UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA

File No. 11-CV-1690(ADM/JJK)

Brian Noel Hester,

Plaintiff,

vs.

Redwood County, Lon Walling, Individually and in his official capacity as Chair of the Redwood County Board of Commissioners, Steven Collins, Individually and in his official capacity as Redwood County Attorney, Patrick Rohland, The State of Minnesota, Mona Dohman, Individually and in her official capacity as Commissioner of the Minnesota Department of Public Safety, The Lower Sioux Indian Community of Minnesota, Gabe Prescott, Individually and in his capacity as President of The Lower Sioux Indian Community of Minnesota, Jean Stacy, and Jonathan Meece, Individually and in his capacity as a police officer for The Lower Sioux Indian Community of Minnesota,

JURY TRIAL DEMANDED

Defendants.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO LOWER SIOUX DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

This matter is before this Court upon the Motion brought by the Lower Sioux Defendant's seeking dismissal of the Complaint, either based upon the failure to state a claim or for summary judgment. Hester brings this action seeking compensation for his illegal detention, arrest, testing demand and conviction arising from the actions of a purported police officer with the Lower Sioux. Based upon an agreement between the

Lower Sioux and Redwood County, the County prosecuted Hester, securing a conviction, resulting in imprisonment. A review of the issues raised in the Complaint and the factual disputes presented, demonstrates that the Motion should be denied.

STATEMENT OF FACTS

On July 9, 1998 Redwood County and the Lower Sioux Indian Community in Minnesota (Lower Sioux) entered into a "Mutual Aid and Assistance Agreement." (Affidavit of Kenneth R. White, filed April 14, 2012, Exhibit 1, ECF Doc 50-1). Under the terms of that Agreement, the Lower Sioux and Redwood County agreed to cooperate in providing law enforcement activities, including providing mutual aid to one another. (White Aff., Ex. 1). Significantly, the Lower Sioux and Redwood County agreed that the Lower Sioux police officers would share concurrent jurisdiction with Redwood County over the geographical area of the Lower Sioux reservation, and that in return, the Lower Sioux would comply with Minnesota law regarding its police officers and waive sovereign immunity for the acts of its employees acting in the scope of their employment. (White Aff., Ex. 1). As a result of this Agreement, Lower Sioux officers generally acted as licensed peace officers with the full authority under Minnesota law. (Amended Complaint, para. 16).

On December 16, 2006, Brian Hester was a passenger in a motor vehicle he owned which became stuck in the ditch. (Amended Complaint, para. 17). Police officers of the Lower Sioux received a report of a motorist in need of assistance and responded to the call. (Amended Complaint, para. 18). Finding Hester standing outside of the vehicle and believing him to be intoxicated, Officer Jonathan Meece (Meece) of

the Lower Sioux Police Department demanded that Hester undergo preliminary breath tests. (Amended Complaint, para. 18). Hester was then told he was being taken to the Law Enforcement Center for additional tests.[1] (Affidavit of Kenneth R. White, filed April 20, 2012, Ex. 101). Hester did not voluntarily accompany Meece. (White Aff., Ex. 101). After Meece checked Hester's driver's license, he was given a ticket for a violation of tribal law for driving without a valid license. (White Aff., Ex. 102).

As part of the DUI investigation, Office Meece demanded that Hester submit to a breath test using the equipment supplied by the Redwood County Sheriff and the standard Minnesota Implied Consent Advisory. Hester refused. (Amended Complaint, para. 21).

Hester was charged with a number of driving offenses, including driving while impaired and driving while impaired – test refusal. (Affidavit of Amanda L. Stubson, dated March 16, 2012, Ex. A). Prior to trial, driving charge was dismissed, leaving only the test refusal charge. (Affidavit of Amanda L. Stubson, dated March 16, 2012, Ex. C). Following his trial, Hester was convicted of the test refusal charge. (Amended Complaint, para. 22). As a result of the conviction, Hester was sentenced to prison. (Amended Complaint, para. 22).

