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award"[26] in favor of Falls City which was in fact vacated by the first appeal. We find no merit in this argument. The district court properly considered the judgment in favor of Falls City in determining its percentage relationship to the entire amount of the judgments initially awarded, and then taxed that percentage of the costs against Falls City because it "failed to carry its claim and it should bear the costs associated with it." Dibbern and Haase also argue that their costs should not have been apportioned because they were never sued by APEA. But they do not challenge the finding of the district court that they did not incur any costs which were unique to them and separate from those incurred by Stauffer and Ward.

In sum, the district court provided a reasoned and logical explanation for the manner in which it apportioned the costs taxed against Falls City. It did not abuse its discretion.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

WRIGHT and MILLER-LERMAN, JJ., not participating.

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[26] Brief for appellees on cross-appeal at 16.

STOREVISIONS, INC., APPELLEE, V. OMAHA TRIBE OF NEBRASKA, ALSO KNOWN AS OMAHA NATION, APPELLANT.

795 N.W.2d 271

Filed March 25, 2011. No. S-10-280.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Motions to Dismiss: Jurisdiction: Appeal and Error.** Aside from factual findings, the granting of a motion to dismiss for a lack of subject matter jurisdiction is subject to a de novo review.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.

4. **Final Orders: Appeal and Error.** An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
5. **Actions: Statutes.** A special proceeding includes every special statutory remedy which is not in itself an action.
6. **Actions: Judgments.** A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding.
7. **Actions: Statutes.** A special proceeding entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.
8. **Actions.** Examples of special proceedings include juvenile court proceedings, probate actions, and workers' compensation cases.
9. **Motions to Dismiss: Actions.** A motion to dismiss is merely a step or proceeding within the overall action, and is not a civil statutory remedy, such as a juvenile court proceeding, a probate action, or a workers' compensation case.
10. ____: ____. The denial of a motion to dismiss does not occur within a special proceeding.
11. **Final Orders: Appeal and Error.** To fall within the collateral order doctrine, an exception to the final order rule, 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.
12. **Principal and Agent.** Apparent authority is authority that is conferred when the principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon an agent's apparent authority.
13. ____. Apparent authority gives an agent the power to affect the principal's legal relationships with third parties. The power arises from and is limited to the principal's manifestations to those third parties about the relationships.
14. **Principal and Agent: Proof.** Apparent authority for which a principal may be liable exists only when the third party's belief is traceable to the principal's manifestation and cannot be established by the agent's acts, declarations, or conduct. Manifestations include explicit statements the principal makes to a third party or statements made by others concerning an actor's authority that reach the third party and the third party can trace to the principal.
15. **Principal and Agent.** For apparent authority to exist, the principal must act in a way that induces a reasonable third person to believe that another person has authority to act for him or her.
16. ____. Whether an agent has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction.

Appeal from the District Court for Thurston County: DARVID D. QUIST, Judge. Affirmed.

Ben Thompson and Amanda J. Karr, of Thompson Law Office, P.C., L.L.O., for appellant.

Michael J. Whaley and Elizabeth M. Skinner, of Gross & Welch, P.C., L.L.O., for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

StoreVisions, Inc., brought an action alleging that the Omaha Tribe of Nebraska (the Tribe) breached several contracts entered into between the parties. The Tribe filed a motion to dismiss, arguing that it had not waived its sovereign immunity. The district court denied the motion to dismiss, and the Tribe appealed.

We conclude that we have jurisdiction over this appeal under the collateral order doctrine. We further conclude that the Tribe waived its sovereign immunity, and therefore we affirm the district court's denial of the Tribe's motion to dismiss.

FACTUAL BACKGROUND

Between April 4 and July 21, 2008, StoreVisions, a general contractor, and the Tribe entered into 11 different agreements related to plans the Tribe had to expand its casino operations. Per those agreements, StoreVisions agreed to provide certain material and labor to the Tribe in return for payment. Prior to the execution of the contracts, StoreVisions requested that the Tribe execute a document waiving its sovereign immunity. That document was signed by the Tribe's council chairman and vice chairman at a meeting held on January 7, 2008. The meeting included representatives of StoreVisions and five of the seven members of the Tribe's tribal council.

On October 9, 2009, StoreVisions sued the Tribe in Thurston County District Court, alleging 11 causes of action related to the breach of 11 different agreements. On November 19, the Tribe filed a motion to dismiss, which indicated that the Tribe was appearing "for the limited purpose of this motion," and further alleged that "[t]he Court does not have jurisdiction of the subject matter of the action because the action is against a sovereign tribal government that has not waived its immunity from suit in this action . . . ."

