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IN THE COURT OF APPEALS OF NEBRASKA

Case No. A-10-280

STOREVISIONS, INC.,

Plaintiff/Appellee,

v.

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

Defendant/Appellant.

APPEAL FROM THE DISTRICT COURT OF THURSTON COUNTY, NEBRASKA

The Honorable Darvid D. Quist, District Judge

REPLY BRIEF FOR APPELLANT

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PROPOSITIONS OF LAW

Three types of final orders may be reviewed on appeal: (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009); Neb. Rev. Stat. § 25-1902 (2009)

II.

Generally, an order denying a motion to dismiss or motion for summary judgment is not immediately appealable; it is not a final order. The Supreme Court has carved out an exception to the rule of finality for cases involving the defense of qualified immunity. *Hertz v. Smith*, 345 F.3d 581, 585 (8th Cir. 2003) (citing *Pendleton v. St. Louis County*, 178 F.3d 1007, 1010 (8th Cir. 1999).

III.

A district court's denial of qualified immunity, if it turns on an issue of law, is an appealable final decision within the meaning of 28 U.S.C. § 1291, even in the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2807, 2817 (1985).

IV.

Qualified immunity is "*immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2807, 2815 (1985).

V.

The reasoning for immediate appeal of any order denying absolute immunity and qualified immunity is that in each case, the decision is effectively unreviewable on appeal from a final judgment. *Mitchell v. Forsyth*, 472 U.S. at 526-27, 105 S. Ct. at 2816.

VI.

The question of immunity should be resolved at the earliest possible point in litigation; otherwise, the immunity from suit is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. at 526, 105 S. Ct. at 2816.

VII.

Interlocutory review of an order on Eleventh Amendment immunity is appropriate because immunity from a suit is "effectively lost if the party claiming it is erroneously forced to stand trial." *Williams v. State of Missouri*, 973 F.2d 599 (8th Cir. 1992) (quoting *Barnes v. State of Missouri*, 960 F.2d 63, 64 (8th Cir. 1992) (per curiam)).

VIII.

"Qualified immunity should be addressed as early as possible in litigation." *Bradford v. Huckabee*, 330 F.3d 1038, 1041 (8th Cir. 2003) (citing *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

IX.

A denial of a motion to dismiss is not generally a final order subject to appeal. *Prescott v. Little Six, Inc.*, 387 F.3d 753, 755 (8th Cir. 2004).

X.

The collateral order doctrine permits interlocutory appeals from a district court's denial of sovereign immunity as an exception to the general rule disallowing appeals of motions to dismiss because they are typically not final orders "under the collateral order doctrine, which permits an

interlocutory appeal from a district court's denial of sovereign immunity." *Prescott v. Little Six, Inc.*, 387 F.3d 753, 755 (8th Cir. 2004);

XI.

"[T]he denial of tribal immunity is an immediately appealable collateral order.", *Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1179 (10th Cir. 1999) *cert. denied*, 530 U.S. 1229, 120 S.Ct. 2657, 147 L.Ed.2d 272 (2000); *see also Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1050 (11th Cir. 1995)

XII.

Under 28 U.S.C. § 1291, appeals from orders other than final judgments are permitted when they have a final and irreparable effect on the parties. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-56 (1949)

XIII.

Sovereign immunity is a proper basis for interlocutory appeal under the collateral order doctrine. *Monroe v. Arkansas State Univ.*, 495 F.3d 591, 593 (8th Cir. 2007); *Prescott v. Little Six, Inc.*, 387 F.3d 753, 755 (8th Cir. 2004); *Williams v. State of Missouri*, 973 F.2d 599, 599 (8th Cir. 1992).

XIV.

Nebraska common law allows the appellate court to review trial court orders that are not usually considered final under the collateral order doctrine. *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007); *State v. Pratt*, 273 Neb. 817, 733 N.W.2d 868 (2007); *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

XV.

"[T]he collateral order] doctrine permits interlocutory relief from a denial of a motion to dismiss based on tribal sovereign immunity."; *Holguin v. Tsay Corp.*, 146 N.M. 346, 347, 210 P.3d 243 (2009).

XVI.