Hester filed a timely appeal, the case eventually reaching the Minnesota Supreme Court. Hester based his appeal on the argument that the police officers for the Lower Sioux lacked sufficient liability insurance and thus were not licensed peace officers as

[1] The point at which Hester was arrested versus detained is not relevant to the issues raised by this Motion. Under any scenario, Meece violated Hester's constitutional rights against unreasonable seizure, by either detaining or arresting him.

required by the implied consent statute. (Amended Complaint, para. 24). In reversing the conviction, the Minnesota Supreme Court noted that a conviction for test refusal can only follow a proper demand for a chemical test by a licensed peace officer. (Amended Complaint, para. 23). The Minnesota Supreme Court then noted that the Lower Sioux did not have the required amount of liability insurance at the time of Hester's arrest and, as a result, were not properly licensed peace officers. As a result, those officers could not demand a test and Hester could not be convicted of test refusal. His conviction was therefore reversed. (Amended Complaint, para. 25). This decision was released on April 27, 2011 and Hester was released from state prison shortly after. (Amended Complaint, para. 25).

ARGUMENT

I. Introduction & Legal Standard

The evaluation of the Motion by the Lower Sioux must begin with consideration of the events upon which Hester bases his claim. The Amended Complaint assert a variety of state and federal legal theories all resulting in the harm of Hester's wrongful detention, arrest and conviction – he was detained, arrested and ultimately convicted of test refusal when the person demanding the test had no legal authority to do so. As a consequence, a series of events must be considered as forming the factual basis for the claims, and potentially distinct claims. First, the Mutual Aid and Assistance Agreement placed certain requirements on the Lower Sioux and Redwood County, requirements that were not maintained when the Lower Sioux failed to maintain the necessary level of insurance. Little in the Memorandum by the Lower Sioux addresses this claim. Second,

Hester asserts that he was placed into custody by a person without the legal authority to do so. It is this claim upon which the Lower Sioux focuses must of its argument. Third, and most significantly, Hester refused a chemical test, was convicted and imprisoned as a result. It is this test refusal conviction that forms the primary basis for Hester's claims. The Lower Sioux fails to address this claim in any detail. It is this series of violations which resulted in the violation of his constitutional rights to be free from unreasonable search and seizure, ultimately including Hester's wrongful incarceration.

In addressing a Rule 12 Motion to Dismiss, the court must accept all of the factual allegations in the Complaint as true. Neitzke v. Williams, 490 U.S. 319, 367-27, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). To survive such a motion, the complaint need only state sufficient factual allegations to "raise a right to relief above the speculative level...." Bell Atlantic Corp. v. Twombley, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

In addressing a summary judgment motion, the court must examine the record for material factual disputes. Woods v. DaimlerChrysler Corp., 409 F.2d 984, 990 (8th Cir. 2005). A factual dispute is material where "a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed2d 202 (1986).

Applying either standard, the Lower Sioux Motion should be rejected and the claims against the Lower Sioux allowed to proceed.

II. Hester states a viable § 1983 claim.

Initially, the Lower Sioux assert that Hester does not state a viable claim under § 1983. A review of the Amended Complaint, in light of the applicable case law, demonstrates that he has asserted such a valid cause of action. Fundamentally, Hester's federal constitutional rights against unreasonable search and seizure were violated by the Lower Sioux, allowing Hester to assert a claim. As the Lower Sioux admit[2], the Minnesota Supreme Court found that Meece lost his status as a peace officer due to the failure to comply with the legal requirements set forth in State statute. Despite that failure, the Lower Sioux continued to utilize its officers to enforce State law as licensed peace officers, acting under color of state law. The Motion should therefore be denied.

1. The Lower Sioux Defendants are persons pursuant to § 1983.

The Lower Sioux argue that all of the Lower Sioux related Defendants are entitled to dismissal since they are not "persons" under § 1983 and thus cannot be sued. It is certainly true that a § 1983 action lies only against a person employed by the State acting in that person's individual capacity, based upon an Eleventh Amendment immunity analysis. Will v. Michigan Dept. of State Police, 491 U.S. 58, 69, 109 S. Ct. 2304, 2311, 105 L. Ed. 2d 45 (1989).

Here, however, the Lower Sioux are in a far different capacity. The officers involved, and the Lower Sioux itself, were acting under specific authority granted by the State of Minnesota to allow its officers to act as peace officers in this State. As such, the Lower Sioux are in the position of a municipality. Armstrong v. Mille Lacs County Sheriffs Dept., 228 F. Supp. 2d 972, 981 (D. Minn. 2002) aff'd sub nom. Armstrong v.

[2] Memorandum in Support of Motion, filed March 30, 2012, ECF Doc. No. 45, page 23.