Following a hearing at which the district court permitted both parties to admit affidavits into evidence, the district court denied the Tribe's motion to dismiss, concluding that the chairman and vice chairman had apparent authority to act on behalf of the Tribe and that therefore the Tribe had waived its sovereign immunity. The Tribe appealed.

Initially, the Nebraska Court of Appeals dismissed without opinion the Tribe's appeal, concluding that the denial of a motion to dismiss was not a final order. The Tribe filed a motion for rehearing, contending that the district court's order was reviewable because it raised the issue of the Tribe's sovereign immunity. The Court of Appeals reinstated the Tribe's appeal, reserving the jurisdictional issue. We then moved this case to our docket pursuant to our authority to regulate the dockets of this court and the Court of Appeals.[1]

ASSIGNMENTS OF ERROR

The Tribe assigns, restated and consolidated, that the district court erred in (1) concluding that the Tribe was not entitled to sovereign immunity and (2) converting the Tribe's motion to dismiss into a motion for summary judgment without proper notice to the Tribe.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[2]

[2] Aside from factual findings, the granting of a motion to dismiss for a lack of subject matter jurisdiction is subject to a de novo review.[3]

ANALYSIS

Jurisdiction: Final Order.

We are first presented with a jurisdictional question. On appeal, StoreVisions contends that the Tribe's appeal is not

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[2] *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

[3] See *City of Fremont v. Kotas*, 279 Neb. 720, 781 N.W.2d 456 (2010).

from a final order, and further argues that contrary to the Tribe's assertions, the collateral order doctrine is inapplicable. We consider each in turn.

[3] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.[4]

[4] An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.[5]

We note that the order denying the Tribe's motion to dismiss did not determine the action or prevent a judgment, because the denial allowed StoreVisions' action to proceed. In addition, the order was not made on summary application in an action after judgment was rendered. Thus, the initial question presented in this case is whether the district court's order was made during a special proceeding.

[5-8] A special proceeding includes every special statutory remedy which is not in itself an action.[6] A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding.[7] Generally, a "special proceeding" entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.[8] Examples of special proceedings include juvenile court proceedings, probate actions, and workers' compensation cases.[9]

[9,10] A motion to dismiss is merely a step or proceeding within the overall action, and is not a civil statutory remedy, such as a juvenile court proceeding, a probate action, or a

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[4] *Williams v. Baird, supra* note 2.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

workers' compensation case.[10] The Court of Appeals has specifically concluded that the denial of a motion to dismiss does not occur within a special proceeding.[11] We agree and conclude that this appeal does not present us with a final order for the purposes of § 25-1902.

Jurisdiction: Collateral Order.

[11] Indeed, the Tribe appears to be in agreement that the district court's order is not final. Instead, the Tribe asks this court to address its appeal under the collateral order doctrine, an exception to the final order rule.[12] To fall within the doctrine, 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.[13] We set forth these elements in *Hallie Mgmt. Co. v. Perry*.[14]

Applying the above factors to the order denying the Tribe's claim of sovereign immunity, we initially note that the first two factors are met in this case. The order in question was an order denying the Tribe's motion to dismiss on the ground that the Tribe was entitled to sovereign immunity. In denying the Tribe's order, the district court explicitly concluded that the Tribe had waived its immunity in this case. In addition, the district court's order is separate from the merits of the case, which deals with whether the Tribe breached a series of contracts entered into between the Tribe and StoreVisions.

We also conclude the third factor—that the order be effectively unreviewable on appeal from a final judgment—is met in this case. Federal courts, including the U.S. Supreme Court, which have addressed this issue have concluded that like claims of qualified or absolute immunity, a claim of sovereign immunity is based in immunity from suit and is not simply a

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[10] See, *Qwest Bus. Resources v. Headliners–1299 Farnam*, 15 Neb. App. 405, 727 N.W.2d 724 (2007); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

[11] See *id.*

[12] See *Williams v. Baird, supra* note 2.

[13] *Id.*

[14] *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

defense against liability.[15] As such, those courts have concluded that such orders are immediately reviewable.[16]

StoreVisions relies on our decision in *Williams v. Baird*[17] to argue that this court should not review a nonfinal order under the collateral order doctrine if questions of fact must be decided and that this case presents such issues. The basis for this portion of our holding in *Williams* was the Supreme Court's conclusion in *Mitchell v. Forsyth*[18] and *Johnson v. Jones*[19] that immunity appeals interfere less with the final judgment rule when limited to issues of law.