Sovereign immunity meets all criteria for the collateral order doctrine to apply. *Bd. of Regents of the Univer. Sys. of Georgia v. Canas*, 295 Ga. App. 505, 507, 672 S.E.2d 471 (2009)

XVII.

To be a collateral order, an order "must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment."*Williams v. Baird*, 273 Neb. 977, 983, 735 N.W.2d 383 (2007).

XVIII.

An appealable interlocutory decision must (1) conclusively determine the disputed question,'" 472 U.S. at 527, 105 S. Ct. at 2816 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)) and, (2) that question must involve a claim of right separate from and collateral to rights asserted in the action. *Id.* (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546).

XIX.

When reviewing a trial court's denial of immunity, the appellate court is not required to consider the correctness of the plaintiff's version of the facts or determine whether the plaintiff's allegations actually state a claim, but only decide if it turns on a question of law. *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S. Ct. 2807, 2816 (1985).

XX.

Where a denial of a qualified immunity claim turns on an issue of law, the order denying immunity is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment. *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2807, 2817 (1985)

XXI.

Absent congressional abrogation of tribal immunity, for 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).

SUMMARY OF ARGUMENT

Sovereign immunity is more than a legal defense to liability; it is a complete bar to suit, which deprives the trial court of jurisdiction. Interlocutory review of a trial court's order denying immunity is appropriate because immunity from suit is lost if the party claiming immunity is erroneously forced to litigate. If forced to proceed to trial, immunity is moot upon entry of final orders and, the order denying immunity is never reviewable on appeal.

Federal courts, including the Eighth Circuit have determined that orders denying sovereign immunity are immediately reviewable on appeal. The policy considerations supporting early resolution of immunity issues in federal courts are equally present in state court

claims of sovereign immunity. This Court should follow the law of other jurisdictions and find that a motion to dismiss is a final decision and as such, is immediately appealable.

ARGUMENT

I. THE DISTRICT COURT ORDER DENYING APPELLANT'S CLAIM OF SOVREIGN IMMUNITY IS A FINAL ORDER AND AFFECTS A SUBSTANTIAL RIGHT AND DETERMINES THE ACTION BECAUSE IT FORCES APPELLATE TO INCUR COSTS AND TIME TO LITIGATE THIS CAUSE, WHEN APPELLANT IS OTHERWISE IMMUNE FROM SUIT.

The district court order denying Appellant's motion to dismiss for lack of jurisdiction on the basis of sovereign immunity falls within the definition of a final order under Neb. Rev. Stat. § 25-1902. Under that statute, three types of final orders may be reviewed on appeal: (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009); Neb. Rev. Stat. § 25-1902 (2009). By denying Appellant's claim of sovereign immunity, the district court order affects a substantial right of Appellant. Appellant is forced to litigate and incur substantial cost and expense to defend a case, which sovereign immunity otherwise protects. A subsequent appeal of the erroneous order would be moot if Appellant must litigate the case to final judgment.

Lawsuits against government entities are not new to Nebraska courts. But while this Court has held that orders on motions to dismiss do not qualify for immediate review, this Court has not addressed whether an order denying a motion to dismiss for lack of jurisdiction based on

sovereign immunity is immediately appealable. The U.S. Supreme Court, federal courts and other jurisdictions have determined that other immunity claims, including absolute, sovereign and Eleventh Amendment immunity are immediately appealable, finding that compelling reasons exist to allow immediate appeal on sovereign immunity claims. Without a right to immediate review of an order denying sovereign immunity, the Court forces the Appellant, and all other government entities and persons with absolute, qualified, or Eleventh Amendment immunity to incur substantial costs and time litigating a lawsuit otherwise barred by immunity.

A. Generally, an Order Denying a Motion to Dismiss or Motion for Summary Judgment Is Not a Final Order; However, the Supreme Court Has Created an Exception to the Finality for Cases Involving the Defense of Qualified Immunity, Which is an Appealable Final Decision Within the Meaning of 28 U.S.C. § 1291.