Mille Lacs Tribal Police Dept., 63 F. App'x 970 (8th Cir. 2003). As a municipality, the Lower Sioux Defendants have no absolute immunity such as that afforded a State on Eleventh Amendment grounds. Monell v. Dep't of Soc. Services of City of New York, 436 U.S. 658, 701, 98 S. Ct. 2018, 2041, 56 L. Ed. 2d 611 (1978). The individuals violated Hester's constitutional rights, making the individuals and the Lower Sioux liable.

First, Meece interacted directly with Hester, detaining him at the scene, transporting him to the Redwood County jail, demanding a chemical test and arresting him for refusing that test. The Fourth Amendment stands as a bulwark of protection against the unlawful search and seizure by persons acting under the purported authority of the state and, as such as the legal basis for Hester's claims. At the time Meece engaged in this conduct, he had no legal authority to undertake these actions, thus violating Hester's federal constitutional rights against unreasonable search and seizure. Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); Giordano v. Lee, 434 F.2d 1227, 1230 (8th Cir. 1970).

The Lower Sioux argue at length that the Amended Complaint fails to state an individual claim against Meece. This argument ignores the import of the Minnesota Supreme Court decision. The Minnesota Supreme Court began by determining the extent and scope of the authority of the Lower Sioux and its police officers:

> Because Lower Sioux officers so appointed have the same authority as officers employed by the Redwood County Sheriff, we conclude that the Lower Sioux officers fall within the definition of "peace officer" in Minn. Stat. § 169A.03, subd. 18(3).

II.

> We next turn to the question of whether the Lower Sioux complied with section 626.91, subdivision 2. The Lower Sioux has the authority to appoint police officers with the same powers as peace officers employed by the Redwood County Sheriff if it complies with the requirements set forth in section 626.91, subdivision 2(a).

State v. Hester, 796 N.W.2d 328, 333 (Minn. 2011). The Minnesota Supreme Court thus conditioned the authority of the Lower Sioux officers as "peace officers" in Minnesota upon a determination they had complied with the statutory requirements. Finding as a matter of law that the Lower Sioux failed to comply, the Minnesota Supreme Court held:

> In sum, we hold that the Lower Sioux did not comply in substance with section 626.91, subdivision 2(a)(2), which required the Lower Sioux to have the correct liability insurance limits at the time Hester was arrested. Because the Lower Sioux had not satisfied the requirements of Minn. Stat. § 626.91, subd. 2(a), the Lower Sioux officer who asked Hester to submit to a chemical test was not a "peace officer" under Minn. Stat. § 169A.03, subd. 18. And because a "peace officer" did not ask Hester to submit to a chemical test, Hester cannot be convicted of criminal test refusal.

Hester, 796 N.W.2d at 336. The Minnesota Supreme Court thus determined that the Lower Sioux officers were not "peace officers" under Minnesota law, leaving them with no more authority than citizens.

This Court has stated that Hester had no "clearly established constitutional right to be free of arrest or testing by police officers covered by minimum levels of liability insurance." Memo. Op. and Order (March 13, 2012) (ECF Doc. No. 28). That may be a true statement, but it ignores the holding of the Minnesota Supreme Court. That Court did not hold that the Lower Sioux officers were peace officers without sufficient insurance coverage. As noted above, that Court held they were not peace officers at all, and thus could not demand a test from Hester. This significant distinction is ignored by

the Lower Sioux and must be considered by this Court in evaluating the claims raised here. He was not detained or arrested, nor was a test demanded, by a peace officer; Meece was acting as a private citizen, under color of the power of his purported office.

The fatal flaw, therefore, in the Lower Sioux argument is that it ignores the results in the criminal case. It is true that probable cause was initially found and that a jury convicted Hester of one of the charges. The Minnesota Supreme Court reversed that conviction for test refusal on the basis that the person who demanded the test was not a "peace officer" as required by statute. Since Meece was not a "peace officer" under Minnesota law, he had no right to detain and arrest Hester. Since he was not a peace officer, Meece had no more authority to detain and arrest Hester than an ordinary citizen. State v. Filipi, 297 N.W.2d 275, 278 (Minn. 1980). An ordinary citizen may undertake an arrest only where the offense is committed in his presence or where a felony has been committed by the person facing arrest. Minn. Stat. § 629.37 (2008). Here, Hester did not commit a felony – the charges of driving under the influence were dismissed – and Hester properly refused the test since Meece had no legal authority to require one.