While the propositions StoreVisions cites are properly stated, this case does not present any disputed questions of fact. The parties are in general agreement about *what* happened; the issue is whether that set of facts gave rise to a waiver of immunity. Thus, this court is presented with a question of law and not a question of fact. As such, this court has jurisdiction under the collateral order doctrine to consider the Tribe's appeal.

Waiver of Sovereign Immunity.

Having concluded that the district court's order overruling the Tribe's motion to dismiss is reviewable under the collateral order doctrine, we turn next to the question of whether the Tribe waived its sovereign immunity so as to make it amenable to suit by StoreVisions.

In its brief, the Tribe focuses on the fact that it is a separate sovereign with immunity from suit. But contrary to the

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[15] *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993); *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007); *Osage Tribal Council v. U.S. Dept. of Labor*, 187 F.3d 1174 (10th Cir. 1999); *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030 (11th Cir. 1995). Cf., *Prescott v. Little Six, Inc.*, 387 F.3d 753 (8th Cir. 2004); *Sault Ste. Marie Tribe v. State of Mich.*, 5 F.3d 147 (6th Cir. 1993).

[16] *Id.*

[17] *Williams v. Baird, supra* note 2.

[18] *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

[19] *Johnson v. Jones*, 515 U.S 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995).

Tribe's discourse in its brief, there is no dispute that the Tribe is a separate sovereign and generally entitled to immunity from suit.[20] Nor is there any dispute that this immunity exists unless limited by Congress[21] or waived by the Tribe.[22] And no one disputes that any waiver of that immunity must be expressly made.[23] The only question in this case is whether such waiver was made.

The Tribe's primary contention is that its sovereign immunity can be waived only by a resolution of the tribal council and not by the independent acts of the chairman and vice chairman of the council. The Tribe contends that its bylaws provide no authority to the officers of the Tribe, save those delegated by the tribal council. As a result, according to the Tribe, the document signed in January 2008 purporting to act as a waiver was ineffective since the chairman and vice chairman cannot waive the Tribe's immunity.

Rush Creek Solutions v. Ute Mountain Tribe,[24] a case cited by the district court in its order, is instructive. In that case, Rush Creek Solutions, Inc., and the Ute Mountain Ute Tribe (Ute Tribe) entered into a contract wherein Rush Creek Solutions would provide the Ute Tribe with computer software and support. The Ute Tribe's chief financial officer (CFO) signed the contract on behalf of the Ute Tribe. The contract included a provision in which the Ute Tribe waived its immunity from suit.

The Ute Tribe later allegedly breached the contract, and Rush Creek Solutions brought suit. The Ute Tribe filed a motion to dismiss, alleging that although the CFO had the authority to enter into the contract, he lacked authority to waive the Ute Tribe's immunity. The Ute Tribe's constitution

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[20] See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).

[21] *Id.*

[22] *Native American Distrib. v. Seneca-Cayuga Tobacco*, 546 F.3d 1288 (10th Cir. 2008).

[23] *Santa Clara Pueblo v. Martinez, supra* note 20.

[24] *Rush Creek Solutions v. Ute Mountain Tribe*, 107 P.3d 402 (Colo. App. 2004).

and bylaws were similar to those in this case; namely, the Ute Tribe's council had the authority to prescribe the duties of the Ute Tribe's officers, but was silent concerning the authority regarding the waiver of sovereign immunity.

The trial court did not reach the issue of whether the CFO actually had the authority to exercise a waiver of the Ute Tribe's immunity, instead concluding that at the very least, the CFO had the apparent authority to do so. The court noted that

> [a]t all relevant times, the CFO was authorized to enter into contracts on behalf of the [Ute] Tribe. The contract at issue here designates the [Ute] Tribe as the customer. The CFO signed the contract on behalf of the customer on a line above the statement, "authorized signature." The [Ute] Tribe's Constitution and personnel policy are silent concerning procedures for signing contracts, waiving sovereign immunity, or authorizing persons to sign waivers.[25]

On this basis, the district court concluded that the Ute Tribe's motion to dismiss should be denied.

In arguing that *Rush Creek Solutions* is inapplicable, the Tribe contends that it is not appropriate to apply agency principles in a sovereign immunity analysis. While the Tribe cites to cases purporting to support that proposition, we have reviewed those cases and find them inapplicable. We adopt the reasoning of *Rush Creek Solutions* and apply agency principles, specifically the principles of apparent authority, to the purported waiver in this case.