This Court should follow the federal court appeal process which allows immediate appeal of a district court order denying a motion to dismiss brought on the basis of absolute and qualified immunity. Although Nebraska courts have determined that an order denying a motion to dismiss or motion for summary judgment is not a final order within the meaning of Neb. Stat. Rev. § 25-1309 (1999) and it is not, therefore, subject to immediate appeal, (April 19, 2010 Order dismissing appeal, citing *Qwest Bus. Resources v. Headliners-1299 Farnam*, 15 Neb. App. 405, 727 N.W.2d 724 (2007)), Nebraska Courts should follow the procedure used in other jurisdictions where this rule is only a general rule, not an absolute rule. In the Eighth Circuit, for example, generally, an order denying a motion to dismiss or motion for summary judgment is not immediately appealable; it is not a final order. *Hertz v. Smith*, 345 F.3d 581, 585 (8th Cir. 2003) (citing *Pendleton v. St. Louis County*, 178 F.3d 1007, 1010 (8th Cir. 1999). But, the U.S. Supreme Court has created an exception to the rule of finality for cases involving the defense of

qualified immunity. *Id.* A district court's denial of qualified immunity, if it turns on an issue of law, is an appealable final decision within the meaning of 28 U.S.C. § 1291, even in the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2807, 2817 (1985).

Sovereign immunity is substantially similar to absolute and qualified immunity in federal civil rights claims and federal courts have interpreted the doctrine of qualified immunity broadly. As explained in *Mitchell v. Forsyth*, qualified immunity is "*immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.* 472 U.S. at 526, 105 S. Ct. at 2815. (italicized emphasis in original) (discussing the qualified immunity doctrine set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1892). Further, the Supreme Court stated that the reasoning for immediate appeal of an order denying absolute immunity showed that qualified immunity should be similarly appealable, because "in each case, the district court's decision is effectively unreviewable on appeal from a final judgment." *Id.*, 472 U.S. at 526-27, 105 S. Ct. 2816.

The policy considerations supporting early resolution of qualified immunity issues in federal courts are equally present in state court claims of sovereign immunity. As with qualified immunity, for an appeal of an order denying sovereign immunity, the question of sovereign immunity should be resolved at the earliest possible point in litigation; otherwise, the immunity from suit is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. at 526, 105 S. Ct. at 2815.

The Eighth Circuit will review a district court order on a state sovereign immunity issue. "Interlocutory review of the district court's order on the Eleventh Amendment issue is appropriate because 'immunity from suit is effectively lost if the party claiming it is erroneously forced to stand trial.'" *Williams v. State of Missouri*, 973 F.2d 599, 599 (8th Cir. 1992) (quoting

Barnes v. State of Missouri, 960 F.2d 63, 64 (8th Cir. 1992) (per curiam)); *see also Monroe v. Arkansas State University et al.*, 495 F.3d 591(8th Cir. 2007) (lower court decision reversed on interlocutory appeal, the district court's denial of a claim of Eleventh Amendment Immunity). Further, "qualified immunity should be addressed as early as possible in litigation." *Bradford v. Huckabee*, 330 F.3d 1038, 1041 (8th Cir. 2003) (citing *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

Accordingly, because of the irreversible impact of denial of sovereign immunity, the order is a final order and is immediately reviewable by this Court.

B. Even if the District Court's Order is Not Final in Nature, It Is Immediately Appealable Under the Collateral Order Doctrine Based on the Final and Irreparable Effect on the Parties.

Federal courts recognize that a denial of a motion to dismiss is not generally a final order subject to appeal. *Prescott v. Little Six, Inc.*, 387 F.3d 753, 755 (8th Cir. 2004). However, there is an exception to this general rule "under the collateral order doctrine, which permits an interlocutory appeal from a district court's denial of sovereign immunity." *Id.*; *see Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1179 (10th Cir. 1999) ("[T]he denial of tribal immunity is an immediately appealable collateral order."), *cert. denied*, 530 U.S. 1229, 120 S.Ct. 2657, 147 L.Ed.2d 272 (2000); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1050 (11th Cir. 1995) (finding the district court's denial of immunity appealable under the collateral order doctrine); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-56 (1949) (interpreting 28 U.S.C. § 1291 to permit "appeals from orders other than final judgments when they have a final and irreparable effect on the parties."). The Eighth Circuit in particular has established that sovereign immunity is a proper basis for interlocutory appeal under the collateral

order doctrine. *Monroe v. Arkansas State Univ.*, 495 F.3d 591, 593 (8th Cir. 2007); *Prescott v. Little Six, Inc.*, 387 F.3d 753, 755 (8th Cir. 2004); *Williams v. State of Missouri*, 973 F.2d 599, 599 (8th Cir. 1992).

The rationale of federal court decisions, that an order denying a claim of qualified immunity as a matter of law is an appealable final decision should apply equally to state claims of sovereign immunity. The policy considerations supporting early resolution of qualified immunity issues in federal litigation are equally present in state court claims of sovereign immunity. More important, immediate review of an order denying sovereign immunity is more compelling that for permitting review of a qualified immunity claim, since qualified immunity requires a factual finding, which is not required in matters of sovereign immunity.

Similar to the policies in federal courts, Nebraska common law allows the appellate court to review trial court orders that are not usually considered final under the collateral order doctrine. *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007); *State v. Pratt*, 273 Neb. 817, 733 N.W.2d 868 (2007); *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006). Nebraska has adopted the same collateral order doctrine as U.S. Supreme Court. *Williams*, 273 Neb. at 983.; *see Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Unlike the federal courts, however, Nebraska state courts have not yet explicitly stated that denial of sovereign immunity is a proper ground for interlocutory appeal under the collateral order doctrine. *Compare Prescott*, 387 F.3d at 755 (explicitly stating that the collateral order doctrine allows interlocutory appeal based on a denial of sovereign immunity) *to In re Marcella B.*, 18 Neb. App. 153, 161, 775 N.W.2d 470 (2009) (discussing doctrine's applicability to a motion for in-chambers testimony) *and Frederick v. Seeba*, 16 Neb. App. 373, 377–79, 745

N.W.2d 342 (2008) (discussing doctrine's applicability to lower court's imposition of attorney fees).

Courts in several other states considering similar issues have opted to follow the federal rule and provided that even if a denial of a motion to dismiss based on sovereign immunity is not a final order, it is immediately appealable as a collateral order. *Holguin v. Tsay Corp.*, 146 N.M. 346, 347, 210 P.3d 243 (2009) ("[T]he collateral order] doctrine permits interlocutory relief from a denial of a motion to dismiss based on tribal sovereign immunity."); *Bd. of Regents of the Univer. Sys. of Georgia v. Canas*, 295 Ga. App. 505, 507, 672 S.E.2d 471 (2009) (holding that sovereign immunity meets all criteria for the collateral order doctrine to apply); Ex parte *Franklin County Dep't of Human Res.*, 674 So.2d 1277, 1282 (Ala. 1996) (Maddox, J., concurring in part, dissenting in part) ("I would adopt the collateral order doctrine in cases involving claims of sovereign immunity . . . ."). Courts that include sovereign immunity in their application of the collateral order doctrine often do so because sovereign immunity is essentially lost if the party claiming immunity in forced to stand trial in error. *See Monroe*, 495 F.3d at 593 (*quoting Williams v. State of Missouri*, 973 F.2d 599, 599 (8th Cir. 1992)); *Bd. of Regents of the Univer. Sys. of Georgia*, 295 Ga. App. at 507 ("[S]overeign immunity is an immunity from suit, rather than a mere defense to liability, and is effectively lost if a case is erroneously permitted to go to trial.") (citing *Griesel v. Hamlin*, 963 F.2d 338, 340(IV)(A) (11th Cir. 1992)). Courts also recognize that the collateral order doctrine facilitates a "speedy, inexpensive, and just determination of sovereign immunity issues." *Ex parte Franklin County Dep't of Human Res.*, 674 So.2d at 1282 (Maddox, J., concurring in part, dissenting in part).

In Nebraska,

> for an order to fall within the [collateral order] doctrine, it must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.
>
> *Williams*, 273 Neb. at 983.

Other courts having considered these prongs of the collateral order doctrine in terms of sovereign immunity claims have found that a denial of sovereign immunity resolves an important issue separate from the merits of the action and is effectively unreviewable on appeal from final judgment. *See, e.g.*, Ex parte *Franklin County Dep't of Human Res.*, 674 So.2d at 1282 (Maddox, J., concurring in part, dissenting in part) ("[S]ometimes review after trial would come too late to vindicate one important purpose of qualified immunity—namely, protecting public officials, not simply from liability, but also from standing trial.") (quoting *Johnson v. Jones*, 515 U.S. at ----, 115 S.Ct. at 2155) (internal quotations omitted)). ; *Bd. of Regents of the Univer. Sys. of Georgia*, 295 Ga. App. at 507.

In the case at bar, the Tribe's sovereign immunity from suit would essentially be lost if it were forced to stand trial in error. *See Monroe*, 495 F.3d at 593 (quoting *Williams v. Missouri*, 973 F.2d 599, 599 (8th Cir. 1992)). Unlike *Frederick*, 16 Neb. App. at 379, the remedies available to the Tribe after final judgment would not be sufficient to adequately protect their interest in immunity from suit. Denying the Tribe jurisdiction to raise an interlocutory appeal on the issue of sovereign immunity would essentially vindicate an important purpose of sovereign immunity—to avoid the cost of going to trial. See Ex parte *Franklin County Dep't of Human Res.*, 674 So.2d at 1282 (Maddox, J., concurring in part, dissenting in part). Based on the impact on the party for the denial of sovereign immunity, Nebraska courts should follow the approach taken by the federal courts and the state courts noted above and apply the collateral order

doctrine to allow immediate appeal on the issue of sovereign immunity even if denial of sovereign immunity is not considered to be a final order and would not otherwise be immediately appealable. Allowing tribes to immediately appeal denials of sovereign immunity as collateral orders maintains the narrowness of the collateral order doctrine that Appellee is concerned with as it is only applicable in a small subset of cases concerning sovereign immunity.

C. The Collateral Order Doctrine Applies to the District Court's Order Denying Appellant's Motion to Dismiss, Making it Immediately Appealable Because the Denial of Tribal Sovereign Immunity Presents Questions of Law.

The Supreme Court, in *Mitchell v. Forsyth*, stated that an appealable interlocutory decision must (1) conclusively determine the disputed question,'" 472 U.S. at 527, 105 S. Ct. at 2816 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)) and, (2) that question must involve a claim of right separate from and collateral to rights asserted in the action. *Id.* (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546). "The denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets these requirements." *Id.* When reviewing a trial court's denial of immunity, the appellate court is not required to consider the correctness of the plaintiff's version of the facts or determine whether the plaintiff's allegations actually state a claim. *Mitchell*, at 528, 2816. The appellate court need only decide if it is a question of law. If it turns on an issue of law, the district court order denying a qualified immunity claim is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2807, 2817 (1985).

Appellee attempts to characterize this issue as purely factual, but the mere presence of facts regarding tribal waiver of sovereign immunity does not remove the existence of the

questions of law surrounding this. As discussed in Appellant's brief, only an act of Congress or an express waiver by the tribe may waive sovereign immunity. Thus whether the agency principles and apparent authority the Appellee attempts to rely upon operate as an *express* waiver of sovereign immunity is not a factual question, but a question of law. While there may be a disputed factual inquiry as to whether apparent authority exists in these circumstances, it is not a question of fact, but a question of law whether apparent authority can be used in the first place to serve as an express waiver of sovereign immunity. Absent congressional abrogation of tribal immunity, for 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).

CONCLUSION

This Court has jurisdiction to hear the instant appeal of the erroneous district court order denying Appellant's claims of sovereign immunity because such an order is a final order. Even if it is not considered a final order, it is appealable under the collateral order doctrine due to the irreparable harm created by denial of immunity from suit. Whether tribal sovereign immunity can be expressly based upon the apparent authority is a question of law, not merely a factual inquiry, making it reviewable under the collateral order doctrine. Because no express waiver of sovereign immunity exists in this matter, this action is barred by the doctrine of sovereign immunity. No valid resolution or ordinance exists in this matter. The apparent authority of a singular tribal official has been typically found to be insufficient to expressly waive the

sovereign immunity of the tribe. When the liberal interpretation to waivers of sovereign immunity required by case law is applied to this matter, it is clear that the Omaha Tribe retains immunity from suit. The Court has jurisdiction to hear the instant appeal. 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: _____

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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 12th day of October, 2010:

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Signed: _____

Printed: Amanda J. Karr

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

_____

GENERAL NOTARY - State of Nebraska
BENJAMIN W. THOMPSON
My Comm. Exp. June 23, 2014