Further, it is important to note that all of the conduct by Hester and Meece was premised upon Meece's assertion of his legal authority as a peace officer. He was in uniform, driving a police vehicle, and in all manners acting as a police officer, not a private citizen. At most, he had the right to attempt to detain Hester until police officers could arrive at the scene. As a Florida Court has noted:

> An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in

> their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.

Collins v. State, 143 So. 2d 700, 703 (Fla. Dist. Ct. App. 1962). Similarly here, by using the color of his office, Meece secured the cooperation of Hester in performing field sobriety tests, taking the PBT, and going to the Redwood County Law Enforcement Center and then to jail.

Second, the leaders of the Lower Sioux, and the municipality, may be liable for the creation of an unconstitutional policy or procedure. Monell v. Dep't of Soc. Services of City of New York, 436 U.S. 658, 692, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611 (1978); Messimer v. Lockhart, 702 F.2d 729, 732 (8th Cir. 1983). A "policy" involves "an official policy, a deliberate choice of a guiding principle or procedure made by the municipal official who has final authority regarding such matters." Mettler v. Whitledge, 165 F.3d 1197, 1204 (8th Cir. 1999).

Here, Hester alleges that they created a policy of securing insufficient insurance to meet the requirements of State law, and as such lost the legal authority to act as a police department. It is that decision that resulted in Hester's unconstitutional detention, test demand and arrest. The Amended Complaint thus states a valid Monell claim against the individuals, and the Lower Sioux, for creating a policy that resulted in the depravation of federal constitutional rights.

The Lower Sioux's Motion for dismissal of the federal claims, therefore, should be denied. As the Eighth Circuit stated in reversing the dismissal of a similar action: "Section 1983 rightly provides a remedy to an innocent man whose constitutional rights

have been violated by an erroneous conviction and wrongful nine-and-one-half-year incarceration." Wilson v. Lawrence County, Mo., 154 F.3d 757, 761 (8th Cir. 1998).

2. Meece's actions were under color of State law.

Meece argues that his actions were taken under color of tribal law and not state law. In addressing claims that a private party is liable under § 1983, the courts apply a two-part test:

> This fair attribution test has two components: a state policy and a state actor. The state policy component requires that "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." Id. A state policy may be inferred from either a state statute, *see* id. at 940–41, 102 S.Ct. at 2755–56, or a well-settled custom or practice, *see* Adickes v. S.H. Kress & Co., 398 U.S. at 168, 90 S.Ct. at 1613. The state actor component requires that the defendant "must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." Lugar, 457 U.S. at 937, 102 S.Ct. at 2754.

Roudybush v. Zabel, 813 F.2d 173, 176-77 (8th Cir. 1987). Meece's conduct meets both of these elements.

As to the first, Meece was acting under a state statute that granted the Lower Sioux the authority to enforce state law.

As to the second, Meece acted in cooperation with a number of county officials in order to test, detain and prosecute Hester. Without the Redwood County Law Enforcement Center equipment, Meece could not have demanded a breath test from Hester; without the jail, Meece could not have detained Hester; without the prosecutor, Meece could not have pursued criminal charges for test refusal. In addition, of course, it

was the State which granted Meece his authority by statute, actualized by the agreement of Redwood County.

Each of the Lugar elements has thus been met, thus fulfilling the color of state law requirement.

In making his argument, Meece places heavy reliance upon Bressi v. Ford, 575 F.3d 891 (9th Cir. 2009). There, the Court recognized the distinction between an officer acting purely under tribal law and one acting under state law:

> Their general request for identification was permissible as part of that determination, but they specifically requested Bressi to show his drivers' license and immediately treated his refusal as a violation of state law. Once they departed from, or went beyond, the inquiry to establish that Bressi was not an Indian, they were acting under color of state law. These actions established, beyond any dispute of fact, that the roadblock functioned not merely as a tribal exercise, but also as an instrument for the enforcement of state law. We emphasize function, rather than intent, because function is a more readily ascertainable guide to conduct and furnishes a more practical rule for determining whether a roadblock is operated (at least in part) under color of state law.

Bressi v. Ford, 575 F.3d 891, 897 (9th Cir. 2009).

Here, the Amended Complaint and the state law criminal complaint allege that Meece took immediate actions against Hester related to the state laws against driving while intoxicated.[3] He did not simply give Hester a ticket for an invalid license and, due to the cold, transport him home or to another safe location. He undertook field sobriety tests at the scene, including the preliminary breath test. He demanded additional field sobriety tests and detained Hester for the purposes of undertaking further tests. He

[3] The Lower Sioux Community Motor Vehicle Code does not include a driving under the influence violation. (Joseph F. Halloran Affidavit, filed March 30, 2012, ECF Doc. No. 46, Ex. 2).

transported Hester to the Redwood County Law Enforcement Center for those test, not to a police station or similar municipal building on the Lower Sioux Reservation. Once at the Redwood County Law Enforcement Center, Meece demanded that Hester comply with his demand for a chemical test and arrested Hester for state law criminal violations.

From these facts, it is clear that Meece almost immediately transitioned from enforcing tribal law to enforcing state law when he found Hester near his motor vehicle. Upon determining that Hester did not have a valid driver's license, all investigation of tribal law was completed – Meece had a basis to cite Hester for driving without a license in violation of the tribal ordinance. It was the purported state law violations of driving under the influence of alcohol that motivated all of Meece's conduct in detaining, demanding a test and arresting Hester.

Thus, the evidence at a minimum creates an issue of fact for future determination and the Motion should be denied on this basis.

3. Prescott and Stacy were acting under color of State law.

As with Meece, the allegations against Prescott and Stacy were under State law, not tribal law. It is only the requirement of the state law that fixed a dollar amount for insurance, as well as the other requirements of the Minnesota statute for valid peace officer status. It is their failure to comply with State law that led to the issues addressed by the Minnesota Supreme Court and the determination that Meece lacked any authority to function as a Minnesota peace officer.

The Amended Complaint, therefore, asserts a claim that the officials of the Lower Sioux acted under color of State law in establishing, and failing to maintain, a police department within the confines of State statute.

4. Qualified immunity does not shield the Lower Sioux Defendants at this stage.

The Lower Sioux further asserts that qualified immunity shields the Lower Sioux from liability. The argument is based upon the immunity afforded by the decisions of the U. S Supreme Court, not state statute. Given the early stage of this litigation, qualified immunity does not apply.

In describing the qualified immunity at issue here, the Eighth Circuit has stated:

> The first inquiry is whether the officer's conduct violated a constitutional right when the facts are viewed in a light most favorable to the party asserting the injury. Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If "a violation could be made out on a favorable view of the parties' submissions," id., the next inquiry is whether the constitutional right was clearly established; that is, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *id.* at 201-02, 121 S. Ct. 2151. "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." Id. at 202, 121 S. Ct. 2151.

Robinette v. Jones, 476 F.3d 585, 591-92 (8th Cir. 2007).

The Supreme Court has since recognized that the stage of the proceeding may make a difference in the ability to undertake the Saucier analysis:

> When qualified immunity is asserted at the pleading stage, the precise factual basis for the plaintiff's claim or claims may be hard to identify. Accordingly, several courts have recognized that the two-step inquiry "is an uncomfortable exercise where ... the answer [to] whether there was a violation may depend on a kaleidoscope of facts not yet fully developed" and have suggested that "[i]t may be that Saucier was not strictly intended to cover" this situation.

Pearson v. Callahan, 555 U.S. 223, 238-39, 129 S. Ct. 808, 819-20, 172 L. Ed. 2d 565 (2009) (citations omitted).

As to the first prong to the analysis, the constitutional violation is addressed above. Given the facts of this case taken in a light most favorable to Hester, the decision to detain, demand a test and arrest Hester were all in violation of his constitutional rights against unreasonable search and seizure. Similarly, to continue to send a police officer onto the streets, utilizing the authority of the State of Minnesota, despite a clear and certain violation of the state statute extending the police power, was a violation of those same rights by the Lower Sioux governing officials.

As to the second prong, at this stage of the proceedings, the parties know nothing about the knowledge Meece had about the levels of insurance, the requirements of the statute or the compliance by the Lower Sioux with those requirements. As a licensed peace officer, however, he certainly had the obligation to ensure that he had the authority he sought to exercise. As a result, the record is insufficiently developed, at this early stage, to determine if immunity applies to Meece.

As to the officials of the Lower Sioux, the record is clearer. They acted to secure the insufficient insurance policy, despite the clarity of the state statute and the requirements of that statute. The Minnesota Supreme Court had no difficulty in undertaking the math and dealing with the significance of the insufficient insurance:

> The Lower Sioux failed to obtain the amount of insurance required. Subdivision 2(a)(2) required the Lower Sioux to obtain a $3.6 million annual cap for liability insurance coverage, and here only $3 million in coverage was in force. The Lower Sioux's failure to meet the statutory threshold is not a technical defect.

State v. Hester, 796 N.W.2d 328, 336 (Minn. 2011). Given the clarity of the statutory requirement, and the significance of the failure to comply, the Lower Sioux officials are not entitled to immunity.

The Lower Sioux have brought the qualified immunity defense early in these proceedings, before any discovery has occurred. Given the early stage of the motion, it should be denied to allow the parties to engage in relevant discovery.

5. Hester is not barred from bringing this action by the prior State court decisions.

The Lower Sioux next asserts it is entitled to dismissal of the wrongful arrest claim on the basis of *res judicata*. As the Lower Sioux note, *res judicata* bars the relitigation of claims litigated in another action, including the criminal matter. Allen v. McCurry, 449 U.S. 90, 96, 101 S. Ct. 411, 414, 66 L. Ed. 2d 308 (1980). The Lower Sioux assert, therefore, that the wrongful arrest claims are barred, apparently because the state trial court found probable cause for Meece's actions. Such an argument ignores the impact of the Minnesota Supreme Court decision and the effect that decision had on all aspects of the criminal case.

As discussed above, the Minnesota Supreme Court began by determining the extent and scope of the authority of the Lower Sioux and its police officers, concluding that the Lower Sioux officers were not "peace officers" under Minnesota law, Hester, 796 N.W.2d at 336, leaving them with no more authority than citizens.

The fatal flaw, therefore, in the Lower Sioux argument is that it ignores the results in the criminal case. It is true that probable cause was initially found and that a jury convicted Hester of one of the charges. The Minnesota Supreme Court reversed that

conviction for test refusal on the basis that the person who demanded the test was not a "peace officer" as required by statute. Since Meece was not a "peace officer" under Minnesota law, he had no right to detain and arrest Hester.

Since the Minnesota Supreme Court determined that Meece lacked the authority to act as a peace officer, he lacked any legal basis to detain, demand a test, or arrest Hester. Issue preclusion does not bar Hester's claims.

III. The Lower Sioux waived sovereign immunity.

The Lower Sioux argue that sovereign immunity bars these claims. It is certainly true that the Lower Sioux enjoy sovereign immunity in a number of settings. Here, however, that immunity was expressly waived as a condition of the Lower Sioux having the authority to enforce Minnesota law.

The state statute allowing the Lower Sioux the authority to enforce state law, the Minnesota Legislature required:

> (1) the community agrees to be subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties arising out of the law enforcement agency powers conferred by this section to the same extent as a municipality under chapter 466, and the community further agrees, notwithstanding section 16C.05, subdivision 7, to waive its sovereign immunity with respect to claims arising from this liability.

Minn. Stat. Ann. § 626.91, subd. 2(a)(1) (1997). As cited in the Lower Sioux Memorandum, this language is similar to that adopted by the Lower Sioux in its resolution agreeing to be bound by the state statute. Nothing in this statute limits the waiver of sovereign immunity to state tort claims or in any other manner precludes a claim under federal law. In fact, municipalities are subject to just such potential liability,

making the Lower Sioux similarly liable. Nevertheless, the Lower Sioux assert sovereign immunity on two grounds.

First, the Lower Sioux assert immunity for all actions taken to enforce tribal law. As noted above, at least an issue of fact exists over the point at which Meece switched from the enforcement of the tribal law licensing requirement to the enforcement of the Minnesota driving under the influence statue. The actions violating Hester's constitutional rights were taken in pursuing the enforcement of State law, not the tribal license violation. Discovery should be allowed to determine that point.

Second, the Lower Sioux argues that they are immune because the officers were not Minnesota peace officers at the time Hester was detained. In effect, the Lower Sioux seek the protection of sovereign immunity even though Meece was acting under the color of state law in his interactions with Hester. The Lower Sioux acted by directing Meece to enforce State law, as well as tribal law, when he was on patrol. By asserting the authority to act for the State of Minnesota, and in enforcement of its laws, Meece and the Lower Sioux waived sovereign immunity by state statute and its own Resolution.

The Motion to Dismiss based upon sovereign immunity, therefore, should be denied.

IV. The claims are not barred by the statute of limitation.

As did Redwood County, the Lower Sioux assert that Hester's claims are barred by the applicable statute of limitation. The Lower Sioux argues that the applicable statute is two years, and that since Hester's suit was served more than two years after his initial arrest, it is time barred. This argument fails on a number of bases.

First, the proper statute of limitation for the federal claims is six years, not two. Under federal law, the courts look to the state law for general personal injury claims. Wallace v. Kato, 549 U.S. 384, 387, 127 S. Ct. 1091, 1093, 166 L. Ed. 2d 973 (2007). The U.S. Supreme Court has expressly rejected the "most analogous" state tort limitation period: "We accordingly hold that where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions." Owens v. Okure, 488 U.S. 235, 249-50, 109 S. Ct. 573, 582, 102 L. Ed. 2d 594 (1989). Minnesota has a six year general statute of limitation. Minn. Stat. § 541.05 (2008).

Thus, contrary to the claims of the Lower Sioux, Hester's federal claims are not time barred – less than six years passed from the date of his first interaction with the police and the start of this suit.

Even if the two year statute applied, Hester's claims are not time barred. Where a claim arises from an unlawful conviction, the plaintiff cannot pursue a § 1983 action until the conviction has been reversed or otherwise invalidated. Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). Here, it was not until April 2011 that Hester's conviction was reversed. It was at that point that his cause of action accrued and he could pursue this action. Since this case was brought well within two years of the reversal of his conviction, Hester's federal claims are not time barred even under the two year statute of limitation.

Second, Hester's state law claims are also not time barred. Minnesota does have a two year limitation period for intentional torts. Minn. Stat. § 541.07(1) (2008). The

issue is thus when Hester's cause of action accrued. "A cause of action accrues and the statute of limitations begins to run when the cause of action will survive a motion to dismiss for failure to state a claim upon which relief can be granted." Herrmann v. McMenomy & Severson, 590 N.W.2d 641, 643 (Minn.1999).

As with federal law, Minnesota precludes litigating the validity of a conviction in a collateral action. State v. Schmidt, 712 N.W.2d 530 (Minn. 2006); Travelers Ins. Co. v. Thompson, 281 Minn. 547, 555, 163 N.W.2d 289, 294 (1968). In addressing this issue in a legal malpractice context, the Minnesota Supreme Court required the conviction to be reversed before the defense attorney could be sued for malpractice: "Thus, we conclude that Noske's legal malpractice claim did not accrue until he received habeas corpus relief in 1999, the point at which it was 'possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded.'" Noske v. Friedberg, 670 N.W.2d 740, 744-45 (Minn. 2003) (citation omitted).

Here, if Hester had started his action upon his arrest or even conviction, he could not have stated a claim upon which relief could be granted. He would have confronted an immediate motion to dismiss, with the Lower Sioux arguing that his civil action was a collateral attack upon his conviction which Minnesota law did not allow. Thus, his cause of action on the State tort claims accrued when the Minnesota Supreme Court reversed his conviction, less than two years before he brought these claims.

Contrary to the arguments of the Lower Sioux, therefore, Hester's claims are not barred by the applicable statute of limitation.

VII. Hester's Complaint states a claim of negligence against the Lower Sioux.

Again, as did Redwood County, the Lower Sioux seek dismissal of the state court negligence claims Hester asserted in the Amended Complaint. Hester asserted negligence and intentional torts as the basis for his state law claims, all of which state valid claims against the Lower Sioux. As a result, the dismissal motion for the state law claims should be denied.[4]

One of the state law claims brought by Hester is a negligence claim. This claim asserts that the Lower Sioux were negligent in failing to ensure that its police officers remained properly licensed peace officers. Contrary to the argument of the Lower Sioux, the source of this duty is not merely state statute, but also the Mutual Aid and Assistance Agreement signed by Redwood County and the Lower Sioux.

The Minnesota courts have recognized the notion of a voluntarily assumed duty, even in a municipal setting: ""Special duty" is nothing more than convenient terminology, in contradistinction to "public duty," for the ancient doctrine that once a duty to act for the protection of others is voluntarily assumed, due care must be exercised even though there was no duty to act in the first instance." Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 806 (Minn. 1979).

[4] In the event this Court dismisses the federal claims, and rejects continued jurisdiction over this case, the State law claims should be dismissed without prejudice, giving Hester the opportunity to pursue them in State court, especially since the Lower Sioux do not seek dismissal of the intentional tort claims other than on statute of limitation grounds.

As noted above, in 1998, Redwood County and the Lower Sioux entered into a Mutual Aid and Assistance Agreement by which the officers of the Lower Sioux police department were granted the authority to serve as peace officers so long as they complied with the requirements of Minn. Stat. § 626.91. (White Aff., Ex. 1). They did so to comply with State statute and to secure the mutual benefit of the increased authority of Lower Sioux police officers to include their ability to enforce State law. By entering into such an Agreement, the Lower Sioux voluntarily assumed the duty to ensure compliance with the Agreement and all of its terms, including the requirements of Minn. Stat. § 626.91.

Again as did Redwood County, the Lower Sioux place further reliance upon Cracraft, asserting that the "public duty" doctrine bars the claims here. The doctrine, however, is limited to those settings where the municipality deals with the public at large and does not address the "scope of a duty which may be owed by a municipality directly to a person with whom it deals." Gilbert v. Billman Const., Inc., 371 N.W.2d 542, 546 (Minn. 1985). Where the municipality deals directly with individuals, and not with third persons, the municipality is liable the same as any individual would be. Gilbert, 371 N.W.2d at 546.

Here, the Lower Sioux, including Meece, acted directly on Hester by detaining, demanding a test and arresting Hester, resulting in a prosecution that resulted in Hester's criminal conviction for test refusal and incarceration for about 28 months. As did the County Health Department in Gilbert, the direct interaction between Hester and the Lower Sioux is one of the causes of his harm.

In addition, the Court in Gilbert confirmed the notion that a municipality may, by its ordinances and other actions, assume a duty:

> In Lorshbough v. Township of Buzzle, 258 N.W.2d 96, 102 (Minn.1977), we acknowledged the principle that:
>
> > [A] governmental unit owes a particular individual a duty of care when its officer or agent, in a position and with authority to act, has or should have had knowledge of a condition that violates safety standards prescribed by statute or regulation, and that presents a risk of serious harm to the individual or his property. When such serious injury is reasonably foreseeable, the governmental unit has a duty to exercise reasonable care for the individual's safety.

Gilbert v. Billman Const., Inc., 371 N.W.2d 542, 546 (Minn. 1985). *See also* Miskovich v. Indep. Sch. Dist. 318, 226 F. Supp. 2d 990, 1034 (D. Minn. 2002) (citations omitted) ("As the Plaintiffs have acknowledged, they do not seek to hold Grand Rapids liable for a failure to provide general police protection, by alleging that the City had a duty to do more to prevent them from being involved in the training exercise—rather, they seek to hold Grand Rapids liable for its own negligence in the execution of the training that it voluntarily undertook. Thus, we are presented with a circumstance in which the Plaintiffs are alleging "a breach of some duty owed them in their individual capacities and not merely a breach of some obligation owed to the general public."") As a consequence by entering into the Mutual Aid and Assistance Agreement, the Lower Sioux assumed a duty and can be liable in negligence.

This Court, therefore, should deny the Motion to Dismiss the negligence claims.

CONCLUSION

This matter is before the Court pursuant to the Lower Sioux's Motion to Dismiss. A review of the arguments demonstrates that they do not form a basis to dismiss any of the claims Hester asserts. The Motion, therefore, should be denied and the case allowed to proceed based upon the Amended Complaint.

Dated: April 20, 2012

s/ Kenneth R. White_____
Kenneth R. White (#0141525)
LAW OFFICE OF KENNETH R. WHITE, P.C.
212 Madison Avenue, Suite 200
Mankato, MN 56001
Telephone: (507) 345-8811
Facsimile: (507) 345-5020
Email: kenwhite@hickorytech.net

s/ Allen P. Eskens_____
Allen P. Eskens
Attorney I.D. #224856
Eskens Peterson Law Firm, Chtd.
151 St. Andrews Court, Ste. 610
P. O. Box 1056
Mankato, MN 56002-1056
Telephone: (507) 345-5500
Facsimile: (507) 345-5207
Email: aeskens@mankatolaw.com

Attorneys for Plaintiffs