[12-14] Apparent authority is authority that is conferred when the principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon an agent's apparent authority.[26] Apparent authority gives an agent the power to affect the principal's legal relationships with third parties. The power arises from and is limited to the principal's manifestations to those third parties about the relationships.[27]

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[25] *Id.* at 407.

[26] *Koricic v. Beverly Enters. - Neb.*, 278 Neb. 713, 773 N.W.2d 145 (2009).

[27] *Id.*

Stated another way, apparent authority for which a principal may be liable exists only when the third party's belief is traceable to the principal's manifestation and cannot be established by the agent's acts, declarations, or conduct.[28] Manifestations include explicit statements the principal makes to a third party or statements made by others concerning an actor's authority that reach the third party and the third party can trace to the principal.[29]

[15,16] For apparent authority to exist, the principal must act in a way that induces a reasonable third person to believe that another person has authority to act for him or her.[30] Whether an agent has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction.[31]

The record in this case shows that the separate waiver signed by the chairman and vice chairman was entered into in the presence of five of the seven members of the tribal council at the Tribe's headquarters. In addition to the waiver, the Tribe's chairman, vice chairman, or both, executed all other contracts between the Tribe and StoreVisions. And a review of the record shows that in resolution No. 08-74, the tribal council acknowledged that it had entered into these previous contracts with StoreVisions. Moreover, because the Tribe's constitution and bylaws are silent as to the method of waiving sovereign immunity, it was reasonable for StoreVisions to rely upon the words and actions of the Tribe with respect to the waiver of immunity.

We note that no source of tribal law beyond the constitution and bylaws was presented to the district court, nor was the district court asked to take judicial notice of any sources. As such, this court will not judicially notice, or otherwise seek out, any authority that might support either position in this litigation.

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

The situation presented by this appeal is virtually identical to the one presented in *Rush Creek Solutions*. One difference is that, in this appeal, the Tribe and StoreVisions entered into a separate waiver prior to entering into the underlying contracts. As noted, this separate waiver was signed in the presence of five of the seven members of the tribal council and lends even more weight to an appearance that the signatories to the document—the chairman and vice chairman—were vested with the authority to waive the Tribe's sovereign immunity.

Like the *Rush Creek Solutions* court, we decline to address the question of whether the chairman and vice chairman had actual authority to waive the Tribe's sovereign immunity, instead concluding that the two had apparent authority to do so based upon the undisputed facts. The Tribe's first assignment of error is without merit.

Conversion of Motion to Dismiss to Motion for Summary Judgment.

In its second and final assignment of error, the Tribe contends that the district court erred in converting its motion to dismiss into a motion for summary judgment without proper notice. The Tribe cites to Neb. Ct. R. Pldg. § 6-1112(b) and *Crane Sales & Serv. Co. v. Seneca Ins. Co.*[32] in support of this argument. Both are inapplicable, and the Tribe's argument is without merit.

The basis of the Tribe's assignment of error is § 6-1112(b), which provides in relevant part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in §§ 25-1330 to 25-1336, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute.

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[32] *Crane Sales & Serv. Co. v. Seneca Ins. Co.*, 276 Neb. 372, 754 N.W.2d 607 (2008).

The Tribe's motion to dismiss is not based in § 6-1112(b)(6), but instead on § 6-1112(b)(1) for lack of jurisdiction over the subject matter. Thus, this language in § 6-1112(b) and this court's opinion in *Crane Sales & Serv. Co.* are inapplicable.[33]

We additionally note that when the Tribe filed its motion, that motion indicated it would be supported by affidavit, and in fact, such affidavits were presented by the Tribe. We therefore question whether the Tribe was truly without notice as to whether the motion to dismiss would be converted to a motion for summary judgment.

The Tribe's final assignment of error is also without merit.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

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[33] Cf. *Washington v. Conley*, 273 Neb. 908, 734 N.W.2d 306 (2007).

KENNETH RIGGS AND LEANN RIGGS, HUSBAND AND WIFE, APPELLANTS, V. GARY NICKEL, APPELLEE.

796 N.W.2d 181

Filed March 25, 2011. No. S-10-459.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence.
3. **Trial: Witnesses: Evidence.** Where a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded. In applying this rule, the important considerations are that the testimony pertains to a vital point, that it is clearly apparent the party has made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony.