing. (7:17–25; 8:1–6). In fact, StoreVisions’ substantive arguments at hearing rested primarily upon the contents of affidavits that the Tribe had never seen before and had no notice of. (7:17–25; 8:1–6, 12–25; 9:1–25; 10:1–2; 12:2–13). While StoreVisions had notice of affidavits that the Tribe would rely upon at the hearing and had the opportunity to prepare its brief accordingly, the Tribe had no such notice. (15:19–23; T42). Yet, the trial court still received StoreVisions’ affidavits into



evidence and relied upon their contents in denying the motion to dismiss. (8:7–8; T44–47). This was in error.

Reasonableness is defined by case law and depends on whether affidavits will be used to support a motion. *Sterling Mfg. Co. v. Hough*, 49 Neb. 618, 621; 68 N.W. 1019 (Neb. 1896). “[R]easonable time is such that the party notified will have *ample time to prepare himself* and be able to be present at the time and place of hearing.” *Id.* (emphasis added). Where affidavits will be used to support a motion, “time must be allowed for obtaining them.” *Id.* In contrast, if only the record or papers already filed are at issue, than reasonable time is defined as the time to enable counsel to be present. *Id.*

Therefore, there are heightened requirements for reasonable notice where affidavits will be relied upon at a hearing. Not only must counsel be given adequate notice to be present at the hearing, but counsel must also be given time to obtain affidavits and be given “ample time to prepare” for hearing. *Id.* In the case at bar, the Tribe’s counsel was neither given reasonable time to obtain StoreVisions’ affidavits, nor given ample time to prepare for StoreVisions’ reliance on these affidavits at the hearing. (7:25; 8:1–6, 12–25; 9:1–17). Therefore, the trial court erred in admitting StoreVisions’ affidavits into evidence.

In *Morrison Enters. v. Aetna Casualty & Surety Co.*, the Nebraska Supreme Court addressed codefendant counsel’s objection to an affidavit presented by the plaintiff and dated on the same day as the hearing. 260 Neb. 634, 637; 619 N.W.2d 432 (Neb. 2000). Codefendant’s counsel noted that “[the affidavit] was not filed with us in advance of the hearing or provided to us in advance of the summary judgment hearing and we first heard about it and first had a chance to even peruse it just a few minutes

ago . . . .” *Id.* at 637–38. The court gave codefendant’s counsel the opportunity to peruse the affidavit and noted that counsel could register specific objections at trial. *Id.* at 638. Significantly, the court did not hear substantive arguments based on the affidavits’ contents, but rather, only marked and received the affidavits as exhibits, giving defendant counsel the opportunity to enter specific objections on a later date. *Id.* at 637–38.

In contrast, the trial court here did not allow the Tribe’s counsel to peruse StoreVisions’ affidavits before receiving them nor did the trial court give the Tribe’s counsel the opportunity to enter specific objections as to the affidavits’ contents on a later date. (E7:24–25; 8:1–8). Moreover, the trial court heard substantive arguments from StoreVisions’ counsel based on the affidavits’ contents at the hearing for the Tribe’s Motion to Dismiss. (8:12–25; 9:1–25; 10:1–2; 12:2–13). Therefore, the trial court erred in admitting StoreVisions’ affidavits into evidence at the hearing for the Tribe’s Motion to Dismiss.

### **III. A FINDING OF APPARENT AUTHORITY IS NOT SUPPORTED BY THE EVIDENCE.**

Apparent authority is authority that is conferred when the principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon an agent’s apparent authority. *Koricic v. Beverly Enters. - Neb.*, 278 Neb. 713, 773 N.W.2d 145 (2009). Apparent authority gives an agent the power to affect the principal’s legal relationships with third parties. *Id.* Apparent authority for which a principal may be liable exists only when the third party’s belief is traceable to the principal’s manifestation and cannot be established by the agent’s acts, declarations, or conduct. *Id.* For apparent authority to exist, the principal must act in a way that induces a reasonable

third person to believe that another person has authority to act for him or her. *Id.* Whether an agent has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction. *Id.*

The only evidence offered on the factual question of apparent authority was the two virtually identical affidavits of StoreVisions' principals. The affidavits assert that the principals met with five members of the seven-member Tribal Council and reviewed the alleged waiver of sovereign immunity. (E2, 4:7,7,v.II). There is no evidence that this was a valid "Called Meeting" with notice to all seven council members as required by the Omaha Tribe's bylaws. (E1,15:4,4,v.II). The required manifestation of the principal is that of the Omaha Tribe – acting through the Tribal Council. There is no evidence of any formal action taken by the Tribal Council body as to the purported waiver of sovereign immunity. At best, the evidence shows that a handful of individuals met with the principals and engaged in a conversation. This cannot be interpreted as the Tribal Council acting. StoreVisions would have the Court believe that it acted reasonably in conducting business with a sovereign tribal government without any due diligence as to the formalities of tribal approval.

### **CONCLUSION**

StoreVisions cannot show an effective waiver of sovereign immunity by the Omaha Tribe and thus this action is barred by the doctrine of sovereign immunity. There is no valid resolution or ordinance authorizing a waiver as to lawsuits by StoreVisions. Further, virtually all courts considering the matter have found that apparent authority of a singular tribal official is insufficient to support a waiver of sovereign immunity. When the alleged waiver of sovereign immunity is interpreted

liberally in favor of the Omaha Tribe, there is no question that the Omaha Tribe retains immunity from suit in this case. The order of the trial court should be reversed because the court erred in denying the motion for dismissal.

RESPECTFULLY SUBMITTED,

OMAHA TRIBE OF NEBRASKA a/k/a  
OMAHA NATION, Appellant

By: 

Ben Thompson, NE 22025  
Thompson Law Office, PC, LLO  
13906 Gold Circle, Suite 201  
Omaha, NE 68144  
Tel: (402) 330-3060, ext. 111  
*Attorney for Appellant*

#### PROOF OF SERVICE

STATE OF NEBRASKA |

ss.

COUNTY OF DOUGLAS |

The undersigned certifies that two copies of the foregoing brief were served upon the following by regular mail, on the 25th day of August, 2010:

Elizabeth M. Skinner  
Gross & Welch, P.C., L.L.O.  
1500 Omaha Tower  
2120 South 72<sup>nd</sup> Street  
Omaha, NE 68124

Signed: 

Printed: BEN THOMPSON

The person named above, known to me to be the same, appeared before me personally and executed the foregoing statement.

