IN THE COURT OF APPEALS OF THE
LOWER SIOUX COMMUNITY IN MINNESOTA

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Margaret Lamote,

*Plaintiff-Appellant,*

vs.

Dennis Lothert and Jackpot Junction,

*Defendants-Appellees*



Court of Appeals File No. 94-120
Decided December 16, 1996

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*Bonnie J. Bennett and Patrick T. Tierney for Appellant.*

*Joseph F. Halloran and John E. Jacobson for Appellee Jackpot Junction.*

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MEMORANDUM OPINION

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*Before SMALL, Chief Justice, OLSON, Associate Justice, and GREY EAGLE, Associate Justice.*

*Opinion for the Court filed by Chief Justice Small.*

Margaret Lamote alleges that Dennis Lothert, an employee of Jackpot Junction, sexually harassed her while she was employed at Jackpot Junction in 1991 and 1992. She also claims that she was constructively discharged from her employment with Jackpot Junction after she complained of Mr. Lothert's actions. Ms. Lamote originally sued Mr. Lothert and Jackpot Junction in a Minnesota District Court, which dismissed the matter in favor of this Court's jurisdiction.

Mr. Lothert never answered Ms. Lamote's complaint, and presumably the action against him is still pending before the tribal court.[1] Jackpot Junction did not answer Ms. Lamote's complaint, either. Instead, it filed a motion to dismiss her complaint against it for lack of subject matter jurisdiction and failure state a claim upon which relief could be granted. The trial court granted Jackpot Junction's motion, and dismissed her complaint with prejudice as to Jackpot Junction. Lamote v. Lothert, Case No. CIV-053, Slip Op. (July 27, 1994).

The basis for the trial court's dismissal was its finding that Jackpot Junction was operated as an arm of the Lower Sioux Community tribal government, possessing sovereign immunity from suit which had not been unequivocally waived with respect to Ms. Lamote's claims. On appeal, Ms. Lamote claims that the trial court erred in so finding, and that the court should have found that Jackpot Junction was not operated as an arm of the Lower Sioux tribal government, but rather as a corporate entity organized under federal law, 25 U.S.C. § 477 (Section 17 of the Indian Reorganization Act ["IRA"]), which had waived its sovereign immunity from suit.[2]

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[1]The trial court noted that "Defendant Lothert did not respond to the complaint, and Plaintiff has not requested default judgment against [him]." Lamote v. Lothert, Case No. CIV-053, Slip Op. at n.1 (July 27, 1994).

[2] In its brief, Jackpot Junction claims that Ms. Lamote "recycled" her memorandum in opposition to dismiss for her appellate brief, and that in so doing, she neglected to assign error to the trial court, which should result in affirmance. (Appellee's Brief, 2). The Court declines to dismiss the appeal on so technical a basis, and finds that Appellant sufficiently assigned error in her brief and in oral argument as to present a valid appeal.

Ms. Lamote's complaint contains three counts against Jackpot Junction: (1) violation of the Minnesota Human Rights Act; (2) violation of Title VII of the Civil Rights Act; and (3) intentional infliction of emotional distress. (Complaint, pp. 3-4). The first two are easily resolved; the third is more difficult.

*Minnesota Human Rights Act*[3]

Ms. Lamote alleges that the Minnesota Human Rights Act, which prohibits discriminatory employment practices and sexual harassment, applies to Jackpot Junction. But Appellant has overlooked the important *preliminary* question of whether the Minnesota Human Rights Act applies in this jurisdiction. The courts of the Lower Sioux Community are not part of, or subject to the control of the courts of the State of Minnesota. The Community's Court system was created by action of the Community's governing body, as an exercise of the Community's inherent sovereign authority. *See* Lower Sioux Community Council Resolution No. 38-93.

As this Court noted in Lower Sioux Community v. Scott, Ct. App. No. 93-100, Slip. Op. at 2 (January 31, 1994):

> Indian tribes are "distinct independent political communities, retaining their original natural rights" in matters of local self-governance. Worcester v. Georgia, 31 U.S. (6 Pet) 515, 559 (1832); *see also* United States v. Mazurie, 419 U.S. 544, 557 (1975). The powers of Indian tribes are, in general, "*inherent powers of a limited sovereignty which has never been extinguished*," Felix S. Cohen, Handbook of Federal Indian Law, 122 (1945) (emphasis in original). These powers derive

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[3]Whether Appellant has stated a claim on which relief can be granted under either the Minnesota Human Rights Act or Title VII of the Civil Rights Act are questions of law, which we review *de novo*. Ruwitch v. William Penn Live Assur. Co. of America, 966 F.2d 1234, 1236 (8th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 331 (1992). (The federal case law cited throughout this opinion is not binding on this Court, and we cite to it as persuasive authority only.)

> from the fact that Indian tribes were self-governing sovereign political communities before the coming of the Europeans. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973).

As such, neither the Lower Sioux Community nor its court system derive from, or are subject to the laws of Minnesota. Bringing a claim under the Minnesota Human Rights Act in this Court is akin to bringing such a claim in a Canadian Court: just as the laws of Minnesota do not apply in Canada, they do not apply here.[4] Thus, the trial court properly dismissed Ms. Lamote's Minnesota Human Rights Act claim for lack of subject matter jurisdiction and failure to state a claim on which relief can be granted.

*Title VII of the Civil Rights Act*

Just as with Ms. Lamote's Minnesota Human Rights Act claim, this Court must first answer the preliminary question of whether Title VII applies in this jurisdiction. Neither party has given the Court any indication that the Lower Sioux Community has adopted Title VII, or incorporated it into the Community's laws. Indeed, a search of Community law demonstrates that the Community has not done so. But our inquiry does not end there.

Unlike Minnesota, which has no authority over Indian tribes, Congress has plenary authority over Indian tribes. It can therefore "limit, modify or eliminate the

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[4]Of course, if it chose to do so, the Lower Sioux Community could incorporate the protections of the Minnesota Human Rights Act into its own laws. But it has not done so to date. We note in passing, however, that those within the jurisdiction of the Lower Sioux Community are protected by the Indian Civil Rights Act, 25 U.S.C. § 1302 *et seq.*, which contains due process and equal protection clauses, as well as other civil rights protections. *See also*, Lower Sioux Community Resolution No. 30-95 (March 23, 1995) (waiving Community's sovereign immunity from suit in Tribal Court for injunctive and declaratory relief pursuant to the Indian Civil Rights Act).

powers of local self-government which the tribes otherwise possess." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). Accordingly, "Constitutional or statutory guarantees are not applicable to the exercise of governmental powers by an Indian tribe except to the extent that they are made explicitly binding by the Constitution or an Act of Congress." Stroud v. Seminole Tribe of Florida, 606 F. Supp. 678, 679 (S.D. Fla. 1985) (citations omitted). We must therefore determine whether Congress has made the provisions of Title VII binding on the government of the Lower Sioux Community.

In fact, Congress has specifically excluded Indian tribes and businesses operating on or near Indian reservations "from the employment discrimination prohibitions of Title VII." Wardle v. Ute Indian Tribe, 623 F.2d 670, 672 (10th Cir. 1980). Although Title VII prohibits any employer from discharging an individual "because of such individual's race, color, religious, sex, or national origin," 42 U.S.C. § 2000e-2(a), "the term 'employer' . . . does not include . . . an Indian tribe." 42 U.S.C. § 2000e-(b)(1). This exemption has been held to apply to Indian tribal business entities as well. *See* Dille v. Council of Energy Resource Tribes, 801 F.2d 373, 376 (10th Cir. 1986)(applying exemption to group of Indian Tribes); Barker v. Menominee Nation Casino, 897 F. Supp. 389, 394 (E.D. Wis. 1995) (applying exemption to tribal casino). Thus, Appellant's Title VII Claim was also properly dismissed for lack of subject matter jurisdiction and failure to state a claim by the Trial Court, for Title VII does not apply to Jackpot Junction.

*Intentional Infliction of Emotional Distress*

As noted at the outset of this opinion, Appellant's claim for intentional infliction of emotional distress is more difficult. Unlike her other claims, it has no statutory basis, so it is not readily apparent whether the "common law" claim of intentional infliction of emotional distress should apply in this jurisdiction. The Community's Judicial Code provides that the Tribal Court shall have jurisdiction over all persons within the Community's Reservation and a 10-mile radius surrounding the Reservation, and over persons who transact business on the Reservation or commit tortious acts on the Reservation. (LSC Judicial Code, Title 1, Ch. II, §§ 1(a)(b) and (d)). The Code also provides that the Court shall have "exclusive original and appellate jurisdiction in all matters in which the Lower Sioux Community in Minnesota, any Tribal entity or subdivision, whether governmental or commercial in nature, or its officers or employees are parties in their official capacities." Id. at § 1(e)(1). Because this matter involves a commercial enterprise of the Community (Jackpot Junction) and centers upon a tortious act allegedly committed on the Reservation, the Court has subject matter jurisdiction to hear Appellant's claim of intentional infliction of emotional distress, unless Jackpot Junction is immune from suit.

*Sovereign Immunity*

Our finding that the Lower Sioux Courts have jurisdiction over Appellant's common law tort claim is only the first hurdle which Appellant must overcome, however. Appellant must also overcome the hurdle presented by Jackpot Junction's

motion to dismiss, i.e. its sovereign immunity from suit, because a grant of jurisdiction is not a waiver of sovereign immunity. United States v. Nordic Village, 503 U.S. ____, 117 L.Ed.2d 181, 190 (1992), *quoting* Blatchford v. Native Village of Noatak, 501 U.S. ____, 115 L.Ed.3d 689 (1991) ("The fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim."). Indeed, the Lower Sioux Judicial Code expressly provides that nothing contained in the language quoted above "shall be construed as a waiver of the sovereign immunity of the Tribe or its officers or enterprises." (Judicial Code, Title 1, Ch. II, § 1(e)(2)).

Sovereign immunity is not simply an affirmative defense; it is a jurisdictional barrier to suit. It goes to the *power* of a court to hear a matter brought before it. Puyallup Tribe, Inc. v. Dept. of Game, 433 U.S. 165, 172 (1977) ("Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe."); *see also*, Smith v. Babbitt, 875 F. Supp. 1353 (D. Minn. 1995), *affirmed*, 1996 WL 640726 (8th Cir. 1996). If Jackpot Junction has not unequivocally waived its sovereign immunity, Jackpot Junction retains its fundamental right not to be sued in any court, including this one. "Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy . . ., the application of which is within the discretion of the district court." California v. Quechan Tribe, 595 F.2d 1153, 1155 (9th Cir. 1979). This fundamental right is a bar not only to entry of judgment against a tribe or tribal entity, but to suit in the first instance. *See, e.g.*, Puyallup,

433 U.S. at 172. If this Court finds, as the trial court found, that Jackpot Junction has not waived its sovereign immunity for Appellant's tort claim in this jurisdiction, this Court must conclude that it has no subject matter jurisdiction over Appellant's intentional infliction of emotional distress claim.

As the trial court noted, the Lower Sioux Community is organized under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 461, *et seq*. The Community "is governed by two primary organic documents--its Constitution and its Corporate Charter." Lamote v. Lothert, Slip Op. at 1. Appellant argues that Jackpot Junction is an entity operating pursuant to the Community's corporate charter, and that the Community has waived Jackpot's sovereign immunity from suit because the corporate charter contains a "sue and be sued" clause. (Appellant's Brief, 5). Jackpot argues that is operated solely pursuant to the Community's constitutional authority, and that it has not waived its immunity from suit. (Appellee's Brief, 3).

The Trial Court found that this question, i.e. under which organic document Jackpot operates, is a question of fact. Lamote v. Lothert, Slip Op. at 2. We agree. As such, the standard of review for the Court's finding that Jackpot Junction is operated pursuant to the Community's Constitution is clear error. Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985). Thus, we must "defer to the [trial] court's findings so long as they are supported by the record and are not clearly erroneous . . . ." Hetzel v. United States, 43 F.3d 1500, 1505. Further, we will "not reverse even if this court as the trier of fact would have weighed the evidence

differently.". Id. *citing* Cuddy v. Carmer, 762 F.2d 119, 124 (D.C. Cir.) *cert. denied*, 474 U.S. 1034 (1985).

Although the clear error standard is generally articulated with respect to trial court judges' ability to best evaluate the credibility of witnesses, it also applies to trial court judges' findings with regard to documentary evidence. Anderson, 470 U.S. at 574 (finding clear error standard applicable "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts"). *See also* Church of God in Christ, Inc. v. Graham, 54 F.3d 522, 525 (8th Cir. 1995). As a result, we are required to give the Trial Court's factual finding effect "unless, after carefully reading the record and according due deference to the trial court, we form a 'strong, unyielding belief that a mistake has been made.'" Windsor Mount Joy Mut. Ins. Co. v. Giragosian, 57 F.3d 50, 53 (1st Cir. 1995).

The Trial Court was presented with two portions of Community law under which Jackpot Junction could be operated: (1) Article V(n) of the Community Constitution, which provides that the Community is empowered to "charter subordinate organizations for economic purposes and to regulate the activities of all such organizations under ordinances which shall be subject to review by the Secretary of the Interior; or (2) Article V(f) of the Community Constitution, which provides that the Community can "manage all economic affairs and enterprises of the Community in accordance with the terms of a charter which may be issued to the Community by the Secretary of the Interior." The Trial Court was presented

with the following evidence as to which of these provisions Jackpot Junction operated under:

(1) An affidavit of the then-chairman of the Community Council, stating that he had been a member of the Council for ten years, had lived on the Community Reservation for 34 years, and that the Community had never operated pursuant to its Corporate Charter;

(2) A Community Council resolution "confirming" that Jackpot Junction is operated pursuant to the Community Constitution and not under the Corporate Charter;

(3) Findings of the Minnesota Department of Human Rights that Jackpot Junction operates as an arm of the tribal government;

(4) The signatures on various equipment leases which were the subject of McCarthy v. Jackpot Junction Bingo Hall, 490 N.W.2d 156 (Minn. Ct. App. 1992), entered into on behalf of the Community by the General Manager of Jackpot Junction rather than by the Community Council; and

(5) The designation on Appellant's unemployment claim that her employer was "Jackpot Junction Lower Sioux Indian Community (Corp.)".

Lamote v. Lothert, Slip. Op. at 2. Obviously, there was evidence in the record to support the trial court's finding of fact that Jackpot Junction was operated pursuant to the Community Constitution and not the Community's Corporate Charter. We simply are not left with the "definite and firm conviction that a mistake has been committed." Roper v. Peabody Coal Co., 47 F.3d 925, 927 (7th Cir. 1995). Indeed, we could not hold such a conviction because Judge BlueDog "chose between permissible views of the evidence." Id. *citing* Anderson, 470 U.S. at 573-74.

Although the trial court's factual finding based on the evidence before it was not clearly erroneous, we must also evaluate Appellant's claim that she was wrongly denied the opportunity to conduct discovery so that she could present more

evidence that the Community operates Jackpot Junction pursuant to its Corporate Charter. When examining their own subject matter jurisdiction, courts have the authority to "resolve any factual dispute regarding the existence of subject matter jurisdiction." Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 451 (6th Cir. 1988), *citing* Rogers v. Strattorn Indus., 798 F.2d 913, 915 (6th Cir. 1986) and Mortenson v. First Federal Sav. & Loan Ass'n, 549 F.2d 884 (3d Cir. 1977). Indeed, courts' authority in this area is quite broad, and they can use several methods to gather factual information regarding subject matter jurisdiction. Courts may "consider affidavits, allow discovery, her oral testimony, order an evidentiary hearing, or even postpone its determination if the question of jurisdiction is intertwined with the merits." Id. The extent of the factual inquiry will depend on the specific jurisdictional question before the court.

In cases involving sovereign immunity, courts are presented with a unique dilemma: "allowing extensive discovery will subject the defendant to proceedings from which it may ultimately be immune, and may "frustrate the significance and benefit of entitlement to immunity from suit. Accordingly, discovery and fact-finding should be limited to the essentials necessary to determining the preliminary question of jurisdiction." Id.

What sort or amount of discovery should be allowed is a matter left wholly to the discretion of the trial court, and we review the trial court's decision on that issue for abuse of discretion. Majd-Pour v. Georiana Community Hosp. Inc., 724 F.2d 901, 903 (11th Cir. 1984) (ruling that district court's dismissal of case for lack of

subject matter jurisdiction after preliminary hearing and before discovery was abuse of discretion). Although a trial court "has wide discretion to determine the scope of [ ] discovery, a plaintiff must have ample opportunity to present evidence bearing on the existence of jurisdiction." Colonial Pipeline Co. v. Collins, 921 F.2d 1237 (11th Cir. 1991).

In the Majd-Pour case, the court found that the district court's failure to allow the plaintiff reasonable discovery before dismissal for lack of subject matter jurisdiction "was premature and an abuse of the court's discretion." 724 F.2d at 903. There, the plaintiff had to demonstrate the location of the defendants' principal places of business to prove that the federal district court had diversity jurisdiction. Although the plaintiff argued at a hearing on a motion for a temporary restraining order that with further discovery he could uncover facts to prove diversity jurisdiction, the court not only denied the motion for a temporary restraining order, but dismissed the matter entirely without allowing any discovery. Id. In so doing, the Majd-Pour court violated the rule that "[b]efore dismissing a case for want of jurisdiction, a court should permit the party seeking the court's intervention to engage in discovery of facts supporting jurisdiction." Alliance of American Insurers v. Cuomo, 854 F.2d 591, 597 (2d Cir. 1988)(citations omitted).[5]

A plaintiff need not be permitted discovery on jurisdictional facts if the court already has extensive factual evidence before it. For example, in Thigpen v. United

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[5]*But see* Gerding v. Republic of France, 943 F.2d 521, 524 (4th Cir. 1991), *cert. denied* 113 S.Ct. 1812 (1993) (upholding dismissal based on Foreign Sovereign Immunity Act where plaintiff failed to meet burden of demonstrating that defendants were instrumentalities of foreign government because plaintiff did not make any requests for discovery).

States, the Fourth Circuit held that it was not an abuse of discretion for a trial court to stay discovery on factual issues and dismiss for lack of subject matter jurisdiction where the court had access to extensive affidavits and testimony on the same issues from a related criminal trial. 800 F.2d 393, 397 (4th Cir. 1986).

In the present case, Appellant was not permitted to conduct discovery, (Protective Order, June 30, 1994), nor did the trial court have an extensive factual record before it. (*See* page 10, *supra*). And while the protective order was not appealable, Appellant argued in her brief and at oral argument that without the opportunity to conduct discovery, she was unable to meet her burden of establishing subject matter jurisdiction.[6] (Oral Argument Transcript, 15; Appellant's Brief, 4). We agree with Appellant, and find that the trial court abused its discretion by dismissing Appellant's claims without allowing her the opportunity to conduct discovery on the question of whether Jackpot Junction was operating as a Section 16 entity or a Section 17 entity.

We therefore vacate the trial court's finding that Jackpot Junction was operated solely pursuant to the Community's Constitution, and remand this matter to the trial court so that Appellant can conduct discovery on the issue of whether Jackpot Junction is operated pursuant to the Community's Constitution or its Corporate Charter. In so doing, we are mindful that because the question before the Court is whether Jackpot Junction is immune from suit, "more than the usual is

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[6]A plaintiff always bears the burden of establishing that a court has jurisdiction to hear her claims. *E.g.*, Swain v. United States, 825 F. Supp. 966, 973 (D. Kan. 1993) (noting that plaintiff had burden of overcoming United States' immunity for flood control activities).

required of trial courts in making pretrial factual and legal determinations." Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 449 (D.C. Cir. 1990) (remanding case to trial court for further findings on degree of control of defendant by Iran, necessary to determine whether defendant was immune from suit). The trial court must "closely control and limit the discovery and fact-finding so as to avoid 'frustrating the significance and benefit of . . . immunity from suit.'" Id., *quoting* Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d at 451.

Toward that end, discovery should be limited as follows:

(1) The plaintiff should not be entitled to discover facts and documents occurring or created *after* she resigned from Jackpot Junction;

(2) Plaintiff's discovery of documents of the Community government (as opposed to Jackpot Junction) should be limited to documents regarding the Community's intent in creating Jackpot Junction;

(3) Documents of the Community government and Jackpot Junction which are subject to plaintiff's discovery requests should be redacted to exclude trade secrets and commercial or financial information and to exclude personnel and similar information, the disclosure of which would constitute an unwarranted invasion of personal privacy; and

(4) The trial court judge should entertain *in camera* inspection of any material which the Community government and Jackpot Junction believe arguably falls within one of the foregoing limitations.

There is one final issue requiring comment. Since oral argument on this case in October, 1994, the Lower Sioux Community Council passed Resolution No. 55-96, in which the Council waived,

> in a limited fashion, the immunity from suit which otherwise applies to the Community, its businesses[,] officers, employees and agents, for any civil action for damages, alleging the commission of a tortious act on the Lower Sioux Reservation; provided that such action is brought in the Court of the Lower Sioux Indian Community, and further

> provided that the extent of such waiver expressly is limited toe [sic] the limits of any applicable insurance contract protecting the Community, its businesses, officers, employees, and agents.

Resolution No. 55-96 (October 30, 1996). The Resolution is silent as to its retroactive effect, but we note that generally, a court looks to the laws governing its power to hear a case at the time the court makes its decision, not at the time the case was filed.[7] On remand, the trial court could should expressly consider whether Resolution No. 55-96 effects a waiver of Jackpot Junction's sovereign immunity for Appellant's claim for intentional infliction of emotional distress, whether it finds that Jackpot Junction was operated pursuant to the Community's Corporate Charter or solely pursuant to its Constitution.

*Conclusion*

The trial court properly dismissed Appellant's claims based on the Minnesota Human Rights Act and Title VII of the Human Rights Act for lack of subject matter jurisdiction and failure to state a claim on which relief can be granted because neither of those acts applies in this jurisdiction. With respect to Appellant's tort claim, we find that although the Courts of the Lower Sioux Community have jurisdiction over tort claims arising on the Reservation as a general matter, further

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[7] For example, the Supreme Court of the United States has long held that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." Bruner v. United States, 343 U.S. 115, 116-17 (1951). Discussing Bruner, the Supreme Court noted that the court was "relying on [its] 'consistent' practice [by ordering] an action dismissed because the jurisdictional statute under which had been (properly) filed was subsequently repealed." Landgraf v. USI Film Products, 511 U.S. ___, ___, 128 L.Ed.2d 229, 258 (1994). Indeed, the court said that "[w]e have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." Landgraf, 128 L.Ed.2d at 258.

findings by the trial court are necessary to determine whether Appellee Jackpot Junction is immune from Appellant's claim for intentional infliction of emotional distress. Thus, we remand that issue to the trial court so that more facts regarding Jackpot Junction's status may be discovered and presented to the court, and so that the court may examine whether the waiver of sovereign immunity by the Lower Sioux Community Council in 1996 applies to Appellant's claim for intentional infliction of emotional distress.

*It is so ordered.*

Andrew M. Small, Chief Justice

Steven F. Olson, Associate Justice

Robert A. Grey Eagle, Associate Justice