UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MILLE LACS BAND OF OJIBWE, a federally recognized Indian tribe; SARA RICE, in her official capacity as the Mille Lacs Band Chief of Police; and DERRICK NAUMANN, in his official capacity as Sergeant of the Mille Lacs Band Police Department, Plaintiffs, -vs- COUNTY OF MILLE LACS, MINNESOTA; JOSEPH WALSH, individually and in his official capacity as County Attorney for Mille Lacs County; DON LORGE, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	Court File No. 17-cv-05155 (SRN-LIB) **DEFENDANTS' OBJECTION TO MAGISTRATE JUDGE BRISBOIS' LETTER ORDER OF JULY 19, 2019**

Pursuant to L.R. 72.2(a), Defendants County Attorney Joseph Walsh and Sheriff Don Lorge object to the Magistrate Judge's July 19, 2019 denial of their motion for leave to file a dispositive motion before the close of fact discovery. (Doc. No. 72.)

ARGUMENT

I. LEGAL STANDARD.

The Court must reverse a magistrate judge's ruling if it is clearly erroneous or contrary to law. *See* 28 U.S.C. § 636; Fed. R. Civ. P. 72; D. Minn. L.R. 72.2(a)(3). A ruling is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure. *Edeh v. Midland Credit Management, Inc.*, 748 F. Supp. 2d 1030,

1043 (D. Minn. 2010). A ruling is clearly erroneous if the court is left with the definite and firm conviction that a mistake has been committed. *Id.*

In this case, the Magistrate Judge's letter order ("Order" Doc No. 72) denying the County Attorney's and Sheriff's motion for leave to file a dispositive motion before the close of fact discovery is contrary to law. (Doc. No. 68.) Specifically, the Order is contrary to *Craft v. Wipf*, 810 F.2d 170, 173 (8th Cir. 1987), which held that a district court's decision to defer qualified immunity to a later time is a reversible error. In reversing that district court decision to postpone an immunity ruling until trial, *Craft* directed the district court to consider the qualified immunity issue on remand and make its ruling thereon. *Id.*;[1] *accord Brown v. Nix*, 33 F.3d 951, 953 (8th Cir.1994) (finding district court erred in not ruling on qualified immunity defense where no dispute existed as to the material facts).

The County Attorney and Sheriff sought leave to bring an early motion for summary judgment on the following legal grounds: (1) several immunities, including prosecutorial immunity, Eleventh Amendment immunity, and qualified immunity; (2) lack of subject-matter jurisdiction; (3) *Younger* abstention; and (4) that the official-capacity claims against Walsh and Lorge are redundant as a matter of law to those against

[1] The First, Second, Fifth and Tenth Circuits have similar rules. *Musso v. Hourigan*, 836 F.2d 736, 741 (2d Cir. 1988) (allowing an appeal from an order that failed to rule on a qualified immunity defense); *Zayas-Green v. Casaine*, 906 F.2d 18, 23 (1st Cir. 1990) (concluding that defendants had right to appeal from pretrial order refusing to entertain motions raising qualified immunity); *Workman v. Jordan*, 958 F.2d 332, 335-36 (10th Cir. 1992).

the Defendant Mille Lacs County as relief against the County can bind both of them, see Fed. R. Civ. P. 65(d)(2)(B). (Doc. No. 68 p. 1.)

The immunities that County Attorney and Sheriff sought to raise are no ordinary defenses. These immunities are designed to prevent litigation itself, not later damages awards. *Myers v. Morris*, 810 F.2d 1437, 1441 (8th Cir. 1987). Not only should these immunities be raised early in litigation, denials of those immunities on legal grounds can be immediately appealed, before a final judgment, and as a matter of right. *Id.* (prosecutorial immunity); *Aaron v. Shelley*, 624 F.3d 882, 883-84 (8th Cir. 2010) (qualified immunity); *see also Hinshaw v. Smith*, 436 F.3d 997, 1003 (8th Cir. 2006). In *Craft*, the Eighth Circuit addressed the right to have the issue decided even if plaintiffs did not seek monetary damages (810 F.2d at 173). And sovereign immunity can be raised at any time, even for the first time on appeal. *Hagen v. Sissteon-Wahpeton Community College*, 205 F.3d 1040, 1039-40 (8th Cir. 2000).

These immunities are effectively lost if they are not adjudicated early because their purpose is to avoid burdening the immune defendant from the distraction of litigation. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (an immunity from suit is "effectively lost if a case is erroneously permitted to go to trial"). The *Mitchell* opinion stressed that qualified immunity is immunity from suit, not merely immunity from liability; it includes the right to avoid pretrial discovery. *Id.* ("Even such pretrial matters as discovery are to be avoided if possible, as inquiries of this kind can be peculiarly disruptive of effective government." (cleaned up)).

Abstention also should be heard early, too, and is usually raised in a motion to dismiss. *See, e.g., Night Clubs, Inc. v. City of Fort Smith*, 163 F.3d 475, 478 (8th Cir. 1998). Furthermore, the basis for Walsh's prosecutorial immunity and the reasons for *Younger* abstention both stem from ongoing state criminal proceedings brought by Walsh in his prosecutorial capacity as county attorney.

Subject-matter jurisdiction is a "threshold" issue. *Kronholm v. F.D.I.C.*, 915 F.2d 1171, 1174 (8th Cir. 1990); *Lors v. Dean*, 746 F.3d 857, 861 (8th Cir. 2014). And jurisdictional issues should be resolved before the merits. *Osborn v. United States*, 918 F.2d 724 729-30 (8th Circuit 1990). Furthermore, "sovereign immunity is jurisdictional in nature," *FDIC v. Meyer*, 510 U.S. 471, 475 (1994), which favors resolving the immunities and jurisdictional questions together.

The Order found no significant efficiencies in granting the County Attorney and Sheriff's motion for leave to file a dispositive motion before the close of fact discovery. Regardless of the correctness of the Magistrate Judge's view of judicial efficiency though, *Craft* shows that the immediate right to an interlocutory appeal and prompt ruling is nondiscretionary. The denial of the motion for leave to file a dispositive motion was thus contrary to law, and the Order should thus be set aside.

CONCLUSION

For the reasons stated above, County Attorney Joseph Walsh and Sheriff Don Lorge respectfully object to the Magistrate Judge's July 19, 2019 denial of their motion for leave to file a dispositive motion before the close of fact discovery. (Doc. No. 72.)

Dated: August 2, 2019

BRIGGS AND MORGAN, P.A.

By *s/Scott G. Knudson*

Scott G. Knudson (#141987)
Scott M. Flaherty (#388354)
2200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Telephone: (612) 977-8400
Fax: (612) 977-8650
Email: sknudson@briggs.com
sflaherty@briggs.com

Attorneys For Defendant
Joseph Walsh

Dated: August 2, 2019

KELLEY, WOLTER & SCOTT, P.A.

By *s/Douglas A. Kelley*

Douglas A. Kelley (#54525)
Steven E. Wolter (#170707)
Brett D. Kelley (#397526)
Centre Village Offices, Suite 2530
431 South Seventh Street
Minneapolis, MN 55415
Telephone: (612) 371-9090
Fax: (612) 371-0574
Email: dkelley@kelleywolter.com
swolter@kelleywolter.com
bkelley@kelleywolter.com

Attorneys For Defendant
Don Lorge