SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 19464

BRIAN LEWIS AND MICHELLE LEWIS

v.

WILLIAM CLARKE

BRIEF OF DEFENDANT-APPELLANT
WITH ATTACHED APPENDICES PARTS 1 & 2

TO BE ARGUED BY:

DANIEL J. KRISCH

DANIEL J. KRISCH
HALLORAN & SAGE LLP
ONE GOODWIN SQUARE
HARTFORD, CT 06103
JURIS NO. 026105
TEL. (860) 522-6103
FAX (860) 548-0006
krisch@halloransage.com

ROBERT A. RHODES
HALLORAN & SAGE LLP
315 POST ROAD WEST
WESTPORT, CT 06880
JURIS NO. 412195
TEL. (203) 227-2855
FAX (203) 227-6992
rhodes@halloransage.com

ATTORNEYS FOR THE DEFENDANT-APPELLANT

FILED: MAY 18, 2015

TABLE OF CONTENTS

Page

STATEMENT OF ISSUE

I. Did the trial court improperly deny the defendant's motion to dismiss, given that a tribal employee – including an employee of a tribal entity – is immune from suit for his actions in the scope and course of his employment, and given the undisputed facts that the defendant was an employee of the Mohegan Tribal Gaming Authority (MTGA), who was chauffeuring Mohegan Sun patrons in an MTGA-owned and insured limousine as part of his job when he and the plaintiffs were involved in a car accident? [pp. 5-21]

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Statutes

Court Rules

STATEMENT OF FACTS AND PROCEEDINGS

I. INTRODUCTION

This appeal concerns the impropriety of permitting a plaintiff to plead around tribal sovereign immunity by suing the employee of a tribal entity in his "individual" capacity for acts in the scope and course of his employment. The plaintiffs, Brian Lewis and Michelle Lewis, sued the MTGA[1] and its employee, William Clarke, for negligence after the MTGA-owned and insured limousine that he was driving struck the plaintiffs' car. (App. Pt. 1, A4-12). Two days after filing suit, the plaintiffs withdrew their action against the MTGA and continued against Clarke in "his individual capacity" only. (App. Pt. 1, A13, A21). The trial court (Cole-Chu, J.) denied Clarke's motion to dismiss the plaintiffs' suit and he appealed. (App. Pt. 1, A30-31).

This Court should reverse the trial court's decision and direct judgment for the defendant because tribal sovereign immunity deprived the court of subject matter jurisdiction. Tribal immunity is a federal doctrine and clear federal precedent bars suit against a tribal employee for actions in the scope and course of his employment. As such, the trial court's undisputed findings that the defendant was an MTGA employee and was acting in the scope and course of his employment required dismissal of the plaintiffs' suit. Instead, the trial court improperly allowed the suit to proceed under a "remedy-sought" approach that only the Ninth Circuit has employed; see *Maxwell v. County of San Diego*,

---

[1] The Mohegan Tribe created the MTGA through a constitutional amendment. Mohegan Const., Art. XIII. Article XIII endows the MTGA with "[a]ll governmental and proprietary powers of The Mohegan Tribe over the development, construction, operation, promotion, financing, regulation and licensing of gaming, and any associated hotel, associated resort or associated entertainment facilities, on tribal lands . . . ." *Id.* Among its many powers as a tribal entity, the MTGA "shall oversee, regulate, prudently hold and manage all of the Gaming assets of The Mohegan Tribe." *Id.*

708 F.3d 1075 (9th Cir. 2013); but that usurps the exclusive province of Congress to set the bounds of tribal immunity. This Court should reject the "remedy-sought" approach because it is contrary to decisions of the Second Circuit, the District Court of Connecticut, and the Appellate Court; it encourages pleading by artifice; and it rests on the fiction that an action against a tribal employee in his "individual" capacity for his conduct on the job does not impact the tribal fisc or threaten tribal sovereignty.

II. FACTUAL AND PROCEDURAL HISTORY

On October 22, 2011, the plaintiffs were in a car traveling south on Interstate 95 in Norwalk. (App. Pt. 1, A19). Brian Lewis was driving; his wife, Michelle, was a passenger. *Id.* Clarke was driving a limousine that was behind the plaintiffs' car. *Id.* The MTGA owned and had insurance for the limousine, and Clarke was an MTGA employee who "was driving patrons of the Mohegan Sun Casino to their homes." *Id.*[2] The limousine struck the rear of the plaintiffs' car and the crash injured both plaintiffs. *Id.*

The plaintiffs sued both Clarke and the MTGA. (App. Pt. 1, A18). Two days after filing suit, the plaintiffs withdrew their claims against the MTGA and proceeded solely against Clarke. *Id.* Clarke moved to dismiss the complaint because, as a tribal employee acting in the scope and course of his employment, tribal sovereign immunity deprives the court of jurisdiction. (App. Pt. 1, A20). In response, the plaintiffs did not challenge Clarke's status, or that the accident happened while he was working for the MTGA. (App. Pt. 1,

[2] Ordinarily, "if the complaint is supplemented by *undisputed* facts established by affidavits submitted in support of the motion to dismiss . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint." *Town of Rocky Hill v. SecureCare Realty, LLC*, 315 Conn. 265, 277 (2015) (emphasis in original). The trial court based its findings about Clarke's employment status on the affidavit of the MTGA's Director of Transportation; the plaintiffs do not dispute those findings. (App. Pt. 1, A19).

A21-22). The plaintiffs also conceded that neither the MTGA, nor Clarke, has waived immunity. (App. Pt. 1, A22). Instead, the plaintiffs relied solely on the "remedy-sought" approach announced in *Maxwell*, *supra*. This approach strips a tribal employee of the protection of tribal sovereign immunity if a plaintiff sues the employee in his individual capacity and ostensibly seeks damages only from the employee – even if, as in this case, the employee was acting in the scope and course of his employment. 708 F.3d at 1087-90; (App. Pt. 1, A20-21).

The parties filed briefs and argued the motion to dismiss at short calendar. (App. Pt. 1, A18). The trial court sided with the plaintiffs and denied the motion because "[u]nder the facts of this case . . . the "remedy-sought" analysis should be applied and, because the remedy sought is not against the MTGA, Clarke is not immune from suit." (App. Pt. 1, A22). The court correctly started with the premise that, as a tribal entity, the MTGA enjoys the same immunity as the Mohegan Tribe itself. *Id.* The court also acknowledged that "there is no claim by the plaintiffs that the MTGA has waived sovereign immunity or that Clarke has waived his claim to sovereign immunity[,]" and "rejected the notion that it had the power to "abrogate sovereign immunity." *Id.*

However, the court improperly framed "the issue presented . . . [as] whether the MTGA's immunity protects its employee, Clarke, from being sued solely in his individual capacity for an alleged tort occurring off the tribal reservation injuring non-patrons of the MTGA."[3] *Id.* Relying on *Maxwell*, the trial court concluded that because the plaintiffs "seek

---

[3] The location of the tort and whether the plaintiffs patronized Mohegan Sun are non sequiturs: Sovereign immunity protects a tribal employee for his acts off of tribal property and regardless of whether the injured party patronized a tribal business. See *Michigan v. Bay Mills Indian Community*, ___ U.S. ___, 134 S.Ct. 2024, 2039 (2014) (tribal sovereign immunity applies whether on or off reservation and whether activity commercial or

money damages not from the sovereign Mohegan Tribe but from Clarke personally . . . [t]he essential nature and effect of the relief sought can mean that the sovereign is not the real, substantial party in interest." (App. Pt. 1, A24). The court stressed that "federal employees may be sued individually for money damages even though the actions giving rise to the claim were done while they were acting within the duties of their employment." (App. Pt. 1, A27). Finally, the court distinguished the host of cases cited by Clarke and rejected his reliance on the MTGA's statutory duty to indemnify him – and the similar obligation under its insurance policy – as mere "voluntary undertaking[s]". (App. Pt. 1, A28). In the court's view, "[t]o hold that the MTGA has the unilateral power to expand the boundaries of sovereign immunity based on tribal legislation, contract or other form of tribal indemnification" would "change the law of sovereign immunity" and violate public policy. (App. Pt. 1, A29). As such, the trial court found "no implication of tribal sovereign immunity such that Clarke, a tribal employee sued in his individual capacity, is immune from suit." *Id.*

Clarke appealed the denial of his motion. (App. Pt. 1, A31). This Court transferred his appeal to itself under Practice Book § 65-2. (App. Pt. 1, A36).

---

governmental); *Beecher v. Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 135 (2007) (same). The trial court distinguished *Kizis v. Morse Diesel International, Inc.*, 260 Conn. 42 (2002), on the same, immaterial bases: that the accident took place "on non-tribal land[,]" and that the plaintiffs "were not invitees of the tribal casino." (App. Pt. 1, A26).

ARGUMENT

I. The trial court improperly denied Clarke's motion to dismiss because the "remedy-sought" doctrine ignores settled law, flies in the face of public policy and encourages litigants to undermine tribal sovereign immunity through creative pleading.

Standard of Review: Plenary. See *Rocky Hill*, 315 Conn. at 276 ("assertion of sovereign immunity that implicates subject matter jurisdiction . . . is a question of law"); *Beecher*, 282 Conn. at 134 (2007).[4]

The trial court's undisputed findings should have led it to dismiss the plaintiffs' suit. Federal law establishes the immunity of Indian tribes and their entities, and makes tribal employees immune from suit for acts in the scope and course of their employment. See *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir.), *cert. denied sub nom.*, *Chayoon v. Reels*, 543 U.S. 966 (2004); *Kizis,* 260 Conn. at 54. The trial court recognized that tribal sovereign immunity applies to the MTGA, and found that Clarke was working for the MTGA at the time of the accident, but improperly rejected the conclusion to which that necessarily leads. The trial court did so based on a "remedy-sought" approach that rests on two untenable premises: (1) a judgment against a tribal employee for a tort committed in the scope and course of his employment will not burden the tribe's treasury; and (2) a tribal employee can act in his "individual" capacity while in the scope and course of his employment. The remedy-sought approach has no place in our law. It is contrary to precedent, bad policy, and allowing a suit to proceed based on it will drain tribal resources, weaken tribal sovereignty and undermine the authority of the tribal court system.

---

[4] A "plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised." *Fort Trumbull Conservancy, LLC v. New London*, 265 Conn. 423, 430, n. 12 (2003); see *Goodyear v. Discala*, 269 Conn. 507, 511 (2004) (ellipses in original) ("burden rests with the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute").

A. Immunity from suit is an essential component of tribal sovereignty and only Congress may abrogate or limit it.

Indian tribes are "separate sovereigns pre-existing the Constitution. . . . Thus, unless and until Congress acts, the tribes retain their historic sovereign authority." *Bay Mills*, 134 S.Ct. at 2030 (citation and quotation marks omitted). As a consequence of this sovereignty, when deciding whether to dismiss a suit against an Indian tribe, its entities, and its employees, a court must "begin with the premise that Indian tribes are domestic dependent nations which exercise inherent sovereign authority over their members and territories." *Beecher*, 282 Conn. at 135; see *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986) ("common law sovereign immunity possessed by [Indian tribes] is a necessary corollary to Indian sovereignty and self-governance"). All tribes possess "sovereignty which has never been extinguished. . . . Before the Europeans arrived, Indian tribes were self-governing political entities. . . . One of the inherent powers possessed by Indian tribes like all sovereign bodies, was immunity from suit." *VAL/DEL, Inc. v. Superior Court of the County of Pima*, 703 P.2d 502, 504 (Ariz.), *cert. denied*, 474 U.S. 920 (1985) (internal citations omitted).

For this reason, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But without congressional authorization, the Indian Nations are exempt from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). This "sovereign immunity is dependent upon neither the location nor the nature of the tribal activities[,]" *Beecher*, 282 Conn. at 135, because "tribal immunity reflects a societal decision that tribal autonomy predominates over other interests." *Florida Paraplegic, Association, Inc. v. Miccosukee Tribe of Indians*, 166

F.3d 1126, 1131 (11th Cir. 1999) (citing *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 781 (D.C. Cir. 1986)). Thus, as the United States Supreme Court recently reaffirmed, a tribe is immune from suit for its commercial activities just as it is for its governmental activities. See *Bay Mills*, 134 S.Ct. at 2039 ("it is for Congress, now more than ever, to say whether to create an exception to tribal immunity for off-reservation commercial activity"; declining to overrule *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 760 (1998)).

Only Congress may alter or abrogate tribal sovereign immunity. See *Bay Mills*, 134 S.Ct. at 2031; *Kiowa*, 523 U.S. at 758. As a consequence,

> [t]he United States Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case. . . . The Supreme Court has stated that there are reasons to doubt the wisdom of tribal sovereign immunity . . . [but] [t]o the extent, however, that these considerations might suggest a need to abrogate tribal immunity, *courts must defer to the role Congress may wish to exercise in this important judgment*.

Beecher, 282 Conn. at 135-36 (emphasis added; internal citations, quotation marks and brackets omitted). In short, "[t]he baseline position, we have often held, is tribal immunity; and to abrogate such immunity, Congress must unequivocally express that purpose." *Bay Mills*, 134 S.Ct. at 2031 (brackets and quotation marks omitted).

The breadth and vitality of tribal sovereign immunity are settled facets of federal law and Connecticut's courts have adhered faithfully to them. This Court made that point plain in *Kizis*, *supra*. In that case, a Mohegan Sun patron slipped and fell on a "negligently placed fieldstone in an entrance walkway," 260 Conn. at 50, and attempted to sue two tribal

employees in state court. *Id.* The Court, *sua sponte*,[5] dismissed the case for lack of subject matter jurisdiction because the plaintiff had an alternate forum in which to obtain redress for her injuries: the Mohegan Gaming Disputes Trial Court. See *id.* at 58. The Court pointed out that

> [t]ribal powers of self-government . . . are observed and protected . . . to insure continued viability of Indian self-government insofar as governing powers have not been limited or extinguished. . . . The exercise of tribal governing power may . . . preempt state law in areas where, absent tribal legislation, state law might otherwise apply. . . .
>
> Thus, in order for a state enactment to impinge on tribal sovereignty . . . the tribe must have a form of demonstrable sovereignty or functioning self-government. And, the state act in question must actually infringe upon the exercise of tribal government or existing tribal legislation.

Id. at 53 (ellipses in original; internal citations and brackets omitted); see *Beecher*, 282 Conn. at 140 (affirming dismissal of vexatious litigation suit against Mohegan Tribe).

B. Tribal sovereign immunity prohibits the court from exercising jurisdiction over any suit against an employee of a tribal entity for tortious acts in the scope and course of his employment.

The immunity from suit of tribal officers and employees is both the natural outgrowth of, and a critical support for, the inherent sovereignty of Indian tribes. It is "settled law . . . that tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself." *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 725 (9th Cir. 2008), *cert. denied*, 556 U.S. 1221 (2009); see also *Ninigret Dev. Corp. v. Narrangansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 27 (1st Cir. 2000). Likewise, "the doctrine of tribal immunity extends to tribal officials acting in their representative capacity and within the scope of their authority[,]" *Kizis,* 260 Conn. at 54, and to tribal employees "when the

---

[5] The trial court had denied the employees' motion to dismiss based on the erroneous determination that only the Tribe, and not its non-Tribal employees, could assert tribal sovereign immunity. *Kizis*, 260 Conn. at 50-51.

complaint concerns actions taken in the defendants' official or representative capacities and the complaint does not allege that they acted outside the scope of their employment." *Chayoon*, 355 F.3d at 143. These are akin to the "rule . . . that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Sullins v. Rodriguez*, 281 Conn. 128, 143 (2007).

The Mohegan Tribe is federally-recognized and this Court has held that the Tribe is immune from suits that concern the operation of Mohegan Sun. See *Beecher*, 282 Conn. at 140; *Kizis,* 260 Conn. at 54. The MTGA and its employees enjoy the same immunity as the Tribe itself because the MTGA is a constitutional entity that oversees all gaming activity for the benefit of the Tribe. See *Cook*, 548 F.3d at 725-26; Mohegan Const., Art. XIII. In fact, the MTGA's profits are a mainstay of the Tribe's exercise of sovereignty; both the Indian Gaming Regulatory Act and the Mohegan Tribal Code require the Tribe to use gaming revenues for the welfare of its members and the furtherance of its governmental activities. See 25 U.S.C. § 2710(b)(2)(B); Mohegan Tribe, Code of Laws § 2-21.[6]

The Appellate Court has held that the MTGA is immune from suit. See *Davidson v. Mohegan Tribal Gaming Authority*, 97 Conn. App. 146, *cert. denied*, 280 Conn. 941 (2006), *cert. denied*, 549 U.S. 1346 (2007) (MTGA immune from suit under state labor and medical

---

[6] The Mohegan Tribal Code requires the Tribe to use the net revenues from Mohegan Sun "to strengthen its Tribal government[,]" and "to provide for the general welfare of its members. The Tribe *shall ensure* that these areas receive the necessary financial support from net gaming revenue *prior to* distributing such revenue for other purposes." Mohegan Tribe, Code of Laws § 2-181 (emphasis added); see Mohegan Tribe, Code of Laws §§ 2-182, 2-185, 2-186 (directing use of revenues and providing for dispute resolution and right of enforcement by any member of Tribe).

leave laws). Likewise, at least five trial courts have dismissed personal injury suits against the MTGA, its employees, or both, based on tribal sovereign immunity. See *Durante v. Mohegan Tribal Gaming Authority*, 2012 WL 1292655 (Conn. Super. Ct., Mar. 30, 2012) (MTGA and its employee); *Ross v. Spaziante*, 2011 WL 5842468 (Conn. Super. Ct., Nov. 1, 2011) (MTGA and its employees); *Johns v. Voebel*, 2011 WL 4908856 (Conn. Super. Ct., Sept. 23, 2011) (MTGA employee); *Vanstaen-Holland v. LaVigne*, 2009 WL 765517 (Conn. Super. Ct., Feb. 26, 2009) (MTGA and its employee); *Richards v. Champion*, Docket No. CV-07-5004614 (J.D. of New London, July 11, 2008) (not reported in Westlaw) (MTGA).[7]

Courts in other jurisdictions, like *Davidson*, *Durante*, *Ross*, *Johns*, *Vanstaen* and *Richards*, have held that a tribal gaming entity and its employees are immune from suit. The reasoning of those decisions applies in equal measure to the MTGA. See, e.g., *Cook*, 548 F.3d at 725-26 (because tribe authorized casino and tribal treasury benefitted from casino revenues "casino functioned as 'an arm of the Tribe' and accordingly enjoyed sovereign immunity"); *Warren v. United States*, 859 F.Supp.2d 522, 541 (W.D.N.Y. 2012), *aff'd*, 517 F. App'x 54 (2d Cir. 2013) (Seneca Gaming Corporation immune from suit because Senecas chartered it under tribal law to generate income for tribe's benefit and majority of Corporation's board were Senecas); *Larimer v. Konocti Vista Casino Resort, Marina & RV Park*, 814 F. Supp. 2d 952, 955 (N.D. Cal. 2011) (casino immune because it was established by tribal constitution and is "wholly owned and operated" by tribe); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1195

[7] The *Ross* court also dismissed two identical suits against the MTGA and its employees that arose out of the same motor vehicle accident. See *Portella v. Spaziante*, 2011 WL 5842232 (Conn. Super. Ct., Nov. 1, 2011); *Sauli v. Spaziante*, 2011 WL 5842352 (Conn. Super. Ct., Nov. 1, 2011).

(10th Cir. 2010), *cert. dismissed*, ___ U.S. ___ 132 S.Ct. 64 (2011) (based on creation, purpose, governance, and use of revenue, casino and tribe's Economic Development Authority were "subordinate economic entities entitled to tribal sovereign immunity").

It is the province of Congress, not the courts, to abrogate immunity for a tribe, its entities and their employees. See *Furry v. Miccosukee Tribe of Indians*, 685 F.3d 1224 (11th Cir.), *cert. denied*, ___ U.S. ___, 133 S.Ct. 663 (2012) (in spite of tribes' participation in commercial activity "the [United States Supreme] Court could not have been clearer about placing the ball in Congress's court going forward"). This Court should reach the same conclusion as the Appellate Court, five trial courts, and, on similar facts, a passel of other jurisdictions: The history and purpose of the MTGA shield it and its employees because unless Congress acts, "[n]either reason nor fairness permits us to disregard the well established doctrine of tribal sovereign immunity." *Beecher*, 282 Conn. at 140.[8]

C. *The law does not permit the plaintiffs to make an end run around tribal sovereign immunity by suing and seeking damages from an employee of a tribal entity only in his "individual" capacity for his actions in the scope and course of his employment.*

Given that a tribal entity and its employees enjoy the same immunity as a tribe itself, the error of allowing the plaintiffs to sue Clarke in his "individual" capacity naturally follows. Respect for tribal sovereignty should lead this Court to the same conclusion as the Second Circuit, the Connecticut District Court and the Appellate Court: No matter how a plaintiff chooses to plead his case, tribal sovereign immunity bars suit against a tribal employee for his actions in the scope and course of his employment. Although this Court should go no

[8] The trial court acknowledged the "MTGA's immunity[,]" but then cited several United States Supreme Court cases for the proposition that "Congress has restricted tribal immunity to matters involving tribal self-governance." (App. Pt. 1, A23). *Bay Mills* and *Kiowa* belie this proposition, which does not seem to have figured in the court's analysis.

further than that bright-line rule, a proper application of the trial court's erroneous "remedy-sought" approach also requires dismissal because the MTGA, not Clarke, is the real party in interest.

1. Tribal sovereign immunity is a federal law doctrine and clear federal precedent establishes that the MTGA's employees are immune from suit for acts in the scope and course of their employment.

Tribal sovereign immunity "protects tribal employees acting in their official capacity and within the scope of their authority." *M.J. ex rel. Beebe v. United States*, 721 F.3d 1079, 1084 (9th Cir. 2013). Like a state official, "[a] tribal official – even if sued in his individual capacity – is only stripped of tribal immunity when he acts manifestly or palpably beyond his authority." *Chayoon v. Sherlock*, 89 Conn. App. 821, 828, *cert. denied*, 276 Conn. 913 (2005), *cert. denied*, 547 U.S. 1138 (2006); see *Gooding v. Ketcher*, 838 F.Supp.2d 1231, 1246 (N.D. Okla. 2012) (same); *Bassett v. Mashantucket Pequot Museum & Research Ctr. Inc.*, 221 F. Supp. 2d 271, 280 (D. Conn. 2002) (brackets omitted) ("a claim for damages against a tribal official lies outside the scope of tribal immunity only where the complaint pleads – and it is shown – that a tribal official acted beyond the scope of his authority").

Most jurisdictions follow this sensible rule. See, e.g., *Tonasket v. Sargent*, 830 F. Supp. 2d 1078, 1082 (E.D. Wash. 2011), *affd*, 510 F. App'x 648 (9th Cir.), *cert. denied*, ___ U.S. ___, 134 S.Ct. 129 (2013); *Inquiry Concerning Complaint of Judicial Standards Comm'n v. Not Afraid*, 245 P.3d 1116, 1120 (Mont. 2010); *Oberloh v. Johnson*, 768 N.W.2d 373, 376 (Minn. App. 2009); *Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275, 1280 (Wash. 2006), *cert. dismissed*, 550 U.S. 931 (2007); *Wright v. Prairie Chicken*, 579 N.W.2d 7, 9 (S.D. 1998). As with state officials, "tribal officials are immunized from suits brought against them *because of* their official capacities – that is, because the powers they possess

in those capacities enable them to grant the plaintiffs relief on behalf of the tribe." *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008) (emphasis in original).

Moreover, a plaintiff "cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities . . . ." *Chayoon*, 355 F.3d at 143; *Gooding*, 838 F.Supp.2d at 1246 ("claimants may not simply describe their claims against a tribal official as in his 'individual capacity' in order to eliminate tribal immunity"). This prohibition is a close cousin of the requirement that to prove an "exception to sovereign immunity, the plaintiffs must do more than allege that the defendants' conduct was in excess of their statutory authority; they also must allege or otherwise establish facts that reasonably support those allegations." *Elec. Contractors, Inc. v. Dep't of Educ.*, 303 Conn. 402, 460 (2012) (brackets omitted); see *Cammarota v. Guerrera*, 148 Conn. App. 743, 749, *cert. denied*, 311 Conn. 944 (2014) ("is well-settled that, in determining the nature of a pleading filed by a party, we are not bound by the label affixed to that pleading by the party").

Guided by these principles, the Second Circuit, the District Court of Connecticut, the Appellate Court, and other courts consistently have held "that tribal immunity extends to all tribal employees acting within their representative capacity and within the scope of their official authority." *Bassett*, 221 F.Supp.2d at 277-78 (collecting cases); see *Chayoon*, 355 F.3d at 143 (affirming dismissal of suit against officers and employees of tribal gaming enterprise, and members of tribal council, because alleged conduct was within scope of authority); *Chayoon*, 89 Conn. App. at 830-31 (same for state court suit); *Young v. Duenas*, 262 P.3d 527, 531 (Wash. App. 2011), *rev. denied*, 272 P.3d 851 (Wash. 2012), *cert.*

denied sub nom., *Young v. Fitzpatrick*, ___ U.S. ___, 133 S.Ct. 2848 (2013) (ellipses in original) (affirming dismissal of suit against tribal police officers; no evidence "suggests they acted in their individual capacity[,]" so "[p]laintiffs . . . cannot circumvent tribal immunity through a mere pleading device"); *Oberloh*, 768 N.W.2d at 377 (reversing denial of tribal treasurer's motion for summary judgment because he "was acting within the scope of his authority" when he mailed allegedly defamatory tribal newsletters).

In the *Chayoon* cases, for example, a former Foxwoods employee sought damages for alleged violations of the Family Medical Leave Act. Chayoon first sued the Mashantucket Pequot Tribal Nation in federal court; the court dismissed that suit for lack of subject matter jurisdiction. See 89 Conn. App. at 823 (recounting history of plaintiff's federal court litigation). Chayoon then filed a second federal action in which he sued only individual tribal employees; the Second Circuit affirmed the dismissal of that suit on the basis of tribal immunity. See 355 F.3d at 143. Finally, Chayoon tried his luck in state court: Again, he sued only individual tribal employees; see 89 Conn. App. at 822-23; and, again, the dismissal of his suit on the basis of tribal immunity was upheld. *Id.* at 830-31.

The *Chayoon* cases illustrate both the dangers of forum-shopping and their cure. The Second Circuit and the Appellate Court did not inquire about the real party in interest. Instead, both adhered to the sensible, bright-line rule that tribal immunity "shields not only the tribe from suit, but it also affords the protection from suit to employees of the tribe for conduct by them within the scope of their employment responsibilities." *Id.* at 825; see 355 F.3d at 143 (looking to whether employee acted in the scope of his employment by Tribe). Significantly, the plaintiff in both *Chayoon* cases sued only tribal employees; see 89 Conn. App. at 824; 355 F.3d at 142; and opposed dismissal because he had sued them as

individuals. 89 Conn. App. at 825. If, as the trial court's decision posits,[9] the plaintiff hoped to get at the Mashantucket tribal treasury through the vicarious liability of its employees, then he was attempting the same end-run as the plaintiffs are in this case – and the outcome should be the same.

Furthermore, tribal sovereign immunity does not deny relief to people like the plaintiffs; it merely requires them to seek it in a different forum: The Mohegan Gaming Disputes Court. In *Kizis*, *supra*, this Court pointed out that "[t]he Mohegan Torts Code together with the gaming compact and the Mohegan constitution provide a forum and mechanism to redress the plaintiff's injuries[,]" and held that the Gaming Disputes Court is "the exclusive forum for the adjudication and settlement of the tort claims against the tribe and its employees . . . ." 260 Conn. at 58-59; see Mohegan Tribe, Code of Laws § 3-21, et seq. (establishing Gaming Disputes Court). The Tribe has adopted Connecticut's General Statutes and common law, to the extent that they do not conflict with tribal law, and the Gaming Disputes Court regularly adjudicates tort suits against the MTGA and its employees. Mohegan Tribe, Code of Laws § 3-52(a)(2).

The plaintiffs could have sued in the Gaming Disputes Court, but they did not. Instead, the plaintiffs brought an action against the MTGA and Clarke in state court and

---

[9] The trial court distinguished *Chayoon* because the employees "were being sued individually as well as in their 'professional capacities[,]'" and "under theories of vicarious tribal liability." (App. Pt. 1, A25). This is incorrect. First, Chayoon initially sued the only Mashantucket Pequot Tribal Nation, but he did not name it as a defendant in his second or third suits. Had either of those suits sought to establish vicarious liability, the Mashantucket Pequot Tribal Nation would have had to be a party. Second, this erroneously lumps *Chayoon* together with *Bassett*, in which the defendants also were sued "in their official capacities." *Id.* Having married apples and oranges, the court then held, "[i]n *Chayoon* and *Bassett* . . . tribal employees were sued in their official capacities. Because it was clear that at least part of the remedy sought was against a sovereign, it was unnecessary to analyze whether there was *no* remedy sought against a sovereign." (App. Pt. 1, A25-26) (emphasis in original).

then withdrew almost immediately as to the MTGA. (App. Pt. 1, Ax). This sort of creative pleading is an improper end-run around tribal immunity. See *Chayoon*, 355 F.3d at 143; *Gooding*, 838 F.Supp.2d at 1246. If sanctioned, it will result in a stampede away from the Mohegan tribal courts. A functioning court system is a critical aspect of tribal sovereignty; reducing the efficacy of the Mohegan court system undermines the Tribe's sovereignty. See *Kizis*, 260 Conn. at 58.

Precedent and policy demonstrate the impropriety of the trial court's conclusion, which undermines tribal sovereignty, weakens the tribal court system and forces the law to "wade into [the] swamp[,]" *Native Am. Distrib.*, 546 F.3d at 1297, of whether a remedy reaches into the sovereign's treasury, or into an employee's wallet. To prevent these undesirable results, this Court should join the Second Circuit, the District Court of Connecticut, and the Appellate Court and hold that tribal sovereign immunity bars a state court from exercising jurisdiction over an action against an MTGA employee for allegedly tortious conduct in the scope and course of his employment.

2. The MTGA is the real party in interest in this case because the Mohegan Tribal Code requires it to indemnify Clarke and because a judgment will impact its operations.

The trial court took the "MTGA's immunity" as a given; (App. Pt. 1, A22); and found that the defendant was an MTGA employee who was acting within the scope and course of his employment. (App. Pt. 1, A19). The plaintiffs sensibly did not claim otherwise – the defendant was driving several casino patrons home in an MTGA-owned and insured limousine when he collided with the plaintiffs' car – and those findings should have ended the case. Instead, while disclaiming "any power to abrogate sovereign immunity or otherwise assume any power or right reserved to the tribe, let alone to the United States

Congress[,]" App. Pt. 1, A22), the trial court "conclude[d] that the "remedy-sought" analysis should be applied and, because the remedy sought is not against the MTGA, Clarke is not immune from suit." *Id.*

For the reasons set forth *supra*, the "remedy-sought" approach is inapplicable; a tribal employee simply is immune from suit in his "individual" capacity for actions in the scope and course of his employment. However, a proper application of the "remedy-sought" approach leads to the same result because the record demonstrates that real party in interest is the MTGA.

With respect to sovereign immunity under state law, a suit against an employee in his "individual" capacity "is in effect, one against the state and cannot be maintained without its consent[,]" if "(1) a state official has been sued; (2) the suit concerns some matter in which that official represents the state; (3) the state is the real party against whom relief is sought; and (4) the judgment, though nominally against the official, will operate to control the activities of the state or subject it to liability." *Sullins*, 281 Conn. at 133, n. 8. Even if a plaintiff "purports to sue" a defendant in his individual capacity, "[t]he fact that the state is not named as a defendant does not conclusively establish that the action is not within the principle which prohibits actions against the sovereign without its consent. . . . The vital test is to be found in the essential nature and effect of the proceeding." *Cimmino v. Marcoccia*, 149 Conn. App. 350, 357 (2014) (ellipses in original) (dismissing suit by former school principal against two state employees in their individual capacities)

The trial court's findings that Clarke was an MTGA employee and was acting in the course and scope of his employment; (App. Pt. 1, A19); satisfy the first two factors of *Sullins*. See *Macellaio v. Newington Police Dep't*, 142 Conn. App. 177, 181 (2013);

Kenney v. Weaving, 123 Conn. App. 211, 216 (2010) (sovereign immunity barred suit against DMV commissioner for "allegedly reckless actions" in performing job). The trial court's conclusion that the third and fourth factors are not met is flawed.[10]

The third criteria of *Sullins* looks to whether the "damages sought by the plaintiff are premised entirely on injuries alleged to have been caused by the defendants in performing acts that were part of their official duties." *Cimmino*, 149 Conn. App. at 359-60. If so, then the state is the real party in interest; see *id.*; *Macellaio*, 142 Conn. App. at 181; because, by statute, the state would have to pay any judgment. See *id.*; Conn. Gen. Stat. § 5-141d(a). This Court upheld the dismissal of a suit against the Highway Commissioner for that reason over a half-century ago.[11] See *Somers v. Hill*, 143 Conn. 476, 480 (1956).

In this case, for instance, the MTGA has the same statutory obligation to the defendant that the state has to its employees: By law, the MTGA must defend and indemnify Clarke. See Mohegan Tribe, Code of Laws §§ 4-52 & 4-53. When given prompt notice "of any claim, demand, or suit, the Employer [MTGA] shall save harmless and indemnify its Officer or Employee from financial loss and expense arising out of any claim,

---

[10] The trial court focused on the third and fourth factors, but also noted: "The defendant *has not been sued* as a tribal official; there is *no allegation* that the defendant was representing the MTGA or the tribe at the time of the collision (even as employee) . . . ." (App. Pt. 1, A28, n. 5) (emphasis added). This misconstrues the *Sullins* test, which comes into play only if a plaintiff does not sue an individual "as a tribal official," and does not allege that the employee was "representing" his tribal employer. The function of *Sullins* is to look behind the façade of such allegations and discover if an action against an individual "is in effect, one against the state". 281 Conn. at 133, n. 8. In addition, the court's findings that Clarke was an MTGA employee and was working at the time of the accident rebut its aside.

[11] *Sullins* holds that it is irrelevant "that the state chooses to indemnify its employees" for the narrow purpose of the employees' immunity from a suit brought under 42 U.S.C. § 1983. 281 Conn. at 144, n. 16. *Sullins* limits its holding to federal law – specifically to immunity under the Eleventh Amendment; see *Alden v. Maine*, 527 U.S. 706 (1999) – and does not overrule this Court's prior, state law precedents.

demand or suit by reason of his or her alleged negligence." § 4-52. Likewise, the MTGA must defend "any such Officer or Employee in any civil action or proceeding . . . arising out of any alleged act, omission or deprivation which occurred or is alleged to have occurred while the Officer or Employee was acting in the discharge of his or her duties or in the scope of his or her employment." § 4-53. Just as in *Somers*, *Cimmino* and *Macellaio*, this potential burden on the MTGA's finances implicates the principal justification for immunity: Any judgment against Clarke would drain the tribal treasury by diverting funds that, under the Mohegan Tribal Code, otherwise would flow into it.[12]

There is a second financial burden on the MTGA: the cost of its liability insurance, both now and in the future. Connecticut law requires any vehicle that uses its highways to have liability insurance. See Conn. Gen. Stat. § 14-213b. In this case, the MTGA has a substantial self-insured retention on its vehicles, so any judgment will affect the MTGA's finances directly. Moreover, an insurance claim has negative collateral consequences, e.g., because losses increase the cost of future coverage.

In a similar vein, any judgment "though nominally against [Clarke], will operate to control the activities of the [MTGA] or subject it to liability." *Sullins*, 281 Conn. at n. 8. Money damages alone satisfy this factor. See *Macellaio*, 142 Conn. App. at 181("the fourth criterion is met because any judgment against the defendant would subject the state to liability"). However, there will be other, deleterious affects: For instance, a judgment against Clarke will have a chilling effect on the MTGA's ability to hire new employees. If

[12] The trial court dismissed this statutory obligation as "a tribal choice". (App. Pt. 1, A29). The MTGA has no more choice whether to defend and indemnify its employees than does the state of Connecticut; and, like the state, the expenditure of money by the MTGA makes it the real party in interest. See § 5-141d(a); *Macellaio*, 142 Conn. App. at 181.

every potential hire will be on the hook for damages from any negligent act while he is on the job, only gluttons for punishment will work for the MTGA.

The Ninth Circuit employed a *Sullins*-like analysis in *Maxwell*. See 708 F.3d at 1088 (tribe not real party in interest for suit against volunteer firefighters). However, no court outside of the Ninth Circuit has followed its lead. Cf. *Native Am. Distrib.*, 546 F.3d at 1296-97 (considering, but not deciding, whether tribal entity was "the real, substantial party in interest"). Consequently, the trial court leaned heavily on *Maxwell*, (App. Pt. 1, A21, A23-24), but ignored critical differences between it and this case.

In *Maxwell*, the Ninth Circuit held that tribal paramedics were not immune from a suit by a shooting victim's family over her allegedly delayed treatment. 708 F.3d at 1081, 1087. The Court's upheld the denial of summary judgment based on a "remedy-focused analysis" that examined "whether the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the sovereign from acting, or to compel it to act." *Id.* at 1088. The Court allowed the action to proceed because the plaintiffs "sued the Viejas Fire paramedics in their individual capacities for money damages. Any damages will come from their own pockets, not the tribal treasury." *Id.* at 1089.

As an initial matter, *Maxwell* has very different facts from this case. For one thing, the paramedics were not simply tribal employees; they responded to the 911 call pursuant to a mutual aid agreement between the Viejas Band and a neighboring fire protection district. 708 F.3d at 1087. Therefore, the exact employment status of the paramedics was at least a disputed issue of fact. In addition, the plaintiffs in *Maxwell* alleged gross negligence, so "denying tribal sovereign immunity to individual employees sued as

individuals will have a minimal effect, if any, on the tribe's hiring ability." 708 F.3d at 1090. There is no allegation of gross negligence in this case; only alleged ordinary negligence with the scope and course of Clarke's job..

More importantly, *Maxwell* is inconsistent with *Kizis*, *Chayoon*, and the other cases discussed above – reason enough to reject its importation into our jurisprudence. *Maxwell* depends on the far-fetched notion that an Indian tribe is not the real party in interest when a plaintiff sues one of the tribe's employees for actions in the scope and course of his employment. Not only will this give rise to a litigation thicket, it stands tribal immunity – a concept borne out of Indian tribes' inherent and broad sovereignty – on its head.

The "remedy-sought" approach allows any potential litigant to sidestep tribal immunity by simply omitting the tribe as a defendant, while remaining secure in the knowledge that the tribe's pocketbook remains open. If a plaintiff can circumvent immunity by a trick of pleading, it will make Swiss cheese out of an attribute of tribal sovereignty that trumps "policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *Beecher*, 282 Conn. at 135. Little wonder that no other federal Court of Appeals has followed *Maxwell*'s lead; and the one other Court to consider doing so, the Tenth Circuit, was happy that "[w]e need not wade into this swamp". 546 F.3d at 1297. Connecticut, too, should avoid treading on such unsteady ground.

The Second Circuit, the District Court of Connecticut, and the Appellate Court follow a simple, sensible and easy-to-follow rule: A tribal employee is immune from suit for his actions in the scope and course of his employment. This Court should do likewise because the trial court's findings make plain that the real party in interest is the MTGA.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the trial court and remand the case with direction to grant the defendant's motion to dismiss.

DEFENDANT-APPELLANT
WILLIAM CLARKE

By: _____

Daniel J. Krisch
Halloran & Sage LLP
One Goodwin Square
Hartford, CT 06105
Juris No. 026105
Tel. (860) 522-6103
Fax (860) 548-0006
krisch@halloransage.com

Robert A. Rhodes
Halloran & Sage LLP
315 Post Road West
Westport, CT 06103
Juris No. 412195
Tel. (203) 227-2855
Fax (203) 227-6992
rhodes@halloransage.com

His Attorneys

SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 19464

BRIAN LEWIS AND MICHELLE LEWIS

v.

WILLIAM CLARKE

APPENDIX PART 1

APPENDIX TABLE OF CONTENTS

PART ONE

PART TWO

State of Connecticut Judicial Branch
Civil and Family Inquiry

Civil / Family Home
-
Attorney/Firm Case List
Attorney/Firm Look-up
-
Docket Number Search
Party Name Search
Property Address Search
-
Short Calendars
By Court Location
By Juris Number
Motions to Seal or Close
Calendar Notices
Short Calendar
Quick Guide
-
Court Events By Date
Court Events By Juris Number
-
Scheduling Inquiry
-
Pending Foreclosure Sales
-
Questions & Answers
Court Information
Legal Terms

Comments

e KNL-CV13-6019099-S LEWIS, BRIAN Et Al v. CLARKE, WILLIAM Et Al

Prefix/Suffix: [none] **Case Type:** V01 **File Date:** 10/21/2013 **Return Date:** 11/19/2013

Case Detail | Notices | History | Scheduled Court Dates | E-Services Login | Screen Section Help

To receive an email when there is activity on this case, click here.

Information Updated as of: 05/14/2015

Case Information

Case Type: V01 - Vehicular - Motor Vehicles - Driver and/or Passenger(s) vs. Driver(s)
Court Location: NEW LONDON
List Type: No List Type
Trial List Claim:
Referral Judge or Magistrate:
Last Action Date: 05/13/2015 (The "last action date" is the date the information was entered in the system)

Disposition Information

Disposition Date:
Disposition:
Judge or Magistrate:

Party & Appearance Information

Party **No Fee Party**

P-01 BRIAN LEWIS

Attorney: e POLITO & QUINN LLC (420119) File Date: 10/21/2013
567 VAUXHALL STREET EXT
SUITE 230
WATERFORD, CT 06385

P-02 MICHELLE LEWIS

Attorney: e POLITO & QUINN LLC (420119) File Date: 10/21/2013
567 VAUXHALL STREET EXT
SUITE 230
WATERFORD, CT 06385

D-01 WILLIAM CLARKE

Attorney: e HALLORAN & SAGE (412195) File Date: 11/19/2013
315 POST ROAD WEST
WESTPORT, CT 068804739

Attorney: e HALLORAN & SAGE LLP (026105) File Date: 09/24/2014
ONE GOODWIN SQUARE
225 ASYLUM STREET
HARTFORD, CT 06103

D-02 MOHEGAN TRIBAL GAMING AUTHORITY
REMOVED

Viewing Documents on Civil Cases:

- Documents, court orders and judicial notices in 2014 and future civil cases are available publicly over the internet.*
- For cases filed prior to 2014, court orders and judicial notices that are electronic are available publicly over the internet. Orders can be viewed by selecting the link to the order from the list below. Notices can be viewed by clicking the **Notices** tab above and selecting the link.*

- If there is an *e* in front of the docket number at the top of this page, then the file is electronic. Documents and court orders can be viewed at any judicial district courthouse and at some geographical area courthouses during normal business hours.*
- You can view pleadings or other documents that are not electronic during normal business hours at the Clerk's Office in the Judicial District where the case is located.*
- Viewing of documents protected by law or court order may be limited.

* unless otherwise restricted

Motions / Pleadings / Documents / Case Status

Entry No	File Date	Filed By	Description	Arguable
	10/21/2013	P	**SUMMONS**	
	10/21/2013	P	**COMPLAINT**	
	10/21/2013	P	**RETURN OF SERVICE**	
	11/19/2013	D	**APPEARANCE** Appearance	
	09/24/2014	D	**APPEARANCE** Appearance	
101.00	10/23/2013	P	**WITHDRAWAL OF ACTION AGAINST PARTICULAR DEFENDANT(S) – CASE REMAINS PENDING**	No
102.00	11/19/2013	D	**MOTION FOR EXTENSION OF TIME TO PLEAD** to Plaintiff's Complaint *RESULT:* Granted 1/9/2014 HON THOMAS PARKER	No
102.01	01/09/2014	C	ORDER *RESULT:* Granted 1/9/2014 HON THOMAS PARKER	No
103.00	11/20/2013	P	**AMENDED COMPLAINT**	No
104.00	12/31/2013	D	**MOTION TO DISMISS PB 10-30** *RESULT:* Denied 9/10/2014 HON LEELAND COLE-CHU	Yes
104.01	09/10/2014	C	MEMORANDUM OF DECISION ON MOTION	No
105.00	12/31/2013	D	**MEMORANDUM IN SUPPORT OF MOTION** MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS	No
106.00	01/06/2014	P	**OBJECTION TO MOTION** to Dismiss and Memo of Law in Support of Objection *RESULT:* Sustained 9/10/2014 HON LEELAND COLE-CHU	No
106.01	09/10/2014	C	ORDER *RESULT:* Sustained 9/10/2014 HON LEELAND COLE-CHU	No
107.00	02/11/2014	D	**REPLY** TO PLAINTIFF'S OBJECTION TO MOTION TO DISMISS	No
108.00	02/14/2014	P	**REPLY** Sur-reply to defendant's Motion to Dismiss	No
109.00	02/18/2014	D	**NOTICE** Notice of Supplemental Authority and Additional Filings in Support of Defendant's Motion to Dismiss	No
110.00	02/21/2014	P	**REQUEST TO AMEND AND AMENDMENT** *RESULT:* Denied 3/25/2014 HON LEELAND COLE-CHU	No
110.01	03/25/2014	C	ORDER *RESULT:* Denied 3/25/2014 HON LEELAND COLE-CHU	No
111.00	02/25/2014	P	**REPLY** Supplemental Response to Additional Filings	No
112.00	02/27/2014	D	**OBJECTION TO REQUEST TO AMEND** Defendant's Objection to Plaintiffs' Request for Leave to Amend Complaint *RESULT:* Sustained 3/25/2014 HON LEELAND COLE-CHU	No

112.01	03/25/2014	C	ORDER *RESULT:* Sustained 3/25/2014 HON LEELAND COLE-CHU	No
113.00	06/13/2014	P	**WAIVER - GENERAL** re: Decision/Motion to Dismiss	No
114.00	06/17/2014	D	**WAIVER - GENERAL**	No
115.00	09/26/2014	P	**REQUEST TO AMEND AND AMENDMENT**	No
116.00	09/30/2014	D	**APPEAL TO APPELLATE COURT**	No
117.00	11/05/2014	C	**APPELLATE COURT MATERIAL**	No
118.00	04/20/2015	C	**APPELLATE COURT DECISION APPEAL TRANSFERRED TO SUPREME COURT**	No
119.00	05/13/2015	C	**JUDGMENT FILE** ! NEW	No

Scheduled Court Dates as of 05/13/2015

KNL-CV13-6019099-S - **LEWIS, BRIAN Et Al v. CLARKE, WILLIAM Et Al**

#	Date	Time	Event Description	Status
No Events Scheduled				

Judicial ADR events may be heard in a court that is different from the court where the case is filed. To check location information about an ADR event, select the **Notices** tab on the top of the case detail page.

Short Calendar and family support magistrate calendar matters are shown as scheduled court dates. If there are multiple motions on a single short calendar, the calendar will be listed once. You can see more information on matters appearing on short calendars and family support magistrate calendars by going to the Civil/Family Case Look-Up page and Short Calendars By Juris Number or By Court Location.

Periodic changes to terminology that do not affect the status of the case may be made.

This list does not constitute or replace official notice of scheduled court events.

Disclaimer: For civil and family cases statewide, case information can be seen on this website for a period of time, from one year to a maximum period of ten years, after the disposition date. If the Connecticut Practice Book Sections 7-10 and 7-11 give a shorter period of time, the case information will be displayed for the shorter period. Under the Federal Violence Against Women Act of 2005, cases for relief from physical abuse, foreign protective orders, and motions that would be likely to publicly reveal the identity or location of a protected party may not be displayed and may be available only at the courts.

Page Created on 5/14/2015 at 11 48 47 AM

SUMMONS - CIVIL

JD-CV-1 Rev. 2-13
C.G.S. §§ 51-346, 51-347, 51-349, 51-350, 52-45a, 52-48, 52-259, P.B. Secs. 3-1 through 3-21, 8-1

STATE OF CONNECTICUT
SUPERIOR COURT
www.jud.ct.gov

See page 2 for instructions

☐ "X" if amount, legal interest or property in demand, not including interest and costs is less than $2,500.
☒ "X" if amount, legal interest or property in demand, not including interest and costs is $2,500 or more.
☐ "X" if claiming other relief in addition to or in lieu of money or damages.

TO: Any proper officer; BY AUTHORITY OF THE STATE OF CONNECTICUT, you are hereby commanded to make due and legal service of this Summons and attached Complaint.

Address of court clerk where writ and other papers shall be filed *(Number, street, town and zip code)* *(C.G.S. §§ 51-346, 51-350)*	Telephone number of clerk *(with area code)*	Return Date *(Must be a Tuesday)*
70 Huntington Street, New London, CT 06320	**(860)443-5363**	**November** (Month) **19** (Day), **2013** (Year)

☒ Judicial District ☐ Housing Session ☐ G.A. Number:	At *(Town in which writ is returnable) (C.G.S. §§ 51-346, 51-349)*	Case type code *(See list on page 2)*
	New London	Major: **V** Minor: **01**

For the Plaintiff(s) please enter the appearance of:

Name and address of attorney, law firm or plaintiff if self-represented *(Number, street, town and zip code)*	Juris number *(to be entered by attorney only)*
James M. Harrington, Polito & Quinn, LLC, 567 Vauxhall Street Ext., Suite 230, Waterford, CT 06385	**420119**

Telephone number *(with area code)*	Signature of Plaintiff *(If self-represented)*
(860) 447-3300	

Number of Plaintiffs: **2** Number of Defendants: **2** ☐ Form JD-CV-2 attached for additional parties

Parties	Name *(Last, First, Middle Initial)* and Address of Each party *(Number; Street; P.O. Box; Town; State; Zip; Country, if not USA)*	
First Plaintiff	Name: **LEWIS, BRIAN** Address: **4235 Harriet Lane, Bethlehem, PA 18017**	P-01
Additional Plaintiff	Name: **LEWIS, MICHELLE** Address: **4235 Harriet Lane, Bethlehem, PA 18017**	P-02
First Defendant	Name: **CLARKE, WILLIAM** Address: **267 Prospect Street, Norwich, CT 06360**	D-01
Additional Defendant	Name: **MOHEGAN TRIBAL GAMING AUTHORITY** Address: **13 Crow Hill Road, Uncasville, CT 06382**	D-02
Additional Defendant	Name: Address:	D-03
Additional Defendant	Name: Address:	D-04

Notice to Each Defendant

1. **YOU ARE BEING SUED.** This paper is a Summons in a lawsuit. The complaint attached to these papers states the claims that each plaintiff is making against you in this lawsuit.
2. To be notified of further proceedings, you or your attorney must file a form called an "Appearance" with the clerk of the above-named Court at the above Court address on or before the second day after the above Return Date. The Return Date is not a hearing date. You do not have to come to court on the Return Date unless you receive a separate notice telling you to come to court.
3. If you or your attorney do not file a written "Appearance" form on time, a judgment may be entered against you by default. The "Appearance" form may be obtained at the Court address above or at *www.jud.ct.gov* under "Court Forms."
4. If you believe that you have insurance that may cover the claim that is being made against you in this lawsuit, you should immediately contact your insurance representative. Other action you may have to take is described in the Connecticut Practice Book which may be found in a superior court law library or on-line at *www.jud.ct.gov* under "Court Rules."
5. If you have questions about the Summons and Complaint, you should talk to an attorney quickly. **The Clerk of Court is not allowed to give advice on legal questions.**

Signed *(Sign and "X" proper box)*	☒ Commissioner of the Superior Court ☐ Assistant Clerk	Name of Person Signing at Left	Date signed
		James M. Harrington	**10/16/2013**

If this Summons is signed by a Clerk:
a. The signing has been done so that the Plaintiff(s) will not be denied access to the courts.
b. It is the responsibility of the Plaintiff(s) to see that service is made in the manner provided by law.
c. The Clerk is not permitted to give any legal advice in connection with any lawsuit.
d. The Clerk signing this Summons at the request of the Plaintiff(s) is not responsible in any way for any errors or omissions in the Summons, any allegations contained in the Complaint, or the service of the Summons or Complaint.

For Court Use Only
File Date
A True Copy
Attest
Robert Davis
CT. State Marshal
New London County

I certify I have read and understand the above:	Signed *(Self-Represented Plaintiff)*	Date

Name and address of person recognized to prosecute in the amount of $250
Ruth G. Mattos, 567 Vauxhall Street Ext.,Suite 230, Waterford, CT 06385

Signed *(Official taking recognizance, "X" proper box)*	☒ Commissioner of the Superior Court ☐ Assistant Clerk	Date	Docket Number
		10/16/2013	

(Pag

A4

RETURN DATE: NOVEMBER 19, 2013	SUPERIOR COURT
BRIAN LEWIS AND MICHELLE LEWIS	JD OF NEW LONDON
VS.	AT NEW LONDON
WILLIAM CLARKE AND MOHEGAN TRIBAL GAMING AUTHORITY	OCTOBER 16, 2013

COMPLAINT

COUNT ONE: (Brian Lewis vs. William Clarke and Mohegan Tribal Gaming Authority)

1. On or about October 22, 2011, at approximately 6:39 p.m., the plaintiff, Brian Lewis (hereinafter the "plaintiff" in this Count One), was the operator of a motor vehicle traveling southbound on Interstate 95 in Norwalk, Connecticut.

2. At the same time and place, the defendant, William Clarke was operating a limousine owned by the defendant, the Mohegan Tribal Gaming Authority, which was traveling behind the plaintiff, southbound on Interstate 95.

3. At said time and at all relevant times herein, William Clarke was acting in the scope of his employment with the Mohegan Tribal Gaming Authority and was driving said vehicle with the permission of the Mohegan Tribal Gaming Authority as its employee/agent and/or servant.

Polito & Quinn, LLC ♦ Attorneys at Law
567 Vauxhall Street Extension, Suite 230 ♦ Waterford ♦ Connecticut 06385
(860) 447-3300 ♦ Juris Number 420119

4. Suddenly and without warning, the defendant, William Clarke, drove the limousine into the rear end of the plaintiff's vehicle, the violent force of which caused that vehicle to propel forward, coming to rest partially on top of a jersey barrier located on the left hand side of the roadway (hereinafter the "collision").

5. Said collision and the injuries and damages as hereinafter set forth, were caused by the negligence and carelessness of William Clarke and the Mohegan Tribal Gaming Authority, in one or more the following ways, in that William Clarke:

a. violated Section 14-218 of the Connecticut General Statutes by operating a motor vehicle at an unreasonable rate of speed having regard for the time of day, intersection of street, width, traffic and use of such highway and the weather conditions;

b. violated Section 14-240 of the Connecticut General Statutes by operating said motor vehicle too close to the vehicle traveling in front of him;

c. failed to apply the brakes of the motor vehicle in a timely manner or otherwise maneuver a motor vehicle so as to avoid the collision with the vehicle in front of him;

d. failed to keep a motor vehicle under reasonable and proper control;

e. failed to keep an adequate and proper lookout ahead;

Polito & Quinn, LLC ♦ Attorneys at Law
567 Vauxhall Street Extension, Suite 230 ♦ Waterford ♦ Connecticut 06385
(860) 447-3300 ♦ Juris Number 420119

f. was inattentive to driving; and

g. failed under all the circumstances then and there existing to take reasonable and proper precautions to avoid the probability of harm to the plaintiff.

6. As a direct result of the collision, the plaintiff sustained the following injuries, some or all of which may be permanent in nature and will be the cause of future pain and disability, as well as fear of the same:

a. Loss of consciousness;

b. Lumbar sprain/strain;

c. Cervical sprain/strain; and

d. Post concussion syndrome

7. To treat said injuries, the plaintiff was required to seek emergency medical treatment, orthopedic treatment, follow-up treatment, physical therapy, radiological exams, and prescription pain killing medication.

8. As a result of said injuries the plaintiff has suffered and in the future will continue to suffer great physical and mental pain.

9. By reason of the negligence and carelessness of the defendant, as aforesaid, the plaintiff was required to spend substantial sums of money for the medical care, services, treatment, diagnostic studies, drugs and devices necessitated by said injuries.

Polito & Quinn, LLC ♦ Attorneys at Law
567 Vauxhall Street Extension, Suite 230 ♦ Waterford ♦ Connecticut 06385
(860) 447-3300 ♦ Juris Number 420119

10. As a result of said injuries the plaintiff has suffered and in the future will continue to suffer from a fear of future disability.

COUNT TWO: (Michelle Lewis vs. William Clarke and Mohegan Tribal Gaming Authority)

1. On or about October 22, 2011, at approximately 6:39 p.m., the plaintiff, Michelle Lewis (hereinafter the "plaintiff" in this Count Two), was the passenger of a motor vehicle traveling southbound on Interstate 95 in Norwalk, Connecticut.

2. At the same time and place, the defendant, William Clarke was operating a limousine owned by the defendant, the Mohegan Tribal Gaming Authority, which was traveling behind the plaintiff, southbound on Interstate 95.

3. At said time and at all relevant times herein, William Clarke was acting in the scope of his employment with the Mohegan Tribal Gaming Authority and was driving said vehicle with the permission of the Mohegan Tribal Gaming Authority as its employee/agent and/or servant.

4. Suddenly and without warning, the defendant, William Clarke, drove the limousine into the rear end of the plaintiff's vehicle, the force of which caused that vehicle to propel forward, coming to rest partially on top of a jersey barrier located on the left hand side of the roadway (hereinafter the "collision").

Polito & Quinn, LLC ♦ Attorneys at Law
567 Vauxhall Street Extension, Suite 230 ♦ Waterford ♦ Connecticut 06385
(860) 447-3300 ♦ Juris Number 420119

5. Said collision and the injuries and damages as hereinafter set forth, were caused by the negligence and carelessness of William Clarke and the Mohegan Tribal Gaming Authority, in one or more the following ways, in that William Clarke:

a. violated Section 14-218 of the Connecticut General Statutes by operating a motor vehicle at an unreasonable rate of speed having regard for the time of day, intersection of street, width, traffic and use of such highway and the weather conditions;

b. violated Section 14-240 of the Connecticut General Statutes by operating said motor vehicle too close to the vehicle traveling in front of him;

c. failed to apply the brakes of the motor vehicle in a timely manner or otherwise maneuver a motor vehicle so as to avoid the collision with the vehicle in front of him;

d. failed to keep a motor vehicle under reasonable and proper control;

e. failed to keep an adequate and proper lookout ahead;

f. was inattentive to driving; and

g. failed under all the circumstances then and there existing to take reasonable and proper precautions to avoid the probability of harm to the plaintiff.

Polito & Quinn, LLC ♦ Attorneys at Law
567 Vauxhall Street Extension, Suite 230 ♦ Waterford ♦ Connecticut 06385
(860) 447-3300 ♦ Juris Number 420119

6. As a direct result of the collision, the plaintiff sustained the following injuries, some or all of which may be permanent in nature and will be the cause of future pain and disability, as well as fear of the same:

a. Nasal fracture;

b. Lumbar sprain/strain; and

c. Cervical sprain/strain.

7. To treat said injuries, the plaintiff was required to seek emergency medical treatment, orthopedic treatment, follow-up treatment, physical therapy, radiological exams, and prescription pain killing medication.

8. As a result of said injuries the plaintiff has suffered and in the future will continue to suffer great physical and mental pain.

9. By reason of the negligence and carelessness of the defendant, as aforesaid, the plaintiff was required to spend substantial sums of money for the medical care, services, treatment, diagnostic studies, drugs and devices necessitated by said injuries.

10. As a result of said injuries the plaintiff has suffered and in the future will continue to suffer from a fear of future disability.

Polito & Quinn, LLC ♦ Attorneys at Law
567 Vauxhall Street Extension, Suite 230 ♦ Waterford ♦ Connecticut 06385
(860) 447-3300 ♦ Juris Number 420119

WHEREFORE, the plaintiffs claim:

1. Monetary damages;

2. Such other relief as is within the jurisdiction of the Court.

THE PLAINTIFFS

BY _____

James M. Harrington
Polito & Quinn, LLC
567 Vauxhall Street, Suite 230
Waterford, CT 06385
(860) 447-3300
Juris No. 420119

RETURN DATE: NOVEMBER 19, 2013 | SUPERIOR COURT

BRIAN LEWIS AND MICHELLE LEWIS | JD OF NEW LONDON

VS. | AT NEW LONDON

WILLIAM CLARKE AND
MOHEGAN TRIBAL GAMING AUTHORITY | OCTOBER 16, 2013

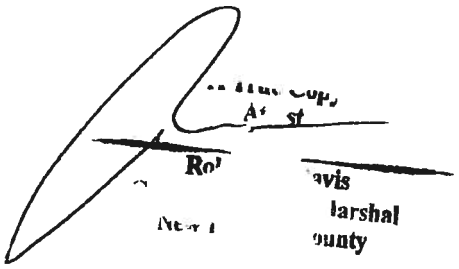
STATEMENT OF AMOUNT IN DEMAND

The amount, legal interest, or property in demand is fifteen thousand dollars or more, exclusive of interest and costs.

THE PLAINTIFFS

BY _____

James M. Harrington
Polito & Quinn, LLC
567 Vauxhall Street, Suite 230
Waterford, CT 06385
(860) 447-3300
Juris No. 420119



WITHDRAWAL
JD-CV-41 Rev. 6-12

STATE OF CONNECTICUT
SUPERIOR COURT
www.jud.ct.gov

Return date: **Nov-19-2013**
Docket number: **KNL-CV-13-6019099-S**

Fill Out All Sections Below

Name of case *(First-named Plaintiff vs. First-named Defendant)*
LEWIS, BRIAN Et Al v. CLARKE, WILLIAM Et Al

[x] Judicial District [ ] Housing Session [ ] Geographical Area number ____

Address of court *(Number, street, town and zip code)*
70 HUNTINGTON STREET NEW LONDON, CT 06320

Section I *(check only one box)* This Withdrawal is being filed because the dispute has been resolved by:

I. Court-Annexed ADR

411088 [ ] Early Intervention
411090 [ ] Attorney Trial Referee
411091 [ ] Fact-Finding
411093 [ ] Arbitration
411094 [ ] Mediation
411095 [ ] Special Masters
411096 [ ] Summary Jury Trial

II. Court Intervention

411098 [ ] Pretrial Conference
411099 [ ] Trial Management Conference
411100 [ ] Commencement of Trial (court trial - first witness sworn; jury trial - trial jurors sworn)

III. Private ADR

411102 [ ] Provider Name: ____

IV. Other

411103 [x] Discussion of Parties on Their Own
415602 [ ] Unilateral Action of Party or Parties

Section II Withdrawal

Dispositive *(Do not check the following two boxes if any intervening complaints, cross complaints, counterclaims, or third party complaints remain pending in this case. See below for partial withdrawal of action.)*

(WDACT) [ ] The Plaintiff's action is WITHDRAWN AS TO ALL DEFENDANTS without costs to any party.

(WOARD) [ ] A judgment has been rendered against the following Defendant(s): ____

and the Plaintiff's action is WITHDRAWN AS TO ALL REMAINING DEFENDANTS without costs.

Partial
The following pleading(s), motion(s) or other paper(s) in the case named above is or are withdrawn:

(WDCOMP) [ ] Complaint
(WDCOUNT) [ ] Counts of the complaint: ____
(WDINTCO) [ ] Intervening Complaint
(WDTHPC) [ ] Third Party Complaint
(WAPPCOM) [ ] Apportionment Complaint
(WDCC) [ ] Cross Complaint (cross claim)
(WOC) [ ] Counterclaim

(WOAAP) [ ] Plaintiff(s): ____
(WOAAD) [x] Complaint against defendant(s): **D-02 MOHEGAN TRIBAL GAMING AUTHORITY** only without costs
(WOM) [ ] Motion: ____ [ ] Other: ____

Signature Required

Party **P-01 BRIAN LEWIS** ; By **POLITO & QUINN LLC** Attorney or Self-represented Party
Party **P-02 MICHELLE LEWIS** ; By **POLITO & QUINN LLC** Attorney or Self-represented Party
Party ____ ; By ____ Attorney or Self-represented Party
Party ____ ; By ____ Attorney or Self-represented Party

Name & Address of Signer: ▶ **JAMES MICHAEL HARRINGTON**
567 Vauxhall Street Ext., Suite 230, Waterford, CT 06385

Section III Certification

I certify that a copy of this document was mailed or delivered electronically or non-electronically on *(date)* **Oct-23-2013** to all attorneys and self-represented parties of record and that written consent for electronic delivery was received from all attorneys and self-represented parties receiving electronic delivery.

Name and address of each party and attorney that copy was mailed or delivered to*

*If necessary, attach additional sheet or sheets with name and address which the copy was mailed or delivered to.

Signed *(Signature of filer)*	Print or type name of person signing	Date signed
▶ **431815**	**JAMES MICHAEL HARRINGTON**	**Oct-23-2013**

Mailing address *(Number, street, town, state and zip code)*	Telephone number
567 VAUXHALL ST EXT SUITE 230 WATERFORD, CT 06385	**860-447-3300**

For Court Use Only

Continuation of JDCV41 Withdrawal for KNL-CV-13-6019099-S

Submitted By POLITO & QUINN LLC (420119)

Certification of Service (Continued from JDCV41)

Other Service Information:

13 Crow Hill Road, Uncasville, CT 06382

******* End of Certification of Service *******

DOCKET NO.: KNL-CV13-6019099-S	:	SUPERIOR COURT
BRIAN LEWIS	:	J.D. OF NEW LONDON
VS.	:	AT NEW LONDON
WILLIAM CLARKE AND MOHEGAN TRIBAL GAMING AUTHORITY	:	DECEMBER 31, 2013

MOTION TO DISMISS

Pursuant to Section 10-30 of the Connecticut Rules of Court, the defendant, William Clarke, hereby moves for dismissal of the claims against him as the Court is without subject matter jurisdiction because he is entitled to tribal sovereign immunity. A detailed Memorandum of Law has been filed in support of this motion.

THE DEFENDANT
WILLIAM CLARKE

BY: _____

Robert A. Rhodes, Esq.
HALLORAN & SAGE
315 Post Road West
Westport, CT 06880
Juris No. 407525

ORAL ARGUMENT REQUESTED
TESTIMONY NOT REQUIRED

CERTIFICATION

This is to certify that a copy of the foregoing has been mailed via first class mail, postage prepaid, to all counsel and parties of record on this 31st day of December, 2013 as follows:

James M. Harrington, Esq.
Polito & Quinn, LLC
567 Vauxhall Street, Suite 230
Waterford, CT 06385

Robert A. Rhodes, Esq.

315 Post Road West
Westport, CT 06880

HALLORAN & SAGE LLP

Phone (203) 227-2855
Fax (203) 227-6992
Juris No. 412195

DOCKET NO.: KNL-CV13-6019099-S	SUPERIOR COURT
BRIAN LEWIS AND MICHELLE LEWIS	JD OF NEW LONDON
VS.	AT NEW LONDON
WILLIAM CLARKE	JANUARY 6, 2014

OBJECTION TO DEFENDANT'S MOTION TO DISMISS

The plaintiffs hereby object to the Motion to Dismiss filed by the defendant as more fully set out in the attached memorandum in opposition.

THE PLAINTIFFS

By _____
James M. Harrington
Polito & Quinn, LLC

CERTIFICATION

I hereby certify that a copy of the foregoing was sent by regular mail on this 6th day of January, 2014 to the following counsel of record:

Robert A. Rhodes, Esquire
Halloran & Sage, LLP
315 Post Road West
Westport, CT 06880

_____
James M. Harrington
Commissioner of Superior Court

Docket no. KNL CV-13-6019099-S	:	CONNECTICUT SUPERIOR COURT
BRIAN LEWIS AND MICHELLE LEWIS, Plaintiffs,	:	J.D. NEW LONDON
v.	:	AT NEW LONDON
WILLIAM CLARKE, Defendant	:	SEPTEMBER 10, 2014

MEMORANDUM OF DECISION ON MOTION TO DISMISS (#104.00)

The plaintiffs, Brian Lewis and Michelle Lewis, initiated this suit by way of complaint filed on October 21, 2013, against William Clarke and the Mohegan Tribal Gaming Authority (MTGA). Two days later, on October 23, 2013, before the return date, the plaintiffs withdrew the action as to the MTGA. On November 19, 2013, William Clarke appeared by counsel. The next day, the plaintiffs filed an amended complaint in two counts, one each by Brian Lewis and Michelle Lewis against Clarke only ("the complaint").[1]

On December 31, 2013, Clarke moved to dismiss the complaint. Filed with the motion were an affidavit of Michael Hamilton, a copy of a police report on the subject accident, portions of the Mohegan Tribe of Indians Code and a copy of the Tribal State Compact between the Mohegan Tribe and State of Connecticut. The plaintiffs filed an objection to the motion to dismiss on January 6, 2014. Clarke filed a reply memorandum to the plaintiffs' objection on February 11, 2014, attaching a copy of the Mohegan Tribal Code §§ 4-52 and 4-53 and an Affidavit of Mary Lou Morrissette. On February 14, 2014, the plaintiffs filed a sur-reply. The motion was argued on February 28, 2014.[2] Also on that day, Clarke filed supplemental authorities discussed at oral argument but not included in the briefs. On February 25, 2014, the plaintiffs filed a response to Clarke's supplemental authorities.

---

[1]On February 21, 2014, the plaintiffs filed another request for leave to amend their complaint, which request was denied by this court on March 25, 2014, without prejudice to renewal after issuance of this decision on the defendant's motion to dismiss.

[2] The parties filed written waivers of the 120-day deadline for this decision, for which the court thanks them and their respective counsel.

Copies mailed to all counsel of record and the Reporter of Judicial Decisions on 9/11/14

FACTS

In deciding a jurisdictional question raised by a motion to dismiss, the court takes the facts to be those alleged, and necessarily implied, in the complaint, construing them in a manner most favorable to the pleader. *Lagassey v. State*, 268 Conn. 723, 736, 846 A.2d 831 (2004). Legal conclusions and opinions are not taken as true. See *Ellef v. Select Committee of Inquiry*, Superior Court, judicial district of Hartford, Docket No. CV-04-0832432-S (April 8, 2004). The interpretation of pleadings is always a question of law for the court. *Boone v. William W. Backus Hospital*, 272 Conn. 551, 559 n.1, 864 A.2d 1 (2005). Viewing the complaint in this light, the essential facts are as follows.

On October 22, 2011, the plaintiff Brian Lewis was operating a motor vehicle southbound on Interstate Route 95 in Norwalk, Connecticut. The plaintiff Michelle Lewis was his passenger. Clarke was driving a limousine behind the plaintiffs. Suddenly and without warning, Clarke drove the limousine into the rear of the plaintiffs' vehicle and propelled the plaintiffs' vehicle forward with such force that it came to rest partially on top of a jersey barrier on the left hand side of the highway. The collision and the plaintiffs' resulting injuries were caused by Clarke's negligence. At that time, Clarke was a Connecticut resident, had a Connecticut driver's license, and, according to the affidavit of Michael Hamilton, the MTGA's Director of Transportation, was driving a limousine owned by the MTGA and was employed by the MTGA to do so.[3] Specifically, Clarke was driving patrons of the Mohegan Sun Casino to their homes. The limousine was covered by an automobile insurance policy issued by Arch Insurance.

DISCUSSION

"[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 134, 918 A.2d 880 (2007). The party who is asking the court to exercise jurisdiction in his favor must be able to allege facts

---

[3] "[I]f the complaint is supplemented by *undisputed facts* established by affidavits submitted in support of the motion to dismiss [or] other types of undisputed evidence . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Conboy v. State*, 292 Conn. 642, 651-52, 974 A.2d 669 (2006).

demonstrating that he is a proper party to make that request. See *St. Paul Travelers Cos. v. Kuehl*, 299 Conn. 800, 808, 12 A.3d 852 (2011). The plaintiff, therefore, bears the burden of proving subject matter jurisdiction. *Fort Trumbull Conservancy, LLC v. New London*, 265 Conn. 423, 430 n.12, 829 A.2d 801 (2003). In determining whether a court has subject matter jurisdiction, every appropriate presumption favors finding such jurisdiction. *Keller v. Beckenstein*, 305 Conn. 523, 531, 46 A.3d 102, 107 (2012).

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." (Internal quotation marks omitted.) *Kizis v. Morse Diesel International, Inc.*, 260 Conn. 46, 52, 794 A.2d 498 (2002). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). "'Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity bars suits for damages against a tribe.' *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996). 'However, such waiver may not be implied, but must be expressed unequivocally.' *McClendon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989)." *Kizis v. Morse Diesel International, Inc.*, supra, 53. The tribe must have consented to suit in the specific forum. Id., 53, citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).

THE PARTIES' CLAIMS

Clarke moves to dismiss the complaint on the ground that the court lacks subject matter jurisdiction because the MTGA is entitled to sovereign immunity, as an entity of the Mohegan Tribe of Indians of Connecticut ("Mohegan Tribe" or "the tribe"), and he is entitled to sovereign immunity as an employee of the MTGA acting within the scope of his employment at the time of the accident. Clarke argues that to deny the present motion would be to abrogate the MTGA's sovereign immunity, and that only the Congress of the United States has that power. Clarke argues that dismissal of this case would not leave the plaintiffs without recourse because they can sue him in the Mohegan Tribal Gaming Court.

The plaintiffs oppose Clarke's motion based on an emerging "remedy-sought" doctrine promulgated by the Ninth and Tenth Circuits of the United States Courts of Appeal. The essence

of the "remedy-sought" doctrine is that sovereign immunity does not extend to a tribal employee who is sued in his individual capacity when damages are sought from the employee, not from the tribe, and will in no legally cognizable way affect the tribe's ability to govern itself independently. The plaintiffs claim that, even treating the MTGA as the Mohegan Tribe, their suit against Clarke individually would not infringe on the tribe's sovereign immunity and therefore, immunity should not be extended to him. Essentially, the plaintiffs argue that the tribe's sovereign immunity is limited; that, in a civil context, tribal immunity prevents only claims and judgments for money against the tribe or the MTGA; and that there is no such claim here, nor any possibility of such a judgment. The plaintiffs urge the court to adopt the remedy-sought analysis applied in *Maxwell v. County of San Diego*, 697 F.3d 941 (9th Cir. 2012), and find that a tribal employee can be sued in his individual capacity so long as the remedy sought is against the employee individually.[4]

Clarke replies that, in our federal circuit – the United States Court of Appeals for the Second Circuit – and under Connecticut law, it is well settled that tribal employees are immune from suit when acting within the scope of their employment, even where a tribal employee is the sole defendant, and that it is unnecessary and inappropriate to examine whether the tribe is a real party in interest. See *Chayoon v. Sherlock*, 89 Conn. App. 821, 877 A.2d 4, cert. denied, 276 Conn. 913, 888 A.2d 83 (2005). Clarke argues that this court should heed the Tenth Circuit's caution, in *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1297 (10th Cir. 2008), that adoption of the remedy-sought analysis would be like wading into a swamp and reject that analysis. Finally, Clarke claims that, even if this court applies the "remedy-sought" analysis, he would still be immune from suit because the MTGA is the real party in interest by virtue of its commitment to indemnify and defend him, its employee.

In the plaintiffs' sur-reply, they argue that the facts of this case differ from those in *Chayoon v. Sherlock*, supra, 89 Conn. App. 821. The plaintiffs contend that tribal immunity is not attached to an individual employee sued in his individual capacity. They argue that *Chayoon*

---

[4]The plaintiffs have cited to the *Maxwell v. County of San Diego* opinion appearing at 697 F.3d 941 (9th Cir. 2012). That opinion, however, has been withdrawn by *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013). Accordingly, this court relies on the latter opinion.

is distinguishable because the court found, despite the plaintiff's claim, tribal employees were being sued, in part, in their roles as tribal representatives. See *Chayoon v. Sherlock*, supra, 89 Conn. App. 829 (saying defendant is being sued individually does not make it so). The plaintiffs distinguish *Bassett v. Mashantucket Pequot Museum & Research Center, Inc.*, 221 F. Supp. 2d 271, 277-78 (D. Conn. 2002), also cited by Clarke, because the complaint in *Bassett* alleged that the tribal employees were being sued "individually and as an authorized agent of the Tribe as well as in their capacities as officers, representatives and/or agents of the [tribal] corporation and/or association."

At oral argument, Clarke cited *Tonasket v. Sargent*, 510 Fed. Appx. 648 (9th Cir., 2013), and *Miller v. Wright*, 705 F.3d 919 (9th Cir., 2013), for the proposition that the remedy-focused analysis employed in *Maxwell* has been abandoned. The plaintiffs' dispute that proposition because *Tonasket* and *Miller* did not address the present issue: those decisions involved the execution of a cigarette tax upon a tribal reservation.

ANALYSIS

At the outset, there is no claim by the plaintiffs that the MTGA has waived sovereign immunity or that Clarke has waived his claim to sovereign immunity. Nor does this court perceive that it has any power to "abrogate sovereign immunity" or otherwise assume any power or right reserved to the tribe, let alone to the United States Congress. Rather, the issue presented is whether the MGTA's immunity protects its employee, Clarke, from being sued solely in his individual capacity for an alleged tort occurring off the tribal reservation injuring non-patrons of the MTGA. In other words, the issue is not whether the court has the power to abrogate sovereign immunity, but whether sovereign immunity is present at all. Under the facts of this case, the court concludes that the "remedy-sought" analysis should be applied and, because the remedy sought is not against the MTGA, Clarke is not immune from suit.

Tribal sovereign immunity is limited. "[T]ribal sovereignty is dependent upon, and subordinate to . . . the [f]ederal [g]overnment." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980). "The [tribal] sovereign's claim to immunity in the courts of a second sovereign . . . normally depends on the second sovereign's law. *Schooner Exchange v. McFadden*, 7 Cranch 116, 136 (1812)."

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., supra, 523 U.S. 760-61 (*Stevens, J.*, dissenting). Tribal immunity "exists only at the sufferance of Congress and *is subject to complete defeasance*." (Emphasis in original; internal quotation marks omitted.) *Rice v. Rehner*, 463 U.S. 713, 724, 103 S. Ct. 3291, 77 L. Ed. 2d 961 (1993). Congress has restricted tribal immunity to matters involving tribal self-governance. *Turner v. United States*, 248 U.S. 354, 358, 39 S. Ct. 109, 63 L. Ed. 291 (1919); *Strate v. A-1 Contractors*, 520 U.S. 438, 459, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997) (immunity has not been extended beyond protecting tribal self government or controlling internal relations); *Rice v. Rehner*, supra, 724 (immunity limited to actions promoting powers such as self-sufficiency and economic development traditionally reserved to the tribe).

In *Maxwell*, the key Ninth Circuit case applying the "remedy-sought" doctrine, a Viejas tribal fire department ambulance with two tribal employee paramedics was dispatched to the scene of a shooting at the plaintiffs' residence, which was not on the Viejas Indian Reservation. *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013). Following the death of the patient, the plaintiffs brought state law tort claims against the tribal paramedics, individually. Although the Viejas Fire Department was also a defendant, the Viejas Tribe was not a party to the suit.

Carefully considering the purposes of tribal sovereign immunity, the court in *Maxwell* applied a remedy focused analysis, seeking to identify the real party in interest. Id., 1087-1090. The *Maxwell* court determined that the tribal paramedics were not entitled to immunity because the remedy sought by the plaintiffs would operate only against them personally. Id., 1088. Underlying the test applied in *Maxwell* was the consideration that the court "must be sensitive to whether the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act." (Internal quotation marks omitted.) Id., 1088.

"Tribal sovereign immunity derives from the same common law immunity principles that shape state and federal sovereign immunity. See *Santa Clara Pueblo v. Martinez*, [supra, 436 U.S. 58]; *Cook* [*v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008)]. Normally, a suit like this one – brought against individual officers in their individual capacities – does not

implicate sovereign immunity." *Maxwell v. County of San Diego*, supra, 708 F.3d 1088, citing *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1190 (9th Cir. 2003). The plaintiffs in this case seek money damages not from the sovereign Mohegan Tribe but from Clarke personally. See *Alden v. Maine*, 527 U.S. 706, 757, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) (states' immunity from private suit in their own courts distinguished from suits against states' employees). The essential nature and effect of the relief sought can mean that the sovereign is not the real, substantial party in interest. See *Maxwell v. County of San Diego*, supra, 1088, citing *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464, 65 S. Ct. 347, 89 L. Ed. 389 (1945).

Several years before *Maxwell*, the Tenth Circuit stated, "[w]here a suit is brought against the agent or official of a sovereign, to determine whether sovereign immunity bars the suit, we ask whether the sovereign is the real, substantial party in interest. *Frazier v. Simmons*, 254 F.3d 1247, 1253 (10th Cir. 2001) . . . This turns on the relief sought by the plaintiffs. Id. . . . '[T]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.' *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101, 104 S. Ct. 900 79 L. Ed. 2d 67 (1984) . . . . Where, however, the plaintiffs' suit seeks money damages from the officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, sovereign immunity does not bar the suit so long as the relief is sought not from the [sovereign's] treasury but from the officer personally.' *Alden v. Maine*, [supra, 527 U.S. 757]." (Citations omitted; internal quotation marks omitted.) *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, supra, 546 F.3d 1296-97; see also *Nahno-Lopez v. Houser*, 627 F. Supp. 2d 1269, 1285 (W.D. Okla. 2009) (claims against individuals are not barred if damages are clearly not sought from the tribe). "The general bar against official-capacity claims . . . does not mean that tribal officials are immunized from individual-capacity suits *arising out of* actions they took in their official capacities . . . ." (Emphasis in original.) *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, supra, 1296. "Rather, it means that tribal officials are immunized from suits brought against them *because of* their official capacities – that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe." (Emphasis in original.) Id., 1296.

Clarke argues that, in *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, supra, 546 F.3d 1288, the Tenth Circuit likened the remedy-sought analysis to wading into a swamp. That argument is a mischaracterization. In fact, the Tenth Circuit stated: "[w]e need not wade into this swamp [of analyzing who is the real party in interest] . . . because a close reading of the plaintiffs' complaint makes clear that plaintiffs have failed to state a claim against the Individual Defendants in their individual capacities." Id., 1297. A close reading of the complaint in this case reveals that Clarke is only being sued in his individual capacity. The interpretation of pleadings is always a question of law for the court. *Boone v. William W. Backus Hospital*, supra, 272 Conn. 559.

Clarke argues that *Johns v. Voebel*, Superior Court, judicial district of New Haven, Docket No. CV-11-6017037-S (September 23, 2011), in which the complaint was dismissed on sovereign immunity grounds, is analogous to the present case. It is true that, in *Johns*, the plaintiff sued a driver employed by the MTGA who, off the tribal reservation, struck the plaintiff's vehicle. *Johns* is distinguishable from this case because the question of whether the tribal employee was being sued solely in his individual capacity was apparently neither raised nor considered by the court. The plaintiff in *Johns* conceded there was sovereign immunity: the issue was whether the tribal employee driver was acting outside the scope of his authority.

The defendant claims that *Bassett v. Mashantucket Pequot Museum & Research Center, Inc.*, supra, 221 F. Supp. 2d 271, and *Chayoon v. Sherlock,* supra, 89 Conn. App. 821, require a different analysis and dismissal of this case. While the plaintiffs' claims in both those cases were dismissed on sovereign immunity grounds, the defendants were tribal employees sued under theories of vicarious tribal liability. The complaint in *Chayoon* stated that the tribal employees were being sued individually as well as in their "professional capacities." *Chayoon v. Sherlock*, supra, 828. In *Bassett*, the District Court found that the defendants were being sued "in their official capacities as officers, representatives, and/or agents of the Tribe." *Bassett v. Mashantucket Pequot Museam and Research Center, Inc.*, supra, 276 n.9. In *Chayoon* and *Bassett*, both of which predate *Native American Distributing*, *Nahno-Lopez v. Houser*, supra, and *Maxwell*, tribal employees were sued in their official capacities. Because it was clear that at least part of the remedy sought was against a sovereign, it was unnecessary to analyze whether there

was *no* remedy sought against a sovereign. Compare *Maxwell v. San Diego*, supra, 708 F.3d 1088 (when a case is an official capacity suit, the remedy-sought analysis is not necessary), with *Cook v. Avi Casino Enterprises, Inc.*, supra, 548 F.3d 718 (sovereign immunity barred suit where real defendant in interest was the tribe).

Clarke also relies upon *Kizis v. Morse Diesel International, Inc.*, supra, but *Kizis* was an action resulting from a fall at the Mohegan Sun Casino, not off the reservation. *Kizis v. Morse Diesel International, Inc.*, supra, 260 Conn. 48-49. Accordingly, *Kizis* is readily distinguishable from the present case. Noting that "[t]he tribe has not consented to state jurisdiction over private actions involving matters that occurred *on tribal land* . . ." the court held that "in this instance, the statutes and compacts cited previously, which have been recognized by both the federal government and the state of Connecticut through compliance with the procedures set forth in the gaming act and the Indian Civil Rights Act, explicitly place the present type of tort action in the jurisdiction of the tribe's Gaming Disputes Court." (Emphasis added; footnote omitted.) Id., 57-58. The facts of *Kizis* make it unilluminating to the present case, in which Clarke is alleged to have driven a limousine on non-tribal land into the vehicle of the plaintiffs, who were not invitees of the tribal casino.

The following Superior Court cases are, contrary to the defendant's claim, not inconsistent with the remedy-sought analysis because their facts and claims are distinguishable. In *Durante v. Mohegan Tribal Gaming Authority*, Superior Court, Complex Litigation Docket, judicial district of Hartford, Docket No. X04-HHD-CV-11-6022130-S (March 30, 2012), the plaintiff was killed in an automobile accident by a drunk driver who had been served alcohol at the Mohegan Sun Casino and brought suit against the MGTA, the chief executive officer of the MGTA, the chairman of the Mohegan Tribal Counsel, and the permittee of a night club at the tribal casino. Likewise, in *Ross v. Spaziante*, Superior Court, judicial district of New London, Docket No. CV-10-6003909-S (November 1, 2011), the plaintiffs filed suit against the MTGA, the permittee of a tribal casino bar, and others following an automobile accident involving a patron of the bar. Unlike in *Durante* and *Ross*, the MTGA is not a party to this suit and the claims here are not brought against high-ranking tribal officials, as in *Durante*, or based on Dram Shop Act liability of a tribal casino bar, as in *Ross*. In *Vanstaen-Holland v. LaVigne*, Superior

Court, judicial district of New London, Docket No. CV-08-5007659-S (February 26, 2009) (47 Conn. L. Rptr. 306), the plaintiffs sued the permittee, the owner, and an employee of an establishment at the Mohegan Sun Casino for reckless service of alcohol to a patron. Again, in *Vanstaen-Holland*, the MTGA was a defendant. *Vanstaen-Holland* does not hold that every tribal employee, as distinguished from officers, is entitled to immunity from personal lawsuits wherever and whenever he or she is working for the tribe.

In the other Superior Court cases cited by Clarke in support of his motion, *McAllister v. Valentino*, Superior Court, judicial district of Fairfield, Docket No. CV-11-5029414-S (April 10, 2012), and *International Motor Cars v. Sullivan*, Superior Court, judicial district of New Britain, Docket No. CV-05-4005168-S (June 20, 2006) (41 Conn. L. Rptr. 559), it was held that sovereign immunity operated to bar suits against Connecticut state marshals, based on several factors including finding no allegations that the respective marshals were being sued in their individual capacities and that the sovereign – the state – was therefore the real party in interest. While *McAllister* and *International Motor Cars* involved claims of state, not tribal, sovereign immunity, those decisions essentially applied the remedy-sought analysis, without that label.

Turning in another direction for illumination, federal employees may be sued individually for money damages even though the actions giving rise to the claim were done while they were acting within the duties of their employment. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). This court is unpersuaded that Clarke's claim to immunity is stronger than that of federal employees. "We see no reason to give tribal officers broader sovereign immunity protections than state or federal officers given that tribal sovereign immunity is coextensive with other common law immunity principles. See *Santa Clara Pueblo*, [supra, 436 U.S. 58] . . . ." *Maxwell v. County of San Diego*, supra, 708 F.3d 1089. Mohegan tribal employees are not "absolutely immune from suit" in Connecticut courts. *Wallet v. Anderson*, 198 F.R.D. 20 (D. Conn. 2000).

Connecticut law includes clear criteria for determining the party against whom relief is being sought. "[The Connecticut Supreme Court has] identified the following criteria for determining whether an action against an individual is, in effect, against the state and barred by the doctrine of sovereign immunity: (1) a state official has been sued; (2) the suit concerns some

manner in which that official represents the state; (3) the state is the real party in interest against whom relief is sought; and (4) the judgment, though nominally against the official, will operate to control the activities of the state or subject it to liability." (Internal quotation marks omitted.) *Gordon v. H.N.S. Management Co.*, 272 Conn. 81, 93-94, 861 A.2d 1160 (2004). "If the plaintiff's complaint reasonably may be construed to bring claims against the defendants in their individual capacities, then sovereign immunity would not bar those claims." *Miller v. Egan*, 265 Conn. 301, 307, 828 A.2d 549 (2003).

It is Clarke's position that, even if the "remedy-sought" analysis is applied here, the court may and should find that the MTGA is the real party in interest in this suit, so that Clarke should be protected by tribal sovereignty. Clarke asserts that, aside from the insurance policy covering the limosine,[5] the MTGA is obligated to defend and indemnify him pursuant to the Mohegan Tribal Code. Accordingly, just to defend Clarke, let alone pay any judgment against him, would adversely affect the MTGA's treasury. A voluntary undertaking cannot be used to extend sovereign immunity where it did not otherwise exist. See *Group Health, Inc. v. Blue Cross Association*, 625 F. Supp. 69, 76 (S.D.N.Y. 1985) (government may not, by indemnity

---

[5] The defendant argues that the fact that the MTGA had liability insurance on the limousine he was driving does not affect the MTGA's status as real party in interest because the MTGA has a self-insured retention and, even if it did not have that, any claim would affect the MTGA's loss history and cost of coverage. He also claims that, if a judgment were to be entered against him, it would affect the MTGA's administration and hiring abilities, *i.e.*, that allowing this suit to proceed would discourage prospective employees from accepting employment with the MTGA – apparently because they expect, if hired by the MTGA, to be treated differently when they are alleged to have been negligent drivers than if they were employed by a non-tribe employer. Assuming these effects are real, and not conjectural, the court for two reasons rejects the defendant's claim that they show harm to the MTGA's, or the tribe's, purse or independence. First, the court finds no basis in fact, law or logic on which to conclude that these effects are significant enough to be legally cognizable. Second, considering these claims with all the defendant's claims, let alone separately, they do not meet the four-prong test for finding the MTGA or the tribe the real party in interest in this case. The defendant has not been sued as a tribal official; there is no allegation that the defendant was representing the MTGA or the tribe at the time of the collision (even as employee); the MGTA is not, and cannot for the reasons here stated make itself, the party against whom relief is sought; and a judgment against the defendant will not operate to control the activities of the MTGA or subject it to liability. See *Gordon v. H.N.S. Management Co.*, supra, 272 Conn. 93-94.

manufacture immunity for its employees). The court finds that Clarke's claims that the MTGA is the real party in interest in this case – the third and fourth factors in *Gordon v. HNS Management Co.*, supra, 272 Conn. 93-94 – are not supported by the facts. This conclusion is strengthened by the long-standing principle that, in considering whether or not the court has subject matter jurisdiction, the plaintiff's allegations are construed in favor of finding jurisdiction where it is possible, in reason, to do so. *Stone v. Hawkins*, 56 Conn. 111, 115, 14 A. 297 (1888). To extend tribal sovereign immunity to Clarke in this case, where the effect of both the claim and any judgment on the tribal purse and self governance is self-inflicted – that is, the effect results from the MTGA's choices – is beyond the power of this court. Even if by tribal law the MTGA has to indemnify Clarke, that is a tribal choice. This court rejects Clarke's implicit claim that a sovereign may extend immunity to its employees by enacting a law assuming its employees' debts. See *Demery v. Kupperman*, 735 F.2d 1139, 1148 (9th Cir. 1984), cert. denied, 469 U.S. 1127, 105 S. Ct. 810, 83 L. Ed. 2d 803 (1985) (state may not extend sovereign immunity by legislation assuming employees' debts). To hold that the MTGA has the unilateral power to expand the boundaries of sovereign immunity based on tribal legislation, contract or other form of tribal indemnification of an employee, or of employees generally, is beyond the power of this court because to do so would not only be to change the law of sovereign immunity, but to do so with unknown public policy ramifications. The Mohegan Tribe, or the MTGA as its subsidiary, can elect to waive sovereign immunity, but cannot unilaterally elect to expand it.

CONCLUSION

This court finds no implication of tribal sovereign immunity such that Clarke, a tribal employee sued in his individual capacity, is immune from suit. Therefore, Clarke's motion to dismiss is denied.

Cole-Chu, J.

STATE OF CONNECTICUT

KNLCV136019099

DOCKET NO. ~~TTD-CV-11-6004270-S~~	:	SUPERIOR COURT
BRIAN LEWIS AND MICHELLE LEWIS 4235 Harriet Lane Bethlehem, PA 18107	:	J.D. OF NEW LONDON AT NEW LONDON
VS.	:	
WILLIAM CLARKE 267 Prospect Street Norwich, CT 06360	:	SEPTEMBER 10, 2014

JUDGMENT

Present: The Honorable Leeland Cole-Chu

The plaintiffs, Brian and Michelle Lewis, commenced this action against William Clarke and the Mohegan Tribal Gaming Authority (MTGA) by a summons and complaint returned to court on November 19, 2013, with counts sounding in negligence and vicarious liability; and thence to a later date when the defendants appeared; and thence to October 23, 2013, when the plaintiffs withdrew their complaint as to the MTGA; and thence to November 20, 2013, when the plaintiffs filed an amended complaint; and thence to December 31, 2013, when defendant William Clarke filed a motion to dismiss based on tribal sovereign immunity; and thence to the present date when the Court denied the defendant's motion to dismiss.

WHEREUPON, it is adjudged that the defendant's motion to dismiss is denied

Linda C. Cole-Chu, J.

One Goodwin Square
225 Asylum Street
Hartford, CT 06103

HALLORAN
&SAGE LLP

Phone (860) 522-6103
Fax (860) 548-0006
Juris No. 26105

APPEAL - CIVIL

JD-SC-28 Rev. 12-09
P.B. §§ 3-8, 62-8, 63-3, 63-4, 63-10
C.G.S. §§ 31-301b, 51-197f, 52-470

See Instructions on Back/page 2

☐ To Supreme Court ☒ To Appellate Court

Name of case *(State full name of case as it appears in the judgment file)*
Brian Lewis & Michelle Lewis v. William Clarke

Classification
☒ Appeal ☐ Cross appeal ☐ Joint appeal ☐ Amended appeal ☐ Stipulation for reservation ☐ Corrected/amended appeal form ☐ Other *(Specify)*

Trial Court History

Tried to: ☒ Court ☐ Jury
Trial court location: **J.D. of New London, at New London**
Trial court judges being appealed: **Cole-Chu, J.**
All other trial court judge(s) who were involved with the case:
List all trial court docket numbers, including all location prefixes: **KNL-CV13-6019099-S**
Judgment for *(Where there are multiple parties, specify any individual party or parties for whom judgment may have been entered.)*
☒ Plaintiff ☐ Defendant ☐ Other:
Judgment date of decision being appealed: **9/10/14**
Date of issuance of notice on any order on any motion which would render judgment ineffective:
Date for filing appeal extended to:
Case type
☐ Juvenile — Termination of Parental Rights ☐ Juvenile — Order of Temporary Custody ☐ Juvenile — Other
☒ Civil/Family: Major/Minor code **V01** ☐ Habeas Corpus ☐ Workers compensation ☐ Other
For habeas corpus or zoning appeals indicate the date certification was granted:

Appeal

Appeal filed by *(Where there are multiple parties, specify the name of the individual party or parties filing this appeal.)*
☐ Plaintiff(s) ☒ Defendant(s) ☐ Other
From *(the action which constitutes the appealable judgment or decision)*: **Denial of defendant's motion to dismiss based on tribal sovereign immunity.**
If to the Supreme Court, the statutory basis for the appeal *(Connecticut General Statutes section 51-199)*

By *(Signature of attorney or self-represented party)*
Telephone number: **860-522-6103**
Fax number: **860-548-0006**
Juris number *(If applicable)*: **026105**

Appearance

Type name and address of person signing above *(This is your appearance; see Practice Book section 62-8)*: **Daniel J. Krisch, Halloran & Sage, 225 Asylum Street, Hartford, CT 06103**
E-mail address: **krisch@halloransage.com**
"X" one if applicable
☐ Counsel or self-represented party who files this appeal will be deemed to have appeared **in addition to** counsel of record who appeared in the trial court under Practice Book section 62-8.
☐ Under Practice Book section 3-8, counsel or self-represented party who files this appeal is appearing **in place of:**
Name of counsel or self-represented party:
Juris number *(If applicable)*:

Certification (Practice Book section 63-3)

I certify that a copy of this appeal was mailed or delivered to all counsel and self-represented parties of record as required by Practice Book section 62-7 on:* **9/30/14**
Signed *(Individual counsel/self-represented party)*
** Attach a list with the name, telephone number and fax number of each counsel and self-represented party and the address where the copy was mailed or delivered.*

To Be Completed By Trial Court Clerk

☐ Entry Fee Paid ☐ No Fees Required ☐ Fees, Costs, and Security waived by Judge *(enter judge's name below)*

Court Use Only
Date and time filed: OCT 1 PM 2 14 HARTFORD, CT. SUPREME COURT APPELLATE CLERK'S OFFICE CHIEF CLERK

Judge:
Date waived:
Signed *(Clerk of trial court)*:
Date:

The clerk of the original trial court, if different from this court, was notified on _____ that this appeal was filed.
In habeas matters, a copy of this endorsed appeal was provided to the Office of the Chief State's Attorney, Appellate Bureau, on _____.

Documents to be given to the Appellate Clerk with the endorsed Appeal form

The following documents must be filed with the Appellate Clerk when filing the endorsed appeal form; Practice Book sections 63-3 and 63-4.
1. Preliminary Statement of the Issues
2. Preliminary Designation of Pleadings
3. Court Reporter's Acknowledgment/Certification re transcript
4. Docketing Statement
5. Statement for Preargument Conference (form JD-SC-28A)
6. Draft Judgment File
7. Constitutionality Notice (if applicable)
8. Sealing Order form, if any
9. List of counsel of record in trial court (DS1 received from clerk)
10. Proof of receipt of the copy of the endorsed appeal form by the original trial court clerk or the clerk of the court or courts where the case was transferred, if the case was in more than one trial court

Certification

I certify that a copy of the endorsed appeal and all documents to be given to the Appellate Clerk with the endorsed Appeal form were mailed or delivered to all counsel and self-represented parties of record* as required by Practice Book section 63-3 on: 10/1/14
Signed *(Individual counsel or self-represented party)*
** Attach a list with the name, telephone number and fax number of each counsel and self-represented party and the address at which the copy was mailed or delivered.*

Houle, Anita

From: Gray, Ruth Ann C.
Sent: Tuesday, September 30, 2014 11:45 AM
To: Houle, Anita
Subject: Emailing: You have successfully e-filed!.htm

[Continue]

[Log out]
[Fake]

State of Connecticut Judicial Branch
Civil and Family E-Services

Attorney/Firm: HALLORAN & SAGE LLP (026105) E-Mail: pogmore@halloran-sage.com Logout

Hide Instructions

You have successfully e-filed!

Instructions: This page is a confirmation of your e-filing. At the top of the page under "Payment Information," you can see the total court fees, the service fee, and the total payment amount for the payment made.

Under "Document Summary," you can see information about each document that you have filed, the date and time of the filing, the logged-in juris number, the fee for the specific document, and the name and docket number of the case.

The service fee is not broken down for each document filed and paid for in a multiple item transaction. Also, the confirmation number is the same for all documents paid for in the transaction.

Print or save a copy of this page for your records. To print a copy, choose the "Print" button. Once you have printed the copy, you can choose "Return to Civil/Family Menu", "Return to Shopping Cart", or "Logout" if you do not need to file anything else.

[Print This Page]

Confirmation of E-filed Transaction (print this page for your records)

For questions regarding this payment: Contact Us

Payment Information

Confirmation Number: **JUDCT0304823**
Total Court Fees: **$250.00**
LexisNexis Service Fee: **$0.00**
Total Transaction Amount: **$250.00**
Payment Method: **Check**
Payment Date: **09/30/2014 11:44AM**
Payment By: **HALLORAN & SAGE LLP (026105)**

Document Summary

Confirmation Number: **JUDCT0304823**
Docket Number: **KNLCV136019099S**
To receive an email when there is activity on this case, click here.
Case Name: **LEWIS, BRIAN v. CLARKE, WILLIAM**
Type of Transaction: **Pleading/Motion/Other**

Court Fee: **$250.00**
Date Filed: **SEP-30-2014**
Filed By: **HALLORAN & SAGE LLP Juris# 026105**
Document Filed: **116.00 APPEAL TO APPELLATE COURT**
Date and Time of Transaction: **Tuesday, September 30, 2014 11:44:16 AM**

[Return to Civil / Family Menu] [Return to Shopping Cart]

Processing Request...

[redacted]

Uploading Document...

[redacted]

[Fake]

A.C. _____
(KNL-CV13-6019099-S)

BRIAN LEWIS AND MICHELLE LEWIS

VS.

WILLIAM CLARKE

APPELLATE COURT
STATE OF CONNECTICUT

OCTOBER 1, 2014

DOCKETING STATEMENT

Pursuant to Practice Book § 63-4(a)(3), the defendant-appellant, The Standard Fire Insurance Company, states as follows:

A. Names & Addresses of Parties and Their Counsel

1. Brian Lewis and Michelle Lewis, *Plaintiffs*
4235 Harriet Lane
Bethlehem, PA 18017

Their Counsel:

James M. Harrington, Esq.
Polito & Quinn, LLC
567 Vauxhall Street, Suite 230
Waterford, CT 06385

2. William Clarke, *Defendant*
267 Prospect Street
Norwich, CT 06360

His Counsel:

Daniel J. Krisch
Halloran & Sage LLP
One Goodwin Sq.
225 Asylum St.
Hartford, CT 06103

Robert A. Rhodes
Halloran & Sage LLP
315 Post Road West
Westport, CT 06103

One Goodwin Square
225 Asylum Street
Hartford, CT 06103

HALLORAN & SAGE LLP

Phone (860) 522-6103
Fax (860) 548-0006
Juris No. 26105

The Mohegan Tribal Gaming Authority, *Withdrawn Defendant/Interested Party*
13 Crow Hill Road
Uncasville, CT 06382

Its Counsel:

Daniel J. Krisch
Halloran & Sage LLP
One Goodwin Sq.
225 Asylum St.
Hartford, CT 06103

Robert A. Rhodes
Halloran & Sage LLP
315 Post Road West
Westport, CT 06103

B. There are no other appeals arising from this case.

C. There were not exhibits in the trial court.

D. N/A

DEFENDANT,
WILLIAM CLARKE

By _____

Daniel J. Krisch
Halloran & Sage LLP
One Goodwin Sq.
225 Asylum St.
Hartford, CT 06103
Juris No. 026105
Tel. (860) 522-6103
Fax (860) 548-0006
krisch@halloransage.com

Robert A. Rhodes
Halloran & Sage LLP
315 Post Road West
Westport, CT 06103
Juris No. 412195
Tel. (203) 227-2855
Fax (203) 227-6992
rhodes@halloransage.com

STATE OF CONNECTICUT

SUPREME COURT
APPELLATE COURT

PAUL S. HARTAN
CHIEF CLERK

231 CAPITOL AVENUE
HARTFORD, CT 06106

TEL. (860) 757-2200
FAX (860) 757-2217

March 31, 2015

Re: A.C. 37228 Brian Lewis et al. v. William Clarke et al.

Dear Counsel:

Pursuant to §65-1, the Supreme Court has transferred the captioned Appellate Court appeal to itself. The Supreme Court docket number assigned is **S.C. 19464.** Use only the Supreme Court number on all future filings in this appeal.

Briefing is in accordance with P.B. 67-1 et seq. Any due dates established in the Appellate Court remain in effect.

Please note that the Appellate Rules of Procedure have been amended effective September 1, 2014. See Connecticut Law Journal, July 22, 2014.

Please refer to **P.B. § 67-2 for important revisions to the rules particularly pertaining to brief copies and electronic submission of briefs.** For technical standards and guidelines, see the Judicial Branch website www.jud.ct.gov "E-Filing" and Supreme Court sections.

The clerk responsible for your case is Attorney L. Jeanne Dullea. She may be reached at 860-757-2144.

Very truly yours,

Alan M. Gannuscio

Alan M. Gannuscio
Assistant Clerk-Appellate

Notice sent: April 1, 2015
Hon. Leeland J. Cole-Chu
Clerk, New London Superior Court, (CV13-6019099S)
Halloran & Sage LLP (Hartford & Westport Offices)
Polito & Quinn, LLC

Carl D. Cicchetti	L. Jeanne Dullea	Alan M. Gannuscio	Cynthia M. Gworek	Susan C. Reeve	Carolyn C. Ziogas
Assistant Clerk	Assistant Clerk	Assistant Clerk	Assistant Clerk	Assistant Clerk	Assistant Clerk
860-757-2223	860-757-2144	860-757-2242	860-757-2149	860-757-2224	860-757-2153

SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 19464

BRIAN LEWIS AND MICHELLE LEWIS

v.

WILLIAM CLARKE

APPENDIX PART 2

---

§ 5-141d. Indemnification of state officers and employees. Duties of Attorney General. Legal fees and costs. Enforcement action.

(a) The state shall save harmless and indemnify any state officer or employee, as defined in section 4-141, and any member of the Public Defender Services Commission from financial loss and expense arising out of any claim, demand, suit or judgment by reason of his alleged negligence or alleged deprivation of any person's civil rights or other act or omission resulting in damage or injury, if the officer, employee or member is found to have been acting in the discharge of his duties or within the scope of his employment and such act or omission is found not to have been wanton, reckless or malicious.

(b) The state, through the Attorney General, shall provide for the defense of any such state officer, employee or member in any civil action or proceeding in any state or federal court arising out of any alleged act, omission or deprivation which occurred or is alleged to have occurred while the officer, employee or member was acting in the discharge of his duties or in the scope of his employment, except that the state shall not be required to provide for such a defense whenever the Attorney General, based on his investigation of the facts and circumstances of the case, determines that it would be inappropriate to do so and he so notifies the officer, employee or member in writing.

(c) Legal fees and costs incurred as a result of the retention by any such officer, employee or member of an attorney to defend his interests in any such civil action or proceeding shall be borne by the state only in those cases where (1) the Attorney General has stated in writing to the officer, employee or member, pursuant to subsection (b) of this section, that the state will not provide an attorney to defend the interests of the officer, employee or member, and (2) the officer, employee or member is thereafter found to have acted in the discharge of his duties or in the scope of his employment, and not to have acted wantonly, recklessly or maliciously. Such legal fees and costs incurred by such officer, employee or member shall be paid to such officer, employee or member only after the final disposition of the suit, claim or demand and only in such amounts as shall be determined by the Attorney General to be reasonable. In determining whether such amounts are reasonable, the Attorney General may consider whether it was appropriate for a group of officers, employees or members to be represented by the same counsel.

(d) Such officer, employee or member may bring an action in the Superior Court against the state to enforce the provisions of this section.

(e) The provisions of this section shall not be applicable to any such officer, employee or member to the extent he has a right to indemnification under any other section of the general statutes.

C.G.S.A. § 14-213b

§ 14-213b. Operation prohibited when insurance coverage fails to meet minimum requirements. Penalty. Evidence of insurance coverage required to restore suspended license

(a) No owner of any private passenger motor vehicle or a vehicle with a combination or commercial registration, as defined in section 14-1, registered or required to be registered in this state may operate or permit the operation of such vehicle without the security required by section 38a-371 or with security insufficient to meet the minimum requirements of said section, or without any other security requirements imposed by law, as the case may be. Failure of the operator to produce an insurance identification card as required by section 14-217 shall constitute prima facie evidence that the owner has not maintained the security required by section 38a-371 and this section.

(b) Any person convicted of violating any provision of subsection (a) of this section shall be fined not less than one hundred dollars or more than one thousand dollars, except that any owner of a motor vehicle with a commercial registration who knowingly violates the provisions of subsection (a) of this section with respect to such vehicle shall be guilty of a class D felony.

(c) The Commissioner of Motor Vehicles shall suspend the registration, and the operator's license, if any, of an owner, for a first conviction of violating the provisions of subsection (a) of this section for a period of one month and for a second or subsequent conviction for a period of six months. No operator's license which has been suspended pursuant to this subsection shall be restored until the owner has provided evidence to the commissioner that he maintains the security required by section 38a-371 or any other security requirements imposed by law for each motor vehicle registered in his name.

25 U.S.C.A. § 2710

§ 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if--

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that--

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than--

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which--

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes--

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if--

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B)(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if--

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which--

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after October 17, 1988; and

(B) has otherwise complied with the provisions of this section1

may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has--

(A) conducted its gaming activity in a manner which--

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for--

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation--

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706 (b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsection (b)(2)(C) of this section and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that--

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection--

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of

its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that--

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over--

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that--

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe2 to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

ARTICLE XIII. - TRIBAL GAMING AUTHORITY AMENDMENT

Section 1. - Creation of Gaming Authority.

All governmental and proprietary powers of The Mohegan Tribe over the development, construction, operation, promotion, financing, regulation and licensing of gaming, and any associated hotel, associated resort or associated entertainment facilities, on tribal lands (collectively, "Gaming") shall be exercised by The Tribal Gaming Authority, provided that such powers shall be within the scope of authority delegated by The Tribal Council to The Tribal Gaming Authority under the ordinance establishing The Tribal Gaming Authority. Leases and other encumbrances granted by The Tribal Gaming Authority for Gaming development and financing shall be deemed to be for governmental purposes and may be for periods not to exceed 50 years. The Tribal Council shall, by ordinance, establish The Tribal Gaming Authority, which shall oversee, regulate, prudently hold and manage all of the Gaming assets of The Mohegan Tribe. The Tribal Gaming Authority shall have the power to grant a limited waiver of sovereign immunity as to Gaming matters, to contracts relating to Gaming, to the revenues of The Tribal Gaming Authority, to the assets within the control of The Tribal Gaming Authority, and as otherwise authorized by The Tribal Council, but shall have no such right as to other tribal revenues, assets or powers. Nothing contained in this Section shall limit the power of The Tribal Council to waive the sovereign immunity of The Mohegan Tribe as to Gaming or other matters, or with respect to other tribal revenues or assets. The Tribal Gaming Authority shall have the power to enter into contractual relationships which bind The Mohegan Tribe, provided that such contracts shall be within the scope of authority delegated by The Tribal Council to The Tribal Gaming Authority. Contracts of The Tribal Gaming Authority shall be the law of The Mohegan Tribe and shall be specifically enforceable in accordance with their terms. To the extent that tribal law does not otherwise govern a dispute, the Gaming Disputes Court may apply relevant provisions of Connecticut law. The Tribal Gaming Authority shall have the authority to submit disputes to arbitration. The Tribal Gaming Authority shall have the authority to stipulate for judgment before the Gaming Disputes Court created by Section 2 of this Article. Any stipulation for judgment made by The Tribal Gaming Authority shall be binding on The Mohegan Tribe, The Tribal Gaming Authority and upon the Gaming Disputes Court, provided that such stipulation is within the scope of authority delegated by The Tribal Council to The Tribal Gaming Authority. The Gaming Disputes Court shall grant the relief so stipulated upon a finding that all conditions for granting such relief expressly set forth in such stipulation have been met.

Section 2. - Creation of Gaming Disputes Court.

The Tribal Council shall establish, by ordinance the Gaming Disputes Court, which shall be composed of a Trial Branch and an Appellate Branch. Exclusive jurisdiction for The Tribe over disputes arising out of or in connection with the Gaming, the actions of The Tribal Gaming Authority, or contracts entered into by The Mohegan Tribe or The Tribal Gaming Authority in connection with Gaming, including without limitation, disputes arising between any person or entity and The Tribal Gaming Authority, including customers, employees, or any gaming manager operating under a gaming management agreement with The Tribal Gaming Authority, or any person or entity which may be in privity with such persons or entities as to Gaming matters shall be vested in the Gaming Disputes Court. Notwithstanding the provisions of Article X of this Constitution, the Gaming Disputes Court shall also have exclusive jurisdiction to determine all controversies arising under this Constitution which in any way relate to Gaming.

2.1. *Procedures.* The Gaming Disputes Court shall have the power to enact reasonable rules of procedure. The Gaming Disputes Court may, in its discretion, receive evidence and adjudicate controversy de novo. All proceedings of the Gaming Disputes Court shall be conducted in the state of Connecticut, and shall be open to the public, absent a finding that justice otherwise requires.

2.2. *Remedies.* Nothing in this Article XIII shall preclude or modify the effect of any arbitration mechanism or other dispute resolution mechanism in any agreement otherwise within the jurisdiction of the Gaming Disputes Court. The Gaming Disputes Court shall have full jurisdiction and authority to compel arbitration, to enforce any arbitration order or other dispute resolution mechanism provision and to mandate any remedy which the Gaming Disputes Court finds justice may require. All findings and orders of the Gaming Disputes Court shall be in writing. In the event that either party to a contract which provides for arbitration seeks an order from the Gaming Disputes Court to compel such arbitration, the Gaming Disputes Court shall not review the merits of the dispute, but shall order the parties to arbitrate; all questions of the enforceability of the agreement to arbitrate, or an obligation to arbitrate the dispute in question, being for the arbitrators to decide.

2.3. *Appointment of Judges.* The Tribal Council shall appoint the Judges of the Gaming Disputes Court. The Tribal Council shall, within thirty days of the adoption of this Article XIII, appoint a minimum number of four Judges for the Gaming Disputes Court. At any time said number of judges falls below four, The Tribal Council shall within thirty days, appoint such additional judges as necessary to restore the minimum number to four judges. If The Tribal Council fails to restore the minimum pool of four within said thirty days, the remaining Judges shall appoint the judges necessary to restore the number to four judges. All judges shall be selected from a publicly available list of eligible retired federal judges or Connecticut Attorney Trial Referees duly appointed by the Chief Justice of the Connecticut Supreme Court pursuant to Connecticut General Statute §52-434(a)(4), as amended from time to time, who remain licensed and qualified to practice law in the State of Connecticut, each of whom:

(a) has never been convicted of a felony or any gaming offense;

(b) is not a member of The Tribal Council, or a relative of any such member by blood, marriage, or operation of law;

(c) is of sound mind, trustworthy, and of good moral character;

(d) is able to determine in what cases he or she will be disqualified and is willing to disqualify himself or herself;

(e) is capable of carrying out the duties of the office, including staff administration and supervision; and

(f) is willing to commit, upon public oath of affirmation, to uphold this Constitution and to fairly and impartially adjudicate all matters before the Gaming Disputes Court.

2.4. *Appeals.* Appeals from any decision of the Trial Branch shall be heard by three Judges in the Appellate Branch. Decisions of the Appellate Branch shall be final. There shall be no further right of appeal within The Tribal Court.

2.5. *Compensation.* Judges of the Gaming Disputes Court shall be compensated by The Tribal Council in amounts appropriate to the duties and responsibilities of the office, which compensation shall not be diminished during a judge's continuation in office. The Gaming Disputes Court shall have the power to take appropriate action to enforce this subsection.

2.6. *Recall and Discipline.* After appointment, Judges of the Gaming Disputes Court shall be subject to discipline and removal for cause pursuant to the Rules of the Court.

Section 3. - Amendments.

Amendments of the ordinances establishing The Tribal Gaming Authority and the Gaming Disputes Court shall require the vote of two-thirds of the members of The Tribal Council, ratified by a two-thirds majority of all votes cast, with at least 40% registered voters voting, in a special tribal meeting called for that purpose by The Tribal Chair. Prior to the enactment of any such amendment by The Tribal Council, any non-tribal party shall have the opportunity to seek a ruling of the Appellate Division of the Gaming Disputes Court that the proposed amendment would constitute an impermissible impairment of contract.

Notwithstanding the provisions of Articles XVI and XVII, amendments to this Article XIII shall require a two-thirds majority of all votes cast, with at least 40% registered voters voting, in a special election called for that purpose by The Tribal Chair. Prior to the adoption of any such constitutional amendment, any non-tribal party shall have the opportunity to seek a ruling of the Appellate Division of the Gaming Disputes Court that the proposed amendment would constitute an impermissible impairment of contract.

Notwithstanding any other provision of this Constitution, amendments to subsection 2.3 of Article XIII and to Article XIV shall require the affirmative vote of 75% of all registered voters of The Mohegan Tribe.

This Section 3 shall have no force or effect during any period in which no indenture or other contract binding on The Tribe or The Tribal Gaming Authority is outstanding or in effect which recites that it is entered into in reliance on this Section 3.

Section 4. - Indian Civil Rights Act.

Nothing in this Article XIII or any other provisions of this Constitution, or any other provision of tribal law shall foreclose or limit any right any person may otherwise have to bring an action in a court of competent jurisdiction to protect a right or seek a remedy otherwise available pursuant to the Indian Civil Rights Act, 25 USC 1301 et seq.

Sec. 2-21. - Establishment.

The Mohegan Tribal Gaming Authority ("Authority") is hereby established by The Mohegan Tribal Council on May 15, 1995, pursuant to and consistent with Article XIII of The Mohegan Constitution, and authorized to exercise all governmental and proprietary powers of The Mohegan Tribe over development, construction, operation, promotion, financing, regulation and licensing of gaming, and any associated hotel, associated resort or associated entertainment facilities, on Tribal lands. The authority hereby assumes all obligations, responsibilities and duties of The Mohegan Tribe under Gaming Law existing at the date of enactment of this Article.

(Ord. No. 95-2, § 1, 7-15-1995)

ARTICLE V. - GAMING REVENUE ALLOCATION PLAN
FOOTNOTE(S):

--- (2) ---

Cross reference— See Section 1-222 for severability clause.

Sec. 2-181. - Policy.

The Mohegan Tribe shall use net revenues from its Gaming Operation to strengthen its Tribal government. It is The Tribe's objective to be a self-determining government by adequately addressing the needs of Tribal government operations/programming and the promotion of economic development. Tribal government operations focus on the infrastructure of The Tribe whereas programming addresses the systems in place to provide for the general welfare of its members. The Tribe shall ensure that these areas receive the necessary financial support from net gaming revenue prior to distributing such revenue for other purposes.

The Tribe is committed to providing for its economic long-range security and for the financial security of its members. Accordingly, The Tribe shall ensure the net revenues distributed to The Tribal government from its Gaming Enterprise are allocated toward investments, programs, and projects that impact not only the present needs but also anticipate future needs. The Tribe, as part of its vision statement, believes it is guided by the thirteen (13) generations past and responsible for thirteen (13) generations to come. Investments, programs and projects funded by gaming revenues are aimed toward improving The Tribal condition and life opportunities of all Tribal members.

The Tribe also retains the inherent sovereign right to determine the best interests of its minor Tribal members by providing for their future welfare by contributing, in amounts as deemed appropriate by the Tribal Council, per capita benefits to grantor trusts owned by The Tribe to be invested, with income earned on trust principal to be accumulated, for future distribution to those minor Tribal members. The Tribe may provide for the future of minors while encouraging Tribal member parents to provide for the immediate living needs of their children as is their responsibility. All assets accumulated in the grantor trusts for future distribution to a minor Tribal member shall be distributed at such time as the Tribal Council deems appropriate but not before the minor reaches the age of eighteen (18), except in the limited extraordinary circumstances provided in Subsection 2-183(h)(4). The Tribal Council, by resolution, shall establish guidelines for distributions to minor Tribal members, including the age(s) and amount(s) of distribution and other conditions of distribution.

The Tribe also has determined that it is in the best interests of its adult Tribal members who have been declared incompetent by a court of competent jurisdiction to contribute per capita benefits to grantor trusts owned by The Tribe to be invested, with income earned on trust principal to be accumulated, for future distribution to those members as necessary for the beneficiary's health, education, or welfare or economic security, as provided in Subsection 2-183(i).

The Tribe also has determined that it is in the best interests of certain adult Tribal members, who have adequate resources available for their current general welfare from other sources, to provide deferred per capita benefits for such members in lieu of current per capita benefits to ensure that they have adequate resources to provide for their general welfare in the future, provided that such members satisfy the eligibility criteria for such benefits in Subsection 2-183(j).

(Ord. No. 2001-08, § I, 7-10-2001; Res. No. 2009-26, 3-18-2009; Res. No. 2010-53, 7-29-2010)

Sec. 2-182. - Use of Net Revenues.

(a) *Net Revenue* shall mean all Casino profits and cash distributed to The Tribe from The Mohegan Tribal Gaming Authority and all profits generated from Class II Gaming.

(b) The Tribal Council by Constitution is responsible for the health, peace, morals, education, and general welfare of The Tribe and its members. The Council approves operating budgets submitted by the Chair, and is responsible for appropriating available funds for the benefit of The Tribe. To fulfill these responsibilities, the following percentages of The Tribe's net revenue from gaming shall be dedicated to:

(1) Tribal government operations and programs including investments and education—30% to 40%;

(2) The general welfare of The Tribe or its members including investments, health, housing, social services and youth services programs—5% to 15%;

(3) Tribal economic development, both gaming and non-gaming related—10% to 20%;

(4) Donations to charitable organizations—as deemed appropriate by The Tribal Council;

(5) Help fund operations of local government—as deemed appropriate by The Tribal Council;

(6) Any purpose authorized by the Indian Gaming Regulatory Act—as deemed appropriate by The Tribal Council.

(c) The Tribal Council is authorized to allocate up to one hundred percent (100%) of its share of net revenues to support its initiatives.

(Ord. No. 2001-08, § II, 7-10-2001; Res. No. 2009-26, 3-18-2009)

Sec. 2-183. - Individual Per Capita Distributions.

(a) In order to advance the personal health, safety and general welfare of qualified Tribal members, and in recognition that The Tribe has experienced financial gain from the operation of Class III Gaming on its reservation, The Tribal Council has elected to distribute a portion of its net revenue to its membership. The Tribal Council shall determine allocation of all revenues received from gaming and shall distribute to its members funds considered to be available for per capita distribution. Funds available for per capita distribution shall be provided to qualified Tribal members in equal amounts, unless determined otherwise by The Tribal Council pursuant to Subsection (b), (c) and/or (d) hereunder, with benefits for minor qualified Tribal members being provided in accordance with provisions of Subsection (h) below, with benefits for adult qualified Tribal members who are legally incompetent being provided in accordance with the provisions of Subsection (i) below, and with deferred benefits for other qualified Tribal members being provided pursuant to one or more plans established by The Tribal Council in accordance with eligibility criteria set forth in Subsection (j) below.

(b)

Per capita benefits shall be paid, deposited into trusts for minors or other legally incompetent persons, or set aside for future payment under a deferred benefit plan on a quarterly basis as provided hereunder.

(1) Initial distribution of per capita benefits under this Plan shall be paid, deposited into trusts, or set aside for future payment on the later of (i) the first Monday of August in the year 2001, or (ii) within ten (10) days after the approval of the Plan by the Bureau of Indian Affairs. Forty (40) percent to fifty (50) percent of net revenue from the three (3) months previous to the declaration date will be distributed to the membership.

(2) The Tribal Council shall hold a meeting during the third week of June, September, December and March each year to determine successive distributions and to declare the amount to be distributed to qualified membership (each such day, the "declaration date"). Quarterly benefits shall be paid, deposited into trusts, or set aside for future payment on the first Monday of August, November, February and May annually (the "distribution date"). Up to fifty (50) percent of net revenue from the three (3) months previous to the declaration date will be distributed to the membership.

(3) Taking into consideration that substantial amounts have been distributed into trusts for minors, the Tribal Council has determined that it is in the best interest of the youth of the Tribe to increase the age at which qualified tribal members shall become eligible to receive quarterly per capita distributions under this plan. Therefore, each qualified tribal member born before January 1, 1993, upon reaching the age of eighteen (18), will be eligible to participate in the next quarterly distribution, and each qualified tribal member born on or after January 1, 1993, upon reaching the age of twenty-one (21), will be eligible to participate in the next quarterly distribution. If, in the future, the amounts contained in trusts held for minors decrease, the Tribal Council, by resolution in its sole discretion, may reduce the age at which qualified tribal members become eligible to receive quarterly per capita distributions, provided, however, in no event shall such age be less than eighteen (18).

(c) *Qualified Tribal Members* for the purpose of this Plan shall mean those individuals who are duly enrolled in The Tribe as of thirty (30) days before the date benefits are to be paid, deposited into trusts, or set aside for future payment, subject to the following limitations:

(1) *Default on Outstanding Debt to Tribe.* Tribal members who are in arrears on personal loans made by The Tribe to the member or have any past-due outstanding debt to The Tribe will be required to bring their debt current in order to be considered a qualified member. Any member refusing to correct a delinquency will have his or her distribution automatically offset by the outstanding principal balance of the debt and will not be considered qualified until all delinquencies are resolved. Tribal members with a past-due outstanding debt shall be notified of such in writing by The Tribe at least thirty (30) days prior to the distribution. Any Tribal member who has been notified of an outstanding debt and who reasonably believes such debt is not owed can request a hearing before The Tribal Court.

(2) *Violation of Tribal Law.* Any Tribal member who violates any law of The Mohegan Tribe which specifically provides the withholding of per capita benefits as a penalty or remedy, as the case may be, may have his or her distribution withheld in accordance with such law, provided such law was duly adopted within thirty (30) days prior to distribution of per capita benefits and comports with the Indian Civil Rights Act (25 USC 1301 et seq.) and provided that The Tribal member is afforded due process in contesting the violation.

(3) *Evidence of Eligibility.* Parents with minor children must provide appropriate documentation in order for children to be eligible and children must be listed on The Tribal rolls.

(d) As an acknowledgement that the elders of The Tribe generally have less time to benefit from the economic successes of The Tribe, and often have less means to be self-sufficient, The Tribal Council may be desirous of increasing the distribution of per capita benefits to the elders of The Tribe relative to other members of The Tribe. As such, The Tribal Council shall have the authority, in accordance with the procedures set forth herein, to distribute, from time to time, amounts greater to the qualified elder members of The Tribe relative to the other qualified members of The Tribe. For the purposes hereof, a "qualified elder member" shall be any qualified Tribal member who has reached the age of sixty-two (62) as of the date benefits are to be paid, deposited into trusts, or set aside for future payments:

(1) If The Tribal Council determines to distribute larger sums of per capita benefits to or for the benefit of qualified elder members of The Tribe relative to other qualified members of The Tribe, such determination shall be made upon the declaration date, which such amounts shall become effective on the distribution date immediately following said declaration date. In such event, The Tribal membership shall be notified of The Tribal Council's decision to do so within fourteen (14) days of its decision. Unless The Tribal Council expressly determines to distribute such relative larger sums to or for the benefit of qualified elder members, benefits shall be equally distributed to or for the benefit of all qualified members of The Tribe on each declaration date thereafter (other than amounts paid to qualified minor Tribal members in the event The Tribal Council deems it appropriate to make a distribution for deposit into the minor's trust pursuant to paragraph (e) hereof).

(2) In no event shall benefits paid to qualified elder members of The Tribe or contributed to trusts for their benefit be greater than those paid to other qualified adult members of The Tribe or contributed to trusts for their benefit for any quarterly distributions, if, for the same quarterly distribution, the benefits paid to the qualified elder members or contributed to trusts for their benefit are equal to or greater than twelve thousand five hundred dollars ($12,500.00).

(e) In recognition that the youth of The Tribe may have available to them substantial resources upon reaching the age of majority, and that such amounts may reduce incentives to become productive members of society, and in recognition that the youth of The Tribe are likely to have adequate resources available to meet their health, education and welfare needs provided by their parents before reaching the age of majority, The Tribal Council, in its discretion, may opt, from time to time, to limit the amounts that are deposited (including opting for no amount to be deposited) into the minor's trust for the benefit of the qualified minor Tribal members for any quarterly distribution in accordance with the procedures set forth herein. For the purposes hereof, a "qualified minor member" shall be any qualified tribal member who has not reached the age of eighteen (18) as of the date benefits are to be paid, deposited into trusts, or set aside for future payments.

(1) If The Tribal Council determines to limit the amounts deposited into the minor's trust for any quarterly distribution, such determination shall be made upon the declaration date and shall become effective on the following distribution date. In such event, The Tribal membership shall be notified of The Tribal Council's decision to impose such limitation within fourteen (14) days of its decision. Such limitation shall remain effective for each distribution thereafter

(without further notice to the membership) unless and until The Tribal Council specifically rescinds such limitation on a subsequent declaration date and notifies The Tribal membership within fourteen (14) days of its decision to rescind such limitation.

(f) The time and amount of distributions from a minor's trust for the benefit of the qualified minor Tribal member shall be made according to the guidelines established by The Tribal Council.

(g) In accordance with the United States Department of Interior's guidelines and for purposes of this Article, "per capita benefits" shall mean those benefits paid, deposited into trusts for minors (see Subsection (h)) or other legally incompetent persons (see Subsection (i)), or set aside for future payment under a deferred benefit plan (see Subsection (j)) to qualified Tribal members from net revenues; no other commonly accepted or used definition of the term "per capita benefit" affects the use of the term herein.

(h) In order to provide for the future safety and well being of Tribal children, per capita benefits intended for future distribution to qualified minor Tribal members shall be contributed by The Tribal Council to one (1) or more trusts which are grantor trusts owned by The Tribe for federal income tax purposes.

(1) Per capita benefits contributed to a trust or trusts shall be invested, with income earned on trust principal to be accumulated in the trust, for future distribution to the minor qualified Tribal members.

(2) Qualified tribal members shall receive payments of amounts from the trust account balance at such time and in such amounts as the Tribal Council deems appropriate. The Tribal Council or its appointed agent shall approve application for payment upon attainment of age eighteen (18) or such later age as the Tribal Council deems appropriate, upon sufficient evidence showing eligibility. Distribution of any accrued per capita sums and interest shall be made within thirty (30) days of attaining the requisite age and within thirty (30) days of each birthday in successive years.

(3) If upon attainment of the age of eighteen (18), the total funds in the beneficiary's trust comprise an amount of less than two thousand five hundred dollars ($2,500.00), the entire trust will be remitted to the beneficiary thirty (30) days after reaching the age of eighteen (18), upon application of the beneficiary, providing sufficient evidence of eligibility, approved by The Tribal Council or its appointed agent.

(4) Prior to the time the beneficiary reaches the age of eighteen (18), The Tribal Court may, after careful consideration of the facts, authorize the trustee or trustees of the trust or trusts to make distributions from the trust or trusts to the parents or guardians of the beneficiary only to defray unreimbursed medical expenses or only as necessary to defray expenses for health, education, or welfare incurred by or on behalf of the beneficiary as established by such parents or guardians. Any request for such disbursements shall include a detailed budget of monies necessary for essential living expenses to include health, education, or welfare costs and only upon presentment of a detailed justification for such essential living needs. The petitioning parent or guardian must show, by a preponderance of the evidence, that the amount requested to defray unreimbursed medical expenses or expenses for health, education or welfare, are reasonable and necessary. The Tribal Court may also require that the petitioning parent or guardian submit receipts of expenditures made from funds disbursed hereunder before any future disbursements are made.

(5)

The interest of each beneficiary shall be accounted for separately by the trustee, and a trust account statement shall be available at least semiannually to the parent or guardian of the beneficiary.

(6) No portion of any trust, and no interest of any minor in future distributions from any such trust, shall be subject to alienation, assignment, encumbrance or anticipation by the minor; to garnishment, attachment, execution or bankruptcy proceedings; to claims for spousal maintenance, child support, or an equitable division of property incident to the dissolution of marriage; to any other claims of any creditor or other person against the minor; or to any other transfer, voluntary or involuntary, by or from any minor, pursuant to a Tribal Court judgment against the minor or otherwise.

(i) In order to provide for the current and future safety and well being of adult qualified Tribal members who have been declared incompetent by a court of competent jurisdiction, per capita benefits intended for future distribution to such qualified Tribal members shall be contributed to one or more trusts which are grantor trusts owned by The Tribe for federal income tax purposes. Per capita benefits contributed to a trust or trusts shall be invested, with income earned on trust principal to be accumulated in the trust, for future distribution to such qualified Tribal members. Upon the petition of the legal guardian of the beneficiary, trust assets shall be distributed by the trustee or trustees to the beneficiary in any amounts as from time to time The Tribal Court, after careful consideration of the facts, deems reasonable and necessary for the member's health, education, or welfare. A petitioner must show, by a preponderance of the evidence, that the amount requested to defray the expenses for health, education or welfare, is reasonable and necessary. The Tribal Court may require that the petitioning guardian submit receipts of expenditures made on behalf of the beneficiary before any disbursements are made, and shall require that the petitioning guardian account to the trustees for any expenditures made from distributions from the trust or trusts. The Tribal Court may, upon a finding of reasonable necessity, authorize the trustee or trustees to establish a regular monthly distribution from the trust for the beneficiary. No portion of any trust, and no interest of any legally incompetent member in future distributions from any such trust, shall be subject to alienation, assignment, encumbrance or anticipation by the member; to garnishment, attachment execution or bankruptcy proceedings; to claims for spousal maintenance, child support, or an equitable division of property incident to the dissolution of marriage; to any other claims of any creditor or other person against the member; or to any other transfer, voluntary or involuntary, by or from any member, pursuant to a Tribal Court judgment against the member.

(j) In order to provide for the future well being of adult qualified Tribal members, other than legally incompetent members, who have adequate resources available for their current general welfare from other sources, funds shall be set aside pursuant to one (1) or more plans established by The Tribal Council for future payment of deferred per capita benefits to such members in lieu of current per capita benefits. A member wishing to participate shall be eligible for deferred per capita benefits under any of the following circumstances:

(1) If The Tribal Council or a committee appointed by The Tribal Council determines that it is appropriate and in the long-term best interests of the member to receive deferred benefits in lieu of current benefits so that there is a source of funds available to him or her upon reaching retirement or becoming disabled.

(2)

If the member or a relative of the member is entitled to benefits under other federal, state, or Tribal government benefit programs, and a committee appointed by The Tribal Council determines that payment of current benefits to the member would jeopardize the member's or relative's entitlement to benefits having a greater overall value to the member or the relative than the per capita benefits that The Tribe is able to provide and that it is otherwise appropriate and in the long term best interests of the member to receive deferred benefits in lieu of current benefits.

In order to qualify for deferred per capita benefits, the member must timely file an application for deferred benefits containing information required by The Tribal Council. No member's interest in future distribution of deferred per capita benefits shall be subject to alienation, assignment, encumbrance or anticipation by the member; to garnishment, attachment execution or bankruptcy proceedings; to claims for spousal maintenance, child support, or an equitable division of property incident to the dissolution of marriage; to any other claims of any creditor or other person against the member; or to any other transfer, voluntary or involuntary, by or from any member, pursuant to a Tribal Court judgment against the member.

(k) In order to further the policies and goals underlying the contribution of per capita benefits to one (1) or more trusts for minors and other legally incompetent persons and to one (1) or more deferred per capita benefit plans for qualifying adults, to the extent permitted by federal law, no benefits contributed to a trust or set aside for future payment under a deferred per capita benefit plan shall be includable in the gross income of the member for federal income tax purposes any earlier than the date(s), and only to the extent, that the member is entitled to distributions from the trust or under the plan.

(l) The Tribal Council or its appointed agent shall ensure that written notification of applicable federal tax laws shall be provided to all recipients for the year in which per capita benefits are paid, distributed from a trust or trusts, or distributed pursuant to a deferred per capita benefit plan. The Tribal Council or its appointed agent shall also implement a procedure by which Tribal members who receive per capita payments shall have applicable federal taxes automatically deducted as elected or required under federal law. The Tribal Council shall provide a notice to the membership of the withholding procedures. Federal income tax must automatically be withheld if the total payment to a member is over the required threshold. Tribal members with elective or automatic withholdings will receive a 1099 form by January 31st of the year following the distribution. Filings of the 1099 form will be made with the Internal Revenue Service by February 28th. Tribal members are required to satisfy any state tax liability independently.

(m) If a per capita distribution is due to a Tribal member on the rolls when a per capita distribution is approved on the declaration date who thereafter dies before the distribution date immediately following said declaration date, said Tribal member shall be entitled to the full amount of the per capita share. Payment will be made to the estate of the deceased Tribal member. After death, The Tribal member's right to receive any future per capita payments shall cease.

(n) The proceeds of any per capita payment not in trust for minors and other legally incompetent persons and not set aside for future payment pursuant to any deferred per capita benefit plan for qualifying adults may be assigned, transferred, or hypothecated by The Tribal member to whom the payment is made provided, however, The Tribe shall not directly remit any per capita payment to any party other than The Tribal member.

(Ord. No. 2001-08, § III, 7-10-2001; Res. No. 2009-26, 3-18-2009; Res. No. 2010-53, 7-29-2010)

Sec. 2-184. - Remaining Net Revenues.

In any year in which a per capita distribution is made to the membership, the remaining funds shall be distributed at the discretion of The Tribal Council for any of the authorized purposes described above or according to the budget prepared by the Chair and approved by The Tribal Council.

(Ord. No. 2001-08, § IV, 7-10-2001; Res. No. 2009-26, 3-18-2009)

Sec. 2-185. - Dispute Resolution.

Disputes arising under this Article shall be brought before The Mohegan Tribal Court. The complaint shall state with particularity the specific grounds of the dispute, and shall be supported by appropriate documentary evidence. The Tribal Court may order such further hearings, proceedings, or submissions as the Court deems necessary, and shall assess the dispute in accordance with this Article and other applicable laws or regulations of The Mohegan Tribe or the United States. Upon the conclusion of its fact finding, the Court shall provide its written findings and recommendations to The Tribal Council. Following receipt of the Court's findings and recommendations, The Tribal Council shall resolve such dispute as it deems to be in the best interest of The Mohegan Tribe.

(Ord. No. 2001-08, § V, 7-10-2001; Res. No. 2009-26, 3-18-2009)

Sec. 2-186. - Enforcement of Plan.

In the event The Tribal Council fails to comply with any or all of the provisions of this Article, any Tribal member aggrieved by such failure may file a complaint with The Tribal Court to compel compliance with this Article.

(Ord. No. 2001-08, § VII, 7-10-2001; Res. No. 2009-26, 3-18-2009)

Sec. 2-187. - Amendment or Repeal of Plan.

This Article may be amended, revoked, or repealed by majority vote of The Tribal Council. Authorization is also given to The Tribal Council to make any technical changes or amendments necessary to achieve the approval of this plan by the Secretary of Interior or his designee in the Bureau of Indian Affairs.

(Ord. No. 2001-08, § VIII, 7-10-2001; Res. No. 2009-26, 3-18-2009)

Sec. 2-188. - Effective date.

This plan shall become effective after adoption by a majority vote of the Tribal Council and after approval by the Secretary of the Interior or his designee at the Bureau of Indian Affairs.

(Res. No. 2010-53, 7-29-2010)

ARTICLE II. - GAMING DISPUTES COURT

DIVISION 1. - GENERALLY

Sec. 3-21. - Establishment of Gaming Disputes Court.

There is hereby established the Gaming Disputes Court. The Gaming Disputes Court shall be composed of a Trial Branch and an Appellate Branch. The Trial Branch shall be known as the "Gaming Disputes Trial Court." The Appellate Branch shall be known as the "Gaming Disputes Court of Appeals." This Appellate Court shall not have jurisdiction to hear or decide any case except cases timely appealed from the Gaming Disputes Trial Court and over which the Gaming Disputes Trial Court properly exercises subject matter jurisdiction pursuant to this Article. The Gaming Disputes Court of Appeals shall have jurisdiction to decide whether any case appealed from the Gaming Disputes Trial Court was within that court's subject matter jurisdiction under this Article and The Mohegan Constitution.

(Ord. No. 95-4, § 100, 7-20-1995)

Sec. 3-22. - Definitions.

For the purpose of this Article, the following words and terms shall have the meanings respectively ascribed:

Authority is the Tribal Gaming Authority.

Member of The Tribe means an Indian person (natural person) who is recognized by The Tribe as being a member of The Tribe.

Ordinance is this Article establishing the Gaming Disputes Court.

Reservation is all lands presently owned or hereafter acquired by The Tribe whether or not such lands have been formally proclaimed to be part of The Mohegan Indian Reservation.

Trial Court is the Gaming Disputes Trial Court.

Tribal Council is the governing body of The Tribe as now or may hereafter exist.

Tribe is The Mohegan Tribe of Indians of Connecticut or any governmental subdivision thereof, including the Tribal Gaming Authority.

(Ord. No. 95-4, § 101, 7-20-1995)

Sec. 3-23. - Limited Jurisdiction; Not Court of General Jurisdiction.

The Gaming Disputes Court is a court of limited jurisdiction. Its subject matter jurisdiction is strictly limited as set forth in this Article. The Gaming Disputes Court is not a court of general jurisdiction.

(Ord. No. 95-4, § 102, 7-20-1995)

Sec. 3-24. - Judges of the Gaming Disputes Court.

The judges of the Gaming Disputes Court shall be appointed and commissioned to serve as judges of the Gaming Disputes Court by The Mohegan Tribal Council in accordance with Article XIII, Section 2.3 of The Mohegan Constitution at an agreed rate of pay to be set by the Tribal Council. A list of such

The Gaming Disputes Court of Appeals shall consist of three (3) judges, one (1) of whom shall be the Chief Judge. The other two (2) judges shall be appointed pursuant to Section 3-24 of this Article. None of the three (3) judges shall have any interest in, or have been the presiding judge at trial of the case brought before the Court of Appeals.

(Ord. No. 95-4, § 105, 7-20-1995)

Sec. 3-27. - Revision of Court Rules.

The Chief Judge of the Gaming Disputes Court shall have the power to adopt reasonable rules of procedure for both the Gaming Disputes Trial Court and Gaming Disputes Court of Appeals.

(Ord. No. 95-4, § 106, 7-20-1995)

Secs. 3-28—3-40. - Reserved.

DIVISION 2. - TERRITORIAL AND EXTRATERRITORIAL JURISDICTION

Sec. 3-41. - [Described.]

(a) Except as provided in Subsection (b), the territory over and with respect to which the courts established by this Article shall have territorial jurisdiction shall include all lands encompassed by the Reservation, as such boundaries may exist as of the institution of the suit in the Gaming Disputes Court.

(b) For the purpose of regulatory enforcement proceedings filed by The Tribe against any defendant except members of The Tribe or challenges to Tribal regulations or Tribal regulatory actions filed by any party except members of The Tribe, the territory over which the courts established by this Article have territorial jurisdiction shall include all lands within The Mohegan Reservation.

(c) The courts established by this Article shall have such extraterritorial jurisdiction as may be permitted by federal law and or Connecticut law as may be necessary and appropriate to execute the provisions hereof.

(Ord. No. 95-4, Art. II, 7-20-1995)

Secs. 3-42—3-50. - Reserved.

DIVISION 3. - SUBSTANTIVE LAW

Sec. 3-51. - Substantive Law.

The judges of the Gaming Disputes Trial Court and the Gaming Disputes Court of Appeals shall apply and enforce the substantive law of The Mohegan Tribe in all cases, except when Tribal law is preempted by applicable federal law.

(Ord. No. 95-4, § 300, 7-20-1995)

Sec. 3-52. - Sources of Tribal Law.

(a) The substantive law of The Mohegan Tribe for application by the Gaming Disputes Court shall be:

(1) The law as set forth in any Mohegan Tribal ordinances or regulations.

(2) The General Statutes of Connecticut, as may be amended from time to time, are hereby adopted as and declared to be the positive law of The Mohegan Tribe for application by the Gaming Disputes Court, except as such statutes are in conflict with Mohegan Tribal Law.

(3)

The common law of the State of Connecticut interpreting the positive law adopted in Subsection (2) above, which body of law is hereby adopted as and declared to be the common law of The Mohegan Tribe for application by the Gaming Disputes Court, except as such common law is in conflict with Mohegan Tribal Law.

(Ord. No. 95-4, § 301, 7-20-1995)

Sec. 3-53. - Traditional Tribal Law.

Unwritten Mohegan Tribe traditional law and customs shall not be applicable to any civil action or appeal in the Gaming Disputes Court, and no evidence offered to prove nor argument predicated upon any such traditional law or custom shall be admissible or accepted in the Gaming Disputes Court.

(Ord. No. 95-4, § 302, 7-20-1995)

Sec. 3-54. - Authority to Further Develop Mohegan Tribe Common Law.

The Gaming Disputes Trial Court and Gaming Disputes Court of Appeals shall have the authority to further develop through their decisions The Mohegan Tribe common law for the Gaming Disputes Court on any question of law.

In further developing The Tribe's common law and in deciding the cases before it, the Gaming Disputes Court shall strive to achieve stability, clarity, equity, commercial reasonableness, and fidelity to any applicable Mohegan Tribal ordinances or regulations.

(Ord. No. 95-4, § 303, 7-20-1995)

Secs. 3-55—3-70. - Reserved.

DIVISION 4. - PERSONAL JURISDICTION

Sec. 3-71. - Personal Jurisdiction.

(a) Personal jurisdiction of the Gaming Disputes Court shall be as follows:

(1) As used in these jurisdictional provisions, the word "person" shall be as defined in the General Statutes of Connecticut.

(2) Subject to any contrary provisions, exceptions or limitations contained in Mohegan Tribal or federal law, the courts established by this Article shall have civil jurisdiction over the following persons:

i. Any person residing, located, or present within The Mohegan Reservation; or

ii. Any person who transacts, conducts, or performs any business or activity within or affecting The Mohegan Reservation, either in person or by an agent or representative for any civil cause of action arising out of that transaction, conduct, business, or activity; or

iii. Any person who owns, uses or possesses any property, including any lease, or sublease, within The Mohegan Reservation; or

iv. Any person who engages in negligent or tortious conduct within The Mohegan Reservation either in person or by an agent or representative; or

v. Any person who initiates or files with the Trial Court any civil cause of action, whether in person or through an attorney, for any counterclaim, cross-claim, or any other affirmative pleading for relief which may be asserted within that same action; or

vi.

Sec. 4-52. - Indemnification.

If the Employee gives the Employer prompt written notice of any claim, demand, or suit, the Employer shall save harmless and indemnify its Officer or Employee from financial loss and expense arising out of any claim, demand, or suit by reason of his or her alleged negligence or alleged deprivation of any person's civil rights or other act or omission resulting in damage or injury, if the Officer or Employee is found to have been acting in the discharge of his or her duties or within the scope of his or her employment and such act or omission is found not to have been wanton, reckless or malicious. The written notice required under this Section 4-52 shall be sent certified mail to the Attorney General of The Mohegan Tribe and to either the Chairman of the Mohegan Tribal Council or the Chairman of the Management Board of the Mohegan Tribal Gaming Authority as applicable.

(Res. No. 2007-06, 1-31-2007)

Sec. 4-53. - Defense against claims.

The Employer shall provide for the defense of any such Officer or Employee in any civil action or proceeding in any Mohegan Tribal, State or Federal court arising out of any alleged act, omission or deprivation which occurred or is alleged to have occurred while the Officer or Employee was acting in the discharge of his or her duties or in the scope of his or her employment, except that the Employer shall not be required to provide for such a defense whenever the Employer based on its investigation of the facts and circumstances of the case, determines that the Officer or Employee has acted outside the scope of his or her employment or has acted wantonly, recklessly or maliciously. The Employer shall notify the Official or Employee in writing of this determination.

(Res. No. 2007-06, 1-31-2007)

2012 WL 1292655

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford.

Kathleen Hurley DURANTE, Administratrix
of the Estate of Elizabeth Young Durante
v.
MOHEGAN TRIBAL GAMING AUTHORITY et al.

No. X04HHDCV116022130S. | March 30, 2012.

BRIGHT, J.

I. INTRODUCTION

*1 This matter arises from a tragic motor vehicle accident that occurred on March 7, 2009. The vehicle in which Elizabeth Durante was a passenger was struck head on by a vehicle owned and operated by Daniel Musser. At the time of the accident, Musser was traveling the wrong way on Interstate 395.

In the first count of the complaint, the plaintiffs allege that the defendants acted recklessly and wantonly by serving alcohol to Musser in the Ultra 88 Nightclub at the Mohegan Sun Casino prior to the accident and not taking various steps to prevent him from driving while intoxicated.

In the second count, the plaintiffs claim that the defendants created a nuisance in the manner in which they operated their premises, including the areas where Musser consumed alcohol immediately prior to the accident. In the third count, plaintiffs Kathleen and Keith Durante seek damages for the loss of fillial consortium due to Elizabeth's death.

Defendants Mohegan Tribal Gaming Authority ("MTGA"), Gary Crowder, Bruce Bozsum and Mitchell Estess (the "Mohegan Defendants") have moved to dismiss the claims against them for lack of subject matter jurisdiction. MTGA argues that the court is without subject matter jurisdiction over this action because it enjoys sovereign immunity from such claims. Crowder, Bozsum and Estess claim that as employees of MTGA they are also entitled to the benefits of MTGA's sovereign immunity.

In response, the plaintiffs argue that there is no sovereign immunity for claims relating to the service of alcohol. Alternatively, the plaintiffs argue that even if such immunity exists, the Mohegan Defendants have, through their conduct, waived that immunity. At the plaintiffs' request, the court conducted an evidentiary hearing on the motion to dismiss pursuant to *Standard Tallow Corp v. Jowdy*, 190 Conn. 48, 459 A.2d 503 (1983). At that hearing, evidence was presented primarily as to MTGA's relationship with Plan "B," LLC, the co-backer of the Ultra 88 Nightclub and a co-defendant in this action. [1]

II. RELEVANT FACTS AND ALLEGATIONS

The plaintiff alleges the following facts, which are accepted as true for purposes of this motion. At all times relevant, the Mohegan Defendants owned, operated, managed, supervised, conducted and/or controlled the Mohegan Sun Casino and Resort and the Ultra 88 Nightclub and Lounge. Complaint, ¶ 2. Estess was the Chief Executive Officer of MTGA; Bozsum was the Chairman of the Mohegan Tribal Counsel. Complaint, ¶¶ 3–4. Crowder was a permittee of the Ultra 88 Nightclub pursuant to a Casino Liquor Permit in which MTGA was the backer. Complaint, ¶ 7.

On the night of March 6, 2009, into the early morning hours of March 7, 2009, employees, agents, and/or servants of the Mohegan Defendants served and delivered large quantities of alcohol to Musser when they knew he would become grossly intoxicated. Complaint, ¶ 10. They continued to serve him after he was grossly intoxicated, knowing that he would then operate his vehicle in a dangerous manner exposing others to death or serious injury. Complaint, ¶ 11. As a result of their conduct, Musser became so intoxicated he was unable to determine if he was operating his vehicle in the proper lane in both the parking garage and public roadways as he departed the casino. Complaint, ¶ 13. Musser drove in a southerly direction in the northbound lanes of Interstate 395. Complaint, ¶ 16. At the same time, Elizabeth Durante was a passenger in a van with other Connecticut College students who were on their way to Logan Airport in Boston to board a flight for a humanitarian mission in Uganda. The van was traveling northbound on Interstate 395. Complaint, ¶ 17. At approximately 3:40 a.m., Musser caused his vehicle to collide head on, and at a high rate of speed with the van. Complaint, ¶ 18. Elizabeth was trapped under the van and suffered severe injuries that led to her death. *Id.*

***2** Evidence presented in connection with the motion to dismiss established the following additional facts which the parties argue are relevant to resolution of the motion. Crowder, at all relevant times, was employed by the MTGA as the Senior Vice President of Resort Operations. It was while working in that capacity that Crowder became one of the two permittees, along with Lyons, of the Ultra 88 Nightclub. Crowder was neither an owner nor employee of the nightclub or of Plan "B." The Ultra 88 Nightclub is located in a fully demised premises which is leased by MTGA to Plan "B." The lease was signed on March 18, 2002. Pursuant to the lease, MTGA receives rent from Plan "B" equal to nine percent (9%) of gross sales, less various deductions, each year of the lease. In addition, MTGA agreed to contribute towards Plan "B" 's cost of construction of the Ultra 88 Nightclub.

The original liquor permit application was for a café permit under which Lyons would be the only permittee. At the time of this application in 2002, establishments with café permits could allow patrons to smoke. That changed in 2003 when the legislature passed a law prohibiting smoking in such establishments. That law was to take effect on April 1, 2004. To avoid the effects of this change in law, Lyons, Plan "B," MTGA and Crowder amended the application for Ultra 88 Nightclub to include the MTGA as a backer and Crowder as a permittee. This was done so that the applicants could seek a casino permit, in addition to the cafe permit. Establishments with casino liquor permits were not covered by the legislature's 2003 smoking prohibition.

In connection with the amended application, the applicants submitted a draft operating services agreement. That agreement provided that MTGA would be the "Owner" of the Ultra 88 Nightclub, and Plan "B" would be the "Operator." The agreement also provided for termination of the 2002 lease between the parties, although the draft agreement incorporated many of the lease's terms. After reviewing the draft operating services agreement, the Liquor Control Division of the Department of Consumer Protection notified the attorney for MTGA and Plan "B" of issues that should be addressed in a revision of that agreement. Instead of revising the agreement, MTGA and Plan "B" chose to go forward with their applications without any further reference to the operating services agreement. The agreement was never signed, nor brought up by the applicants or the Liquor Control Division again during the permitting process. Ultimately, the Division granted both permits for the Ultra 88 Nightclub prior to April 1, 2004 when the no smoking law went into effect.

III. LEGAL STANDARD

"A motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court ... A motion to dismiss tests, *inter alia*, whether, on the face of the record, the court is without jurisdiction."(Internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 134, 918 A .2d 880 (2007)."Pursuant to the rules of practice, a motion to dismiss is the appropriate motion for raising a lack of subject matter jurisdiction."*St. George v. Gordon*, 264 Conn. 538, 545, 825 A.2d 90 (2003)."When a ... court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light ... In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader."(Internal quotation marks omitted.) *Gold v. Rowland*, 296 Conn. 186, 200 01, 994 A.2d 106 (2010).

***3** "[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss."(Internal quotation marks omitted.) *Housatonic Railroad Co., Inc. v. Commissioner of Revenue Services*, 301 Conn. 268, 274, 21 A.3d 759 (2011)."[T]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised."(Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. New London*, 265 Conn. 423, 430 n. 12, 829 A.2d 801 (2003)."[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor ... clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute."(Internal quotation marks omitted.) *The St. Paul Travelers Companies, Inc. v. Kuehl*, 299 Conn. 800, 808, 12 A.3d 852 (2011). Finally, "[w]hen issues of fact are necessary to the determination of a court's jurisdiction, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses."*Standard Tallow Corp. v. Jowdy*, *supra*, 190 Conn. at 56.

IV. DISCUSSION

The Mohegan Defendants argue that the plaintiffs' claims against them must be dismissed based on the doctrine of tribal

sovereign immunity. The defendants claim that MTGA is immune as a federally recognized tribal organization, and that Estess, Bozsum and Crowder, as employees and agents of MTGA are also entitled to the benefits of the tribe's immunity.

"Tribal sovereign immunity is governed by federal law ... Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers ... We begin with the premise that Indian tribes are domestic dependent nations which exercise inherent sovereign authority over their members and territories ... Tribal sovereign immunity is dependent upon neither the location nor the nature of the tribal activities."(Citations omitted; internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut, supra,* 282 Conn. at 134–35.

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity ... and the tribe itself has consented to suit in a specific forum ... Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity bars suits for damages against a tribe ... However, such waiver may not be implied, but must be expressed unequivocally."(Citations omitted; internal quotation marks omitted.) *Chayoon v. Sherlock,* 89 Conn.App. 821, 826, 877 A.2d 4 (2005).

As to individual defendants, "the doctrine of tribal immunity ... extends to individual tribal officials acting in their representative capacity and within the scope of their authority ... The doctrine does not extend to tribal officials when acting outside their authority in violation of state law ... Tribal immunity also extends to all tribal employees acting within their representative capacity and within the scope of their official authority."(Citations omitted; internal quotation marks omitted.) *Id.*

*4 The plaintiffs first claim that the Tribe, and hence MTGA, was never granted sovereign immunity regarding the dispensing of alcohol. They argue that Congress has always controlled the use of alcohol on tribal lands, and never granted Indian Tribes sovereign immunity over liquor regulation. In making this argument the plaintiffs rely principally on *Rice v. Rehner,* 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983). There, the Court held that a tribal entity desiring to sell alcohol must comply with state liquor regulations. In so holding, the Court rejected the claim that tribal sovereignty precluded such regulation. "Because we find that there is no tradition of sovereign immunity that favors the Indians in this respect, and because we must consider that the activity in which Rehner seeks to engage potentially has a substantial impact beyond the reservation, we may accord little if any weight to any asserted interest in tribal sovereignty in this case."463 U.S. 725. The Court then considered whether state laws regarding the sale of alcohol by Indian tribes were preempted by federal law. The Court concluded that, not only did federal law not preempt state regulation of such sales, it expressly authorizes such regulation. In particular, 18 U.S.C. § 1161 requires that any transaction involving alcohol on tribal land or involving a tribe comply with the law of the state in which the transaction takes place. [2] Based on this language, the Court concluded that "Congress intended to delegate a portion of its authority [over liquor transactions on tribal lands] to the tribes as well as to the States ."*Rice, supra,* 463 U.S. at 733.

The plaintiffs argue that Connecticut's Dram Shop Act, General Statutes § 30–102, is a law regarding the sale of alcohol with which MTGA was required to comply under 18 U.S.C. § 1161. They argue that Connecticut's common-law rules regarding the reckless sale of alcohol and nuisance are no different. They are rules of law in the state that regulate the sale of alcohol, and, therefore, must be followed by MTGA. Consequently, the plaintiffs argue, the defendants are not entitled to sovereign immunity from the plaintiffs' claims.

Two courts, one in Connecticut, have adopted the plaintiffs' analysis. In *Schram v. Ohar,* Superior Court, judicial district of New London at Norwich, Docket No. 0114403 (November 16, 1998, Hurley, J.T.R.) (23 Conn. L. Rptr. 407), the court explicitly relied on the argument made by the plaintiffs here to deny the defendants' motion to dismiss. In *Bittle v. Bahe,* 192 P.3d 810 (Okla.2008), the Oklahoma Supreme Court held that *Rice*"very clearly ruled that Indians did not have the inherent attributes of sovereignty to regulate in the area of alcoholic beverages. It is the sovereignty that gives rise to the immunity from private suit in order to protect the dignity of the sovereign."192 P.3d 819.

By contrast, as far as this court can tell, every other court that has examined the issue, both in Connecticut and elsewhere, has held that Congress's grant of authority to the states to regulate a tribe's sale of alcohol does not constitute an abrogation by Congress of the tribe's immunity from suit by a private citizen for damages. For example, in *Greenidge v. Volvo Car Finance, Inc.,* Superior Court, complex litigation docket of New London at Norwich, Docket No. X04 CV

96 0119475 (August 25, 2000, Koletsky, J.) (28 Conn. L. Rptr. 2), the court dismissed a reckless service of alcohol claim, holding that "[f]rom the fact that a *state* may *regulate* the use and distribution of alcohol on a reservation, the leap to the conclusion that a tribe's immunity does not apply when a private party brings a private cause of action against a tribe in any situation involving the use or consumption of alcohol on a reservation is a leap which this court is unwilling to take, particularly in view of the recent reaffirmation of the existence (if not the logical basis) of tribal immunity from suit. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)." (Emphasis in original.) *Greenidge, supra,* at 3. Based on this conclusion, the court expressly rejected the court's conclusion in *Schram.*Every Connecticut decision since then has adopted Judge Koletsky's reasoning in *Greenidge.*See *Ross v. Spaziante,* Superior Court, judicial district of New London at Norwich, Docket No. CV 10 6003909S, (November 1, 2011, Cosgrove, J.) (2011 Conn.Super. LEXIS 2785), and cases cited therein.

***5** "Additionally, the majority of appellate courts in other states have found that private individuals cannot bring an action against a tribe pursuant to either the Dram Shop Act or common law theories of liability. See *Foxworthy v. Puyallup Tribe of Indians Assn.*, 141 Wn.App. 221, 169 P.3d 53 (2007), cert. granted, 164 Wn.2d 1019, 195 P.3d 89 (2008), *Filer v. Tohono O'Odham Nation Gaming Enterprise,* 212 Ariz. 167, 129 P.3d 78, cert. denied, 2006 Ariz. LEXIS 117 (2006), *Holquin v. Ysleta Del Sur Pueblo,* 95 S.W.2d 843 (Tex.App. El Paso 1997, petition denied)."*Vanstaen–Holland v. LaVigne,* Superior Court, judicial district of New London, Docket No. CV 08 5007659 (February 26, 2009, Martin, J.) (47 Conn. L. Rptr 306, 308); see also *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir.2008).

The underpinning on which all of these cases rest—the distinction between subjecting a tribe to state regulation and permitting it to be sued—has been recognized time and again by the U.S. Supreme Court. As the Court has said, "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them."*Kiowa, supra,* 523 U.S. at 755.For example, a state may tax cigarette sales by a tribe to nonmembers, but the tribe is immune from a suit by the state to collect the taxes due. *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi,* 498 U.S. 505, 510, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). It seems clear to this court that if the granting of authority to a state to tax a tribe is insufficient to constitute an abrogation of sovereign immunity to collect that very tax, then the granting of authority to regulate transactions involving alcoholic beverages is insufficient to constitute an abrogation of sovereign immunity from private suits for injuries that may arise from such transactions. See also *Florida Paraplegic, Association v. Miccosukee Tribe of Indians,* 166 F.3d 1126, 1131 (11th Cir.1999) (Tribe immune from suit even though it was required to comply with Title III of the ADA and regulations promulgated thereunder).

The court completely understands the plaintiffs' frustrations with the application of sovereign immunity to a case such as this. As the Supreme Court has recognized, "[t]here are reasons to doubt the wisdom of perpetuating the doctrine [of tribal sovereign immunity]. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians ... In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims."(Citations omitted.) *Kiowa, supra,* 523 U.S. at 758.Certainly, Elizabeth Durante falls into this last group of individuals.

***6** This court, though, has no authority to abrogate MTGA's sovereign immunity, no matter how sound the reasons to do so might be. "Like foreign sovereign immunity, tribal immunity is a matter of federal law ... Although the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation."(Citations omitted.) *Kiowa, supra,* 523 U.S. at 759."To abrogate tribal immunity, Congress must 'unequivocally' express that purpose."(Citations omitted.) *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001). See also *State of Florida v. Seminole Tribe,* 181 F.3d 1237, 1241 (11th Cir.1999) ("A suit against an Indian tribe is ... barred unless the tribe clearly waived its immunity or Congress expressly abrogated that immunity by authorizing the suit").18 U.S.C. § 1161 does not constitute an explicit or express abrogation of tribal immunity from suit for the sale of alcohol to an intoxicated person who injures another after being served by the tribe or its agents. *Furry v. Miccosukee Tribe of Indians of*

Fla., 2011 U.S. LEXIS 75581 (S.D.Fla. July 13, 2011), *10–11. Consequently, MTGA and the individuals defendants, as MTGA's agents, are protected by sovereign immunity from this suit, unless MTGA has waived that immunity. [3]

The plaintiffs argue that the defendants have taken several actions, each of which constitutes a waiver of their sovereign immunity. These include: 1) MTGA obtaining a liquor license from the State of Connecticut and agreeing to be bound by the state's laws regarding the sale of alcoholic beverages; 2) MTGA entering into a gaming compact with the state that requires that the sale of alcoholic beverages be subject to the laws and regulations of the state; 3) MTGA being a co-backer and Crowder being a co-permittee of the Ultra 88 Nightclub; 4) MTGA explicitly agreeing to be subject to the jurisdiction of Connecticut courts in its lease with Plan "B" for the Ultra 88 Nightclub; and 5) MTGA effectively entering into a partnership with Plan "B" for operation of the Ultra 88 Nightclub.

"Courts consistently have applied two complementary principles to waivers: (1) a sovereign's waiver must be unambiguous, and (2) a sovereign's interest encompasses not merely whether it may be sued, but where it may be sued."(Internal quotation marks omitted.) *Chayoon v. Sherlock, supra,* 89 Conn.App. at 827."[S]uch waiver may not be implied, but must be expressed unequivocally."(Internal quotation marks omitted.) *Id.*, at 826.

None of the actions relied upon by the plaintiffs constitute such a waiver. As to the first two, merely agreeing to a legal obligation does not constitute an explicit waiver of immunity from suit for breach of that obligation. For example, in *Kiowa,* the respondent, Manufacturing Technologies, Inc., claimed that the Indian tribe breached a contract it entered into with the respondent by failing to pay $285,000 due on a note. The Court held that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has the petitioner waived it."*Kiowa, supra,* 523 U.S. at 760.Similarly, in *Chayoon v. Sherlock, supra,* the plaintiff claimed that "the tribe, by its reference to the FMLA in various Foxwoods employment forms that it drafted, has adopted the FMLA and therefore, has expressly waived its tribal immunity from suit for violations of the FMLA's proscriptions."89 Conn.App. 827. The court rejected the plaintiff's claim, holding that employment forms "do not provide a clear waiver of sovereign immunity."*Id.*

*7 The same is true here. The fact that MTGA agreed to sell alcohol only in conformity with Connecticut law does not constitute a clear waiver of its sovereign immunity from private suits for damages by those claiming to be injured as a result of such sales. *Ross v. Spaziante, supra,* Superior Court, Docket No. CV 10 6003909S, 2011 Conn.Super. LEXIS, *12.

Nor does the fact that MTGA is a co-backer and Crowder is a co-permittee of the Ultra 88 Nightclub constitute a waiver of tribal sovereign immunity. As the Court made clear in *Kiowa,* tribal sovereign immunity applies equally to both governmental and commercial activity of a tribe. *Kiowa, supra,* 523 U.S. at 760.That MTGA and Crowder are co-backer and co-permittee, respectively, with Plan "B" and Lyons does not change the analysis. The relationship between those parties is contractual in nature. Consequently, as noted above, merely entering into a contract does not waive the tribe's sovereign immunity for claims arising out of the contract.

This reasoning similarly defeats the plaintiffs' claims that MTGA waived its sovereign immunity by entering into a partnership with Plan "B." Assuming such a partnership exists, [4] it would not constitute the explicit waiver of sovereign immunity that the law requires. After all, a partnership is nothing more than a contractual agreement between two or more parties to work for a common purpose, and to share in the outcome of the enterprise. While it is true that each partner acts as an agent for the partnership, and each partner may be held liable for the actions of the other partners, that does not mean that if one partner enjoys the benefits of sovereign immunity, he waives it by entering into the partnership. The plaintiffs cite to no cases that have held otherwise. Nor have they provided any rationale for treating this type of contractual relationship differently than any other. The court can think of none.

Finally, the plaintiffs argue that the explicit terms of the lease between MTGA and Plan "B" include an explicit waiver of sovereign immunity. In particular, the plaintiffs rely on Section 23 .15 of the lease. That provision is of no help to the plaintiffs. In fact, it provides a perfect example of how a tribe can waive sovereign immunity when it chooses to do so. The first sentence of the section states: "Landlord [MTGA] expressly waives its immunity from uncontested suit for purpose of permitting a suit by Tenant [Plan "B"] in

any court of competent jurisdiction for any claims by Tenant for the purpose of enforcing this Lease and any judgment arising out of this Lease."Exhibit 1, Tab 7. This language makes clear that MTGA's waiver is limited to suits only brought by Plan "B," and then only as to suits to enforce the lease. Furthermore, the next sentence of the section further defines the limitations on MTGA's "waiver of immunity from suit." *Id.*

The plaintiffs seek to avoid the limited nature of the waiver by focusing on the last sentence of the section. It states: "[MTGA] expressly and irrevocably hereby consents to the exercise of personal jurisdiction over it by, and venue in, any federal or state court located in the State of Connecticut and waives any claim that such court is an inconvenient forum and agrees to give full legal effect to any order or judgment issued by such court."*Id.* The plaintiffs argue that the limitations expressed earlier in the section do not apply to this sentence because there is no mention of them, and because the sentence is set off as a separate paragraph.

***8** The court disagrees. The sentence appears as part of Section 23.15. The only logical reading of the section as a whole is that the consent to jurisdiction is limited to actions previously specified in that section. The last sentence merely describes where MTGA is agreeing to be sued on the matters previously identified. It cannot reasonably be construed as both a consent to jurisdiction and waiver of sovereign immunity from suit as to all matters brought by any party relating to the premises described in the Lease. In fact, were the court to read the last sentence as suggested by the plaintiffs, the first sentence of Section 23.15 would be completely superfluous. The court will not adopt such an interpretation. Section 23.15 is not a waiver of MTGA's sovereign immunity from suits such as this one.

V. CONCLUSION

For all of the foregoing reasons, the Mohegan Defendants' Motion to Dismiss is GRANTED.

Parallel Citations

53 Conn. L. Rptr. 811

Footnotes

1 In addition to Plan "B," the plaintiffs have also named Patrick T. Lyons and Lyons Group LTD as defendants. The complaint alleges that Lyons is the co-permittee of Ultra 88 Nightclub with Crowder. The complaint alleges that Lyons Group, LTD, along with the other defendants, owned, operated, managed, supervised, conducted and/or controlled Ultra 88 Nightclub. The motion to dismiss does not concern Plan "B," Lyons or Lyons Group, LTD.

2 18 U.S.C. § 1161 provides in relevant part: "The provisions of ... this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country."

3 In their Memorandum in Opposition to the Motion to Dismiss, the plaintiffs argue that the individual defendants are not entitled to the benefits of sovereign immunity because they were acting outside the scope of their employment and are not actual members of the tribe. Both arguments are without merit. First, the complaint does not allege that the individual defendants acted outside the scope of their authority. In fact, they appear to be named specifically because of their responsibilities, as MTGA employees, for the operation of the Ultra 88 Nightclub. Furthermore, the court allowed the plaintiffs to take discovery to see if they could develop any evidence that any of the individual defendants were acting outside the scope of their authority in connection with operation of the Ultra 88 Nightclub. The plaintiffs provided the court with no such evidence at the evidentiary hearing on the motion to dismiss. Second, the application of sovereign immunity does not turn on whether the individual was a member of the tribe, but on whether he was acting within the scope of his agency. See, e.g., *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir.2004) ("[A plaintiff] cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in the defendants' official or representative capacities and the complaint does not allege that they acted outside the scope of their authority").

4 The plaintiffs' partnership claim is premised on the draft operating services agreement that was submitted by the defendants to the Liquor Control Division in connection with the amended permit application. As noted above, there was no evidence that the agreement was ever actually entered into between MTGA and Plan "B."

2011 WL 4908856
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of New Haven.

Peter JOHNS
v.
George VOEBEL.

No. NNHCV116017037S. | Sept. 23, 2011.

FACTS

WILSON, J.

***1** On January 10, 2011, Peter Johns, the plaintiff, filed a complaint against George Voebel, the defendant, alleging that as a result of the defendant's negligent driving, he suffered injuries. The complaint alleges the following. On or about July 23, 2009, the defendant was operating a 2005 Lincoln bearing Connecticut registration # L6968L with permission to do so from its owner, Mohegan Tribal Gaming Authority (the authority). Suddenly and without warning, the defendant "steered, operated and/or controlled the course and movement of the motor vehicle he was operating so as to cause same to strike into, upon and against the motor vehicle being operated by Peter Johns."The defendant was negligent and careless in one or more of the following ways: he failed to watch his surroundings; he failed to act as a reasonable and prudent person under the circumstances; "he entered the lane being occupied by the motor vehicle being operated by Peter Johns when he knew or should have known that it was unsafe and unreasonable to do so"; and he failed to apply his brakes. As a result of the defendant's negligence, the plaintiff suffered numerous injuries.

On March 25, 2011, the defendant filed a motion to dismiss for lack of subject matter jurisdiction on the ground that he is entitled to sovereign immunity in light of his status as an employee of the authority. The motion was supported by a memorandum of law. The plaintiff filed his memorandum of law in opposition to the defendant's motion to dismiss on May 19, 2011, arguing that the defendant is not entitled to sovereign immunity. The defendant filed his reply memorandum of law on June 2, 2011. The matter was heard at short calendar on June 6, 2011.

DISCUSSION

"[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss."(Internal quotation marks omitted.) *Bacon Construction Co. v. Dept. of Public Works*, 294 Conn. 695, 706, 987 A.2d 348 (2010)."A motion to dismiss admits all facts well pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts."(Internal quotation marks omitted.) *Coughlin v. Waterbury*, 61 Conn.App. 310, 314, 763 A.2d 1058 (2001)."[I]f the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss ... other types of undisputed evidence ... and/or public records of which judicial notice may be taken ... the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint."(Citations omitted; internal quotation marks omitted.) *Conboy v. State*, 292 Conn. 642, 651-52, 974 A.2d 669 (2009)."If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits ... or other evidence, the trial court may dismiss the action without further proceedings."(Citations omitted.) *Id.*, at 652."[A]ffidavits are insufficient to determine the facts unless ... they disclose that no genuine issue as to a material fact exists."(Internal quotation marks omitted.) *Id.*, at 651 n. 14.

***2** In the present case, the defendant moves to dismiss the complaint on the ground that the court lacks subject matter jurisdiction because the defendant is an employee of the authority, and thus, is entitled to sovereign immunity. In his memorandum in support of the motion to dismiss, he also argues that the Mohegan Tribe has neither waived sovereign immunity nor consented to state jurisdiction over private actions. Attached to his memorandum is an affidavit of Michael Hamilton, who attests that he was employed by the authority as the director of transportation at all relevant times.

The plaintiff, in his memorandum of law in opposition to the motion to dismiss, argues that the defendant is not entitled to sovereign immunity as he acted beyond his authority.

Additionally, the plaintiff argues that the proper procedural vehicle is a motion to strike, not a motion to dismiss because he contends that there are additional allegations that can be made to circumvent the issue of sovereign immunity. Attached to the memorandum is the plaintiff's affidavit. In the defendant's reply memorandum of law, he argues that because there was no unequivocal waiver of sovereign immunity by the tribe and also because the regulation of use and distribution of alcohol by the state does not constitute a waiver of sovereign immunity, he is entitled to the immunity.

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."(Internal quotation marks omitted.) *Kizis v. Morse Diesel International, Inc.*, 260 Conn. 46, 52, 794 A.2d 498 (2002)."Because Indian tribes possess this inherent sovereignty they are allowed to form their own laws and be ruled by them ... Tribal powers of self-government ... are observed and protected ... to insure continued viability of Indian self-government insofar as governing powers have not been limited or extinguished ... The exercise of tribal governing power may ... preempt state law in areas where, absent tribal legislation, state law might otherwise apply."(Citation omitted; internal quotation marks omitted.) *Id.*, at 53."Consequently, [a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity ... and the tribe itself has consented to suit in a specific forum ...*Absent a clear and unequivocal waiver by the tribe or congressional abrogation,* the doctrine of sovereign immunity bars suits for damages against a tribe."(Citations omitted; emphasis added; internal quotation marks omitted.) *Id.*

Furthermore, "[t]he doctrine of tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority."(Internal quotation marks omitted.) *Id.*, at 54.Nevertheless, "[t]he doctrine does not extend to tribal officials when acting outside their authority in violation of state law."*Id.*, at 51 n. 7."Tribal immunity also extends to all tribal employees acting within their representative capacity and within the scope of their official authority."*Chayoon v. Sherlock*, 89 Conn.App. 821, 826–27, 877 A.2d 4,cert. denied, 276 Conn. 913, 888 A.2d 83 (2005), cert. denied, 547 U.S. 1138, 126 S.Ct. 2042, 164 L.Ed.2d 797 (2006).

***3** "In the tribal immunity context, a claim for damages against a tribal official lies outside the scope of tribal immunity only where the complaint pleads—and it is shown—that a tribal official acted beyond the scope of his authority to act on behalf of the [t]ribe ... Claimants may not simply describe their claims against a tribal official as in his individual capacity in order to eliminate tribal immunity ... [A] tribal official—even if sued in his individual capacity—is only stripped of tribal immunity when he acts manifestly or palpably beyond his authority ... [I]n order to overcome sovereign immunity, the [plaintiff] must do more than allege that the defendants' conduct was in excess of their ... authority; [the plaintiff] also must allege or otherwise establish facts that reasonably support those allegations."(Citations omitted; internal quotation marks omitted.) *Id.*, at 828."In order to circumvent tribal immunity, the plaintiff must have alleged and proven ... that the defendants acted without any colorable claim of authority."(Internal quotation marks omitted.) *Id.*, at 830.

In the present case, the plaintiff alleges in his complaint that the defendant had permission to drive the motor vehicle owned by the authority. The defendant attached to his memorandum in support of his motion an affidavit by Michael Hamilton, who attests that he was the authority's director of transportation at all relevant times. He attests further that on the date of the accident at issue, the defendant was operating a limousine owned by the authority, acting in his capacity as a limousine driver and in the course of his employment with the authority. The plaintiff attached his own affidavit, in which he attests that "[a]t the time of the accident Mr. Voebel acted outside his authority as an employee of the Mashantucket Tribal Gaming Authority. [1] I believe he acted outside of his authority in the way that he acted on the date that he hit my motor vehicle."In the next paragraph, he also attests that "[a]t the time of the accident the defendant acted outside of his authority with the Mashantucket Tribal Gaming Authority."In *Credit One, LLC v. Head*, the defendant attested that "[i]t is the defendant's belief that the charges claimed are not [the] defendant's, and that should it be the case that certain of the charges alleged to be [the defendant's] are actually [the] defendant's charges ..." when challenging the amount that he owed without providing any evidence. As a result, the Appellate Court held that the defendant's assertions in his affidavit—his unsubstantiated belief unsupported by any evidence—were "mere assertions of fact and are insufficient to establish the existence of a material fact ..."*Credit One, LLC v. Head*, 117 Conn.App. 92, 101, 977 A.2d 767,cert. denied, 294 Conn. 907, 982 A.2d 1080 (2009).

In the present case, because the plaintiff has failed to provide any evidence in support of his assertions in the affidavit that the defendant was acting beyond his authority at the time of the accident, they are mere assertions of fact, which are insufficient to establish the existence of a material fact. Also importantly, in order to overcome or circumvent sovereign immunity in the absence of a clear and unequivocal waiver by the tribe or congressional abrogation, the plaintiff must have done more than merely allege in his assertions that the defendant's conduct at the time of the accident was in excess of his authority.[2] He must have alleged or otherwise established facts that reasonably support his allegations and assertions. Because the plaintiff has not done more than merely assert that the defendant acted outside of his authority while he had the authority's permission to drive the vehicle at the time of the accident, the defendant is entitled to sovereign immunity as an employee of the authority acting in his capacity and within the scope of his official authority. Therefore, defendant's motion to dismiss the plaintiff's complaint is granted.

CONCLUSION

*4 Accordingly, for the foregoing reasons, because the defendant is entitled to sovereign immunity, the motion to dismiss the plaintiff's complaint is granted.

Parallel Citations

52 Conn. L. Rptr. 641

Footnotes

1 The plaintiff's assertion that the defendant is an employee of the Mashantucket Tribal Gaming Authority, instead of the Mohegan Gaming Authority, is irrelevant.

2 The constitution of the Mohegan Tribe of Indians of Connecticut provides in relevant part: "The Tribal Council shall establish by ordinance, the Gaming Disputes Court, which shall be composed of a Trial Branch and an Appellate Branch. Exclusive jurisdiction for the Tribe over disputes arising out of or in connection with the Gaming, the actions of the Tribal Gaming Authority, or contracts entered into by The Mohegan Tribe or the Tribal Gaming Authority in connection with Gaming, including without limitation, disputes arising between any person or entity and the Tribal Gaming Authority, including customers, employees ... or any person or entity which may be in privity with such persons or entities as to Gaming matters shall be vested in the Gaming Disputes Court."Mohegan Const. Art. XIII, § 2. Accordingly, the Mohegan constitution provides a forum and mechanism to redress the plaintiff's injuries as the Mohegan Gaming Disputes Court has exclusive jurisdiction over disputes arising between any person and the authority's employees.

Therefore, the Mohegan Tribe has waived its sovereign immunity only to the extent that claims are brought in the courts established by its own constitution.

End of Document

2011 WL 5842232
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New London.

Richard PORTELLA et al.
v.
Joseph SPAZIANTE et al.

No. KNLCV106004105. | Nov. 1, 2011.

Opinion

COSGROVE, J.

***1** On April 23, 2010, the plaintiffs, Richard Portella, Maureen Wolf and Leslie Legan, filed a fifty-four-count complaint against the defendants, Joseph A. Spaziante, Matthew Spaziante, Gary S. Crowder, Mohegan Tribal Gaming Authority (MTGA), Patrick T. Lyons, Plan "B," LLC (Plan "B"), Kantilal D. Patel and Fourty–Four Hersha Norwich Associates, LLC (Fourty–Four Hersha), seeking damages for personal injuries allegedly sustained by the defendants as the result of a motor vehicle accident. [1] The plaintiffs' complaint alleges that prior to the accident, Joseph was a patron of several establishments, including Leffingwells Martini Bar at Wombi Rock (Leffingwells), a bar in the Mohegan Sun Casino Resorts in Uncasville, Connecticut, where the defendants recklessly served him alcohol. The plaintiffs' complaint further alleges that Crowder is the "duly licensed permittee" and the MTGA is the "duly licensed backer and/or owner" of Leffingwells.

Counts six, seven, thirteen, fourteen, twenty-four, twenty-five, thirty-one, thirty-two, forty-two, forty-three, forty-nine and fifty of the plaintiffs' complaint are directed toward the defendants. Counts six and seven brought by Richard, counts twenty-four and twenty-five brought by Maureen, and counts forty-two and forty-three brought by Leslie, seek recovery pursuant to the Dram Shop Act, General Statutes § 30–102, for the reckless service of alcohol to Joseph by Crowder and by the MTGA, respectively. Counts thirteen and fourteen brought by Richard, counts thirty-one and thirty-two brought by Maureen, and counts forty-nine and fifty brought by Leslie, seek recovery pursuant to common-law liability for the reckless service of alcohol to Joseph by Crowder and by the MTGA, respectively.

On June 16, 2010, the defendants filed a motion to dismiss the claims against them on the ground that the court lacked subject matter jurisdiction pursuant to the doctrine of tribal sovereign immunity. The defendants submitted a memorandum of law in support of their motion. The plaintiffs filed an objection to the defendants' motion, accompanied by a memorandum in support of their motion, on August 11, 2011. On August 12, 2011, the defendants filed a reply memorandum of law in further support of their motion. On August 15, 2011, the matter was argued on short calendar. Subsequent to the short calendar hearing, the plaintiffs filed a sur-reply on August 31, 2011. On September 2, 2011, the defendants filed a memorandum of law in reply to the plaintiffs' sur-reply.

DISCUSSION

"A motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court ... A motion to dismiss tests, *inter alia,* whether, on the face of the record, the court is without jurisdiction."(Internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut,* 282 Conn. 130, 134, 918 A.2d 880 (2007)."Pursuant to the rules of practice, a motion to dismiss is the appropriate motion for raising a lack of subject matter jurisdiction."*St. George v. Gordon,* 264 Conn. 538, 545, 825 A.2d 90 (2003)."When a ... court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light ... In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader."(Internal quotation marks omitted.) *Gold v. Rowland,* 296 Conn. 186, 200–01, 994 A.2d 106 (2010).

***2** "[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss."(Internal quotation marks omitted.) *Housatonic Railroad Co., Inc. v. Commissioner of Revenue Services,* 301 Conn. 268, 274, 21 A.3d 759 (2011)."[T]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised."(Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC*

v. New London, 265 Conn. 423, 430 n. 12, 829 A.2d 801 (2003)."[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor ... clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute."(Internal quotation marks omitted.) *The St. Paul Travelers Companies, Inc. v. Kuehl*, 299 Conn. 800, 808, 12 A.3d 852 (2011).

The defendants argue that the court lacks subject matter jurisdiction over both the plaintiffs' statutory and common-law claims for reckless service of alcohol pursuant to the doctrine of tribal sovereign immunity. The defendants claim that the MTGA is immune as a federally recognized Indian tribal entity, and that tribal sovereign immunity extends to Crowder in his capacity as a tribal representative. The plaintiffs counter that the Mohegan Tribe has no sovereign authority over alcohol in Connecticut as evidenced by its annual submission to the state for a liquor permit. The plaintiffs further counter that, if it exists, tribal sovereign immunity for both statutory and common-law actions for reckless service of alcohol is waived pursuant to 18 U.S.C. § 1161 and the tribe's agreement to be bound by the state's liquor laws.

"Tribal sovereign immunity is governed by federal law ... Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers ... We begin with the premise that Indian tribes are domestic dependent nations which exercise inherent sovereign authority over their members and territories ... Tribal sovereign immunity is dependent upon neither the location nor the nature of the tribal activities."(Citations omitted, internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut, supra*, 282 Conn. at 134–35, 918 A.2d 880.

"[A]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity ... and the tribe itself has consented to suit in a specific forum ... Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity bars suits for damages against a tribe ... However, such waiver may not be implied, but must be expressed unequivocally."(Internal quotation marks omitted.) *Chavoon v. Sherlock*, 89 Conn.App. 821, 826, 877 A.2d 4 (2005)."The Mohegan Tribe is a federally recognized Indian tribe whose sovereignty renders it immune from suit, absent authorization from Congress, unless the Mohegan Tribe explicitly waives its sovereign immunity."*Paszkowski v. Chapman*, Superior Court, judicial district of Ansonia–Milford, Docket No. CV 01 0072786S (August 30, 2001, Arnold, J.).

***3** The court in *Vanstaen–Holland v. LaVigne*, Superior Court, judicial district of New London, Docket No. CV 08 5007659 (February 26, 2009, Martin, J.) (47 Conn. L. Rptr. 306), recently provided the following comprehensive analysis addressing whether tribal sovereign immunity for statutory and common-law reckless service of alcohol claims have been waived by the Mohegan Tribe pursuant to the liquor license requirements set forth in 18 U.S.C. § 1161.

"Our appellate courts have not yet addressed this issue and there exists a split of authority among other courts. The view promoted by the plaintiffs argues that Congress implicitly waived tribal sovereign immunity for alcohol related claims in its passage of 18 U.S.C. § 1161.[2] In *Rice v. Rehner*, 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983), the United States Supreme Court held that a tribal entity that sold alcohol for off-premises consumption must obtain a state liquor license pursuant to 18 U.S.C. § 1161. The court in *Schram v. Ohar*, Superior Court, judicial district of New London at Norwich, Docket No. 0114403 (November 16, 1998, Hurley, J.T.R.) (23 Conn. L. Rptr. 407), extended the holding in *Rice v. Rehner, supra*, 463 U.S. at 713, to conclude that the plaintiff's claims, which included actions pursuant to the Dram Shop Act and common-law recklessness, were not barred by tribal sovereign immunity pursuant to 18 U.S.C. § 1161 because such actions further the legitimate purpose of the state's liquor regulations. See also *Bittle v. Bahe*, 2008 OK 10, 192 P.3d 810 (2008) (finding 18 U.S.C. § 1161 constituted implicit waiver of tribal sovereign immunity for actions brought pursuant to Oklahoma's Dram Shop Act) ...

"Other courts, however, have refused to extend the waiver of tribal sovereign immunity to include additional alcohol related claims brought by private citizens. In *Greenidge v. Volvo Car Finance, Inc.*, Superior Court, complex litigation docket of New London at Norwich, Docket No. X04 CV 96 0119475 (August 25, 2000, Koletsky, J.) (28 Conn. L. Rptr. 2, 3), the court dismissed a reckless service of alcohol claim, stating that, '[f]rom the fact that a *state* may *regulate* the use and distribution of alcohol on a reservation, the leap to the conclusion that a tribe's immunity does not apply when a private party brings a private cause of action against a tribe in any situation involving the use or consumption of alcohol on a reservation is a leap which this court is unwilling to take, particularly in view of the recent affirmation of the existence

(if not the logical basis) of tribal immunity from suit.*Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).' ... Further, the court acknowledged that it was 'aware of the superior court decision *Schram v. Ohar,* [*supra,* Docket No. CV 98 0114403], in which the court denied a motion to dismiss a cause of action at the casino, but respectfully disagree[d] with the conclusion reached therein.' *Id.* See also *Van Etten v. Mashantucket Pequot Gaming Enterprise,* Superior Court, judicial district of New London, Docket No. KNL CV 04 4001587 [40 Conn. L. Rptr. 221] (October 31, 2005, Jones, J.) (finding case law supported result reached in *Greenidge* in court's dismissal of plaintiff's alcohol related negligence claims pursuant to tribal sovereign immunity) ...

***4** "Most recently, in *Richards v. Champion,* Superior Court, judicial district of New London, Docket No. CV 07 5004614 (July 11, 2008, Abrams, J.), the plaintiffs sought recovery against the MTGA after they were struck by a motor vehicle operated by a driver who had allegedly been served alcohol at the Mohegan Sun Resorts Casino prior to the accident. After acknowledging a split in authority, the court aligned with *Greenidge v. Volvo Car Finance, Inc., supra,* 28 Conn. L. Rptr. at 2, in finding that, 'the relationship between state regulation of the sale and distribution of alcohol on tribal lands and dram shop actions brought by private parties is simply too attenuated to support a finding that § 1161 serves as a Congressional declaration of the waiver of tribal sovereign immunity as it relates to dram shop actions.' " *Id.*

"Additionally, the majority of appellate courts in other states have found that private individuals cannot bring an action against a tribe pursuant to either the Dram Shop Act or common law theories of liability. See *Foxworthy v. Puyallup Tribe of Indians Assn.*, 141 Wash.App. 221, 169 P.3d 53 (2007), cert. granted, 164 Wash.2d 1019, 95 P.3d 89 (2008), *Filer v. Tohono O'Odham Nation Gaming Enterprise,* 212 Ariz. 167, 129 P.3d 78, cert. denied, 2006 Ariz. LEXIS 117, 2006 WL 465841 (2006), *Holguin v. Ysleta Del Sur Pueblo,* 954 S.W.2d 843 (Tex.App. El Paso 1997, petition denied)." *Vanstaen Holland v. LaVigne, supra,* 47 Conn. L. Rptr. at 308.

Pursuant to the foregoing case law and analysis, this court joins the latter group of decisions in finding that "the state's police power to regulate the sale and distribution of alcohol is not tantamount to an authorization by Congress to waive tribal sovereign immunity for dram shop actions or common-law recklessness actions brought by private individuals."*Vanstaen Holland v. LaVigne, supra,* 47 Conn. L. Rptr. at 308.

The plaintiffs further argue that the defendants have acknowledged that they have no sovereign authority over alcohol related claims pursuant to the provisions of the Mohegan Tribe–State of Connecticut Gaming Compact (gaming compact), an agreement with the state regarding the tribe's sale and distribution of alcohol. Section 14(b) of the gaming compact provides in relevant part: "Service of alcoholic beverages within any gaming facility shall be subject to the laws and regulations of the State applicable to sale or distribution of alcoholic beverages."

"Courts consistently have applied two complementary principles to waivers: (1) a sovereign's waiver must be unambiguous, and (2) a sovereign's interest encompasses not merely whether it may be sued, but where it may be sued."(Internal quotation marks omitted.) *Chayoon v. Sherlock, supra,* 89 Conn.App. at 827, 877 A.2d 4. In *Vanstaen–Holland v. LaVigne, supra,* 47 Conn. L. Rptr. at 306, the court found that the tribe had not waived its sovereign immunity pursuant to the gaming compact because "[a]n agreement to be subject to the state's regulations on the sale and distribution of alcohol does not constitute an unequivocal waiver of tribal sovereign immunity for all actions brought by private citizens related to alcohol use and consumption," and further, "Section 14(b) does not provide where the tribe may be sued for such actions."*Id.*, at 309.This court agrees with the *Vanstaen–Holland* court's analysis, and therefore finds that the gaming compact does not impact the tribe's sovereign immunity over dram shop claims and reckless service of alcohol claims.

***5** Pursuant to the foregoing, the court holds that the MTGA is immune from liability as to the plaintiffs' claims pursuant to tribal sovereign immunity. Furthermore, as "[t]he doctrine of tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority," and the plaintiffs have not alleged any facts indicating that Crowder, as the licensed permittee of Leffingwells, acted beyond the scope of his authority, Crowder is also immune from the plaintiffs' claims pursuant to tribal sovereign immunity. (Internal quotation marks omitted.) *Kizis v. Morse Diesel International, Inc.*, 260 Conn. 46, 54, 794 A.2d 498 (2002). As a result, the defendants' motion to dismiss the plaintiffs' claims against them must be granted.

CONCLUSION

Based on the foregoing, the court hereby grants the defendants' motion to dismiss counts six, seven, thirteen, fourteen, twenty-four, twenty-five, thirty-one, thirty-two, forty-two, forty-three, forty-nine and fifty of the plaintiffs' complaint.

Parallel Citations

52 Conn. L. Rptr. 813

Footnotes

1 Joseph, Michael, Lyons, Plan "B," Patel and Fourty–Four Hersha are not parties to the present motion. Hereinafter, the term the defendants refers to Crowder and the MTGA, collectively.

2 18 U.S.C. § 1161 provides in relevant part: "The provisions of ... this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country ..."

End of Document

LEXSEE 2008 CONN. SUPER. LEXIS 3430

DONNA RICHARDS, ET AL. v. JASON CHAMPION, ET AL.

CV-07-5004614S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF NEW LONDON AT NEW LONDON

2008 Conn. Super. LEXIS 3430

July 11, 2008, Decided
July 11, 2008, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

JUDGES: [*1] James W. Abrams, Judge.

OPINION BY: James W. Abrams

OPINION

MEMORANDUM OF DECISION RE: DEFENDANT MOHEGAN TRIBAL GAMING AUTHORITY'S MOTION TO DISMISS (# 116)

This action stems from injuries sustained by Donna Richards and her daughter in a motor vehicle accident that took place on January 21, 2007 in Old Lyme, Connecticut. They were struck by a vehicle operated by defendant Jason Champion, who allegedly had been served alcohol at the Mohegan Sun facility prior to the accident. Plaintiffs seek recovery from the Mohegan Tribal Gaming Authority pursuant to *§ 30-102 of the Connecticut General Statutes*, the Connecticut Dram Shop Act.

Defendant Mohegan Tribal Gaming Authority filed a Motion to Dismiss dated February 18, 2008 based on its argument that the Court lacks subject matter jurisdiction over plaintiffs' dram shop claims pursuant to the doctrine of tribal sovereign immunity. Plaintiffs filed an Objection dated April 17, 2008 and the parties presented oral argument before the Court on June 2, 2008.

"The standard of review for a court's decision on a motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . When a . [*2] . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Citations omitted; internal quotation marks omitted.) *Cogswell v. American Transit Ins. Co., 282 Conn. 505, 516, 923 A.2d 638 (2007).*

The determinative issue in this matter is whether dram shop actions against tribal entities are barred by sovereign immunity. Tribal sovereign immunity is governed by federal law and is only abrogated under very limited circumstances: "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. An Indian tribe is subject to suit only when Congress has authorized the suit or the tribe has waived its immunity. . . . However, such waiver may not be implied, but must be expressed unequivocally. [*3] The United States Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case. *Beecher v. Mohegan Tribe of Indians, 282 Conn. 130, 133-34, 918 A.2d 880 (2007).* (Citations and internal quotation marks omitted).

Neither party argues that Congress has expressly authorized dram shop actions against tribal entities or that the Mohegan Tribal Gaming Authority was waived its sovereign immunity in this regard. Rather, plaintiffs argue that since state regulation over the sale and distribution of alcohol on tribal lands is not barred by sovereign immunity, its dram shop action should not be barred either. In *Rice v. Rehner, 463 U.S. 713, 103 S.Ct. 3291, 77 L. Ed. 2d 961 (1983)*, the U.S. Supreme Court found that a tribal business that sold liquor for off-premises consumption was required to obtain a state liquor license pursuant to *18 U.S.C. § 1161*, "which provides that liquor transactions in Indian country are not subject to prohibition under federal law provided those transactions are in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted [*4] by the tribe . . . ." *Id., 716.*

Authority is split on the issue of whether the language in *§ 1161* serves as an abrogation of sovereign immunity as it relates to dram shop actions. In *Bittle v. Bahe, 2008 OK 10, 192 P.3d 810 (2008)* and *Schram v. Ohar, Judicial District of New London, Dkt. No. 114403, 1998 Conn. Super. LEXIS 3263 (November 16, 1998, Hurley, J.)*, the courts concluded that since dram shop actions further the legitimate objectives of state liquor laws, the exception to sovereign immunity approved in *Rice* was applicable and that dram shop actions against the tribes could proceed. However, in *Filer v. Tohono O'Odham Nation Gaming, 212 Ariz. 167, 129 P.3d 78 (App. 2006)*, *Foxworthy v. Puyallup Tribe of Indians, 141 Wa. App. 221, 169 P.3d 53 (2007)*, *Holguin v. Ysleta Del Sur Pueblo, 954 S.W.2d 843 (Tex. App.-- El Paso 1997)* and *Greenidge v. Volvo Car Finance, Judicial District of New London, Docket No. 96-0119475, 2000 Conn. Super. LEXIS 2240 (August 25, 2000, Koletsky, J.)*, the courts refused to extend the waiver of sovereign immunity to dram shop actions: "From the fact that a state may regulate the use and distribution of alcohol on a reservation, the leap to the conclusion that the tribe's immunity does not apply when a private party brings a private cause [*5] action against a tribe in any situation involving the use or consumption of alcohol on a reservation is a leap which this court is unwilling to take . . . ." Id.

This Court finds second group of cases to be better reasoned as the relationship between state regulation of the sale and distribution of alcohol on tribal lands and dram shop actions brought by private parties is simply too attenuated to support a finding that *§ 1161* serves as a Congressional declaration of the waiver of tribal sovereign immunity as it relates to dram shop actions.

However, the Court reaches this decision with a great deal of trepidation about the public policy ramifications of allowing the Mohegan Tribal Gaming Authority to escape liability when it serves alcohol to patrons who then proceed to drive off tribal lands and kill or injure the citizens of the State of Connecticut. The solution to this problem, however, lies with the legislature rather than the judiciary. While the U. S. Supreme Court has questioned the continued validity of tribal sovereign immunity, it has concluded that the solution rests with Congress rather than the courts: "There are reasons to doubt the wisdom of perpetuating the doctrine. [*6] At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims. These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, 523 U.S. 751, 758, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998).* [1]

1 The Mashantucket Pequot Tribal Nation has taken steps to address this issue [*7] by waiving its sovereign immunity and allowing dram shop actions to be brought in their Tribal Court. Mashantucket Pequot Tribal Laws, Title XVII, § 40. This Court could find no evidence that the Mohegan Tribal Gaming Authority has taken any action to address this issue.

Defendant Mohegan Tribal Gaming Authority's Motion to Dismiss is hereby granted.

/s/ James W. Abrams

James W. Abrams, Judge

2011 WL 5842468
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of New London.

Jeffrey ROSS et al.
v.
Joseph SPAZIANTE et al.

No. KNLCV106003909S. | Nov. 1, 2011.

COSGROVE, J.

FACTS

*1 On April 9, 2010, the plaintiffs, Jeffrey Ross and Lisa Ross, filed a nineteen-count complaint against the defendants, Joseph Spaziante, Matthew Spaziante, Gary S. Crowder, Mohegan Tribal Gaming Authority (MTGA), Patrick T. Lyons, Plan "B," LLC (Plan "B"), Kantilal D. Patel and Fourty–Four Hersha Norwich Associates, LLC (Fourty–Four Hersha), seeking damages for personal injuries allegedly sustained by the defendants as the result of a motor vehicle accident. [1] The plaintiffs' complaint alleges that prior to the accident, Joseph was a patron of several establishments, including Leffingwells Martini Bar at Wombi Rock (Leffingwells), a bar in the Mohegan Sun Casino Resorts in Uncasville, Connecticut, where the defendants recklessly served him alcohol. The plaintiffs' complaint further alleges that Crowder is the "duly licensed permittee" and the MTGA is the "duly licensed backer and/or owner" of Leffingwells.

Counts six, seven, thirteen and fourteen of the plaintiffs' complaint are brought by Jeffrey and directed toward the defendants. Counts six and seven seek recovery pursuant to the Dram Shop Act, General Statutes § 30–102, for the reckless service of alcohol to Joseph by Crowder and by the MTGA, respectively. Counts thirteen and fourteen seek recovery pursuant to common-law liability for the reckless service of alcohol to Joseph by Crowder and by the MTGA, respectively.

On June 16, 2010, the defendants filed a motion to dismiss the claims against them on the ground that the court lacked subject matter jurisdiction pursuant to the doctrine of tribal sovereign immunity. The defendants submitted a memorandum of law in support of their motion. The plaintiffs filed an objection to the defendants' motion, accompanied by a memorandum in support of their motion, on September 10, 2010. On August 9, 2011, the defendants filed a reply memorandum of law in further support of their motion. On August 15, 2011, the matter was argued on short calendar. Subsequent to the short calendar hearing, the plaintiffs filed a sur-reply on August 30, 2011. On September 2, 2011, the defendants filed a memorandum of law in reply to the plaintiffs' sur-reply.

DISCUSSION

"A motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court ... A motion to dismiss tests, *inter alia,* whether, on the face of the record, the court is without jurisdiction."(Internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut,* 282 Conn. 130, 134, 918 A.2d 880 (2007)."Pursuant to the rules of practice, a motion to dismiss is the appropriate motion for raising a lack of subject matter jurisdiction."*St. George v. Gordon,* 264 Conn. 538, 545, 825 A.2d 90 (2003)."When a ... court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light ... In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader."(Internal quotation marks omitted.) *Gold v. Rowland,* 296 Conn. 186, 200–01, 994 A.2d 106 (2010).

*2 "[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss."(Internal quotation marks omitted.) *Housatonic Railroad Co., Inc. v. Commissioner of Revenue Services,* 301 Conn. 268, 274, 21 A.3d 759 (2011)."[T]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised."(Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. New London,* 265 Conn. 423, 430 n. 12, 829 A.2d 801 (2003)."[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor ... clearly to allege facts

demonstrating that he is a proper party to invoke judicial resolution of the dispute."(Internal quotation marks omitted.) *The St. Paul Travelers Companies, Inc. v. Kuehl*, 299 Conn. 800, 808, 12 A.3d 852 (2011).

The defendants argue that the court lacks subject matter jurisdiction over both the plaintiffs' statutory and common-law claims for reckless service of alcohol pursuant to the doctrine of tribal sovereign immunity. The defendants claim that the MTGA is immune as a federally recognized Indian tribal entity, and that tribal sovereign immunity extends to Crowder in his capacity as a tribal representative. The plaintiffs counter that the Mohegan Tribe has no sovereign authority over alcohol in Connecticut as evidenced by its annual submission to the state for a liquor permit. The plaintiffs further counter that, if it exists, tribal sovereign immunity for both statutory and common-law actions for reckless service of alcohol is waived pursuant to 18 U.S.C. § 1161 and the tribe's agreement to be bound by the state's liquor laws.

"Tribal sovereign immunity is governed by federal law ... Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers ... We begin with the premise that Indian tribes are domestic dependent nations which exercise inherent sovereign authority over their members and territories ... Tribal sovereign immunity is dependent upon neither the location nor the nature of the tribal activities."(Citations omitted, internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut, supra*, 282 Conn. at 134-35, 918 A.2d 880.

"[A]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity ... and the tribe itself has consented to suit in a specific forum ... Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity bars suits for damages against a tribe ... However, such waiver may not be implied, but must be expressed unequivocally."(Internal quotation marks omitted.) *Chayoon v. Sherlock*, 89 Conn.App. 821, 826, 877 A.2d 4 (2005)."The Mohegan Tribe is a federally recognized Indian tribe whose sovereignty renders it immune from suit, absent authorization from Congress, unless the Mohegan Tribe explicitly waives its sovereign immunity."*Paszkowski v. Chapman*, Superior Court, judicial district of Ansonia–Milford, Docket No. CV 01 0072786S (August 30, 2001, Arnold, J.).

***3** The court in *Vanstaen–Holland v. La Vigne*, Superior Court, judicial district of New London, Docket No. CV 08 5007659 (February 26, 2009, Martin, J.) (47 Conn. L. Rptr. 306) recently provided the following comprehensive analysis addressing whether tribal sovereign immunity for statutory and common-law reckless service of alcohol claims have been waived by the Mohegan Tribe pursuant to the liquor license requirements set forth in 18 U.S.C. § 1161.

"Our appellate courts have not yet addressed this issue and there exists a split of authority among other courts. The view promoted by the plaintiffs argues that Congress implicitly waived tribal sovereign immunity for alcohol related claims in its passage of 18 U.S.C. § 1161.[2] In *Rice v. Rehner*, 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983), the United States Supreme Court held that a tribal entity that sold alcohol for off-premises consumption must obtain a state liquor license pursuant to 18 U.S.C. § 1161. The court in *Schram v. Ohar*, Superior Court, judicial district of New London at Norwich, Docket No. 0114403 (November 16, 1998, Hurley, J.T.R.) (23 Conn. L. Rptr. 407), extended the holding in *Rice v. Rehner, supra*, 463 U.S. at 713, to conclude that the plaintiff's claims, which included actions pursuant to the Dram Shop Act and common-law recklessness, were not barred by tribal sovereign immunity pursuant to 18 U.S.C. § 1161 because such actions further the legitimate purpose of the state's liquor regulations. See also *Bittle v. Bahe*, 2008 OK 10, 192 P.3d 810 (2008) (finding 18 U.S.C. § 1161 constituted implicit waiver of tribal sovereign immunity for actions brought pursuant to Oklahoma's Dram Shop Act) ...

"Other courts, however, have refused to extend the waiver of tribal sovereign immunity to include additional alcohol related claims brought by private citizens. In *Greenidge v. Volvo Car Finance, Inc.*, Superior Court, complex litigation docket of New London at Norwich, Docket No. X04 CV 96 0119475 (August 25, 2000, Koletsky, J.) (28 Conn. L. Rptr. 2, 3), the court dismissed a reckless service of alcohol claim, stating that, '[f]rom the fact that a *state* may *regulate* the use and distribution of alcohol on a reservation, the leap to the conclusion that a tribe's immunity does not apply when a private party brings a private cause of action against a tribe in any situation involving the use or consumption of alcohol on a reservation is a leap which this court is unwilling to take, particularly in view of the recent affirmation of the existence (if not the logical basis) of tribal immunity from suit.*Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).'... Further,

the court acknowledged that it was 'aware of the superior court decision *Schram v. Ohar,* [*supra,* Docket No. CV 98 0114403], in which the court denied a motion to dismiss a cause of action at the casino, but respectfully disagree[d] with the conclusion reached therein.'*Id.* See also *Van Etten v. Mashantucket Pequot Gaming Enterprise,* Superior Court, judicial district of New London, Docket No. KNL CV 04 4001587 (October 31, 2005, Jones, J.) [40 Conn. L. Rptr. 221] (finding case law supported result reached in *Greenidge* in court's dismissal of plaintiff's alcohol related negligence claims pursuant to tribal sovereign immunity) ...

***4** "Most recently, in *Richards v. Champion,* Superior Court, judicial district of New London, Docket No. CV 07 5004614 (July 11, 2008, Abrams, J.), the plaintiffs sought recovery against the MTGA after they were struck by a motor vehicle operated by a driver who had allegedly been served alcohol at the Mohegan Sun Resorts Casino prior to the accident. After acknowledging a split in authority, the court aligned with *Greenidge v. Volvo Car Finance, Inc., supra,* 28 Conn. L. Rptr. at 2, in finding that, 'the relationship between state regulation of the sale and distribution of alcohol on tribal lands and dram shop actions brought by private parties is simply too attenuated to support a finding that § 1161 serves as a Congressional declaration of the waiver of tribal sovereign immunity as it relates to dram shop actions.'*Id.*

"Additionally, the majority of appellate courts in other states have found that private individuals cannot bring an action against a tribe pursuant to either the Dram Shop Act or common law theories of liability. See *Foxworthy v. Puyallup Tribe of Indians Assn.,* 141 Wash.App. 221, 169 P.3d 53 (2007), cert. granted, 164 Wash.2d 1019, 95 P.3d 89 (2008), *Filer v. Tohono O 'Odham Nation Gaming Enterprise,* 212 Ariz. 167, 129 P.3d 78, cert. denied, 2006 Ariz. LEXIS 117, 2006 WL 465841 (2006), *Holguin v. Ysleta Del Sur Pueblo,* 954 S.W.2d 843 (Tex.App. El Paso 1997, petition denied)."*Vanstaen Holland v. LaVigne, supra,* 47 Conn. L. Rptr. at 308.

Pursuant to the foregoing case law and analysis, this court joins the latter group of decisions in finding that "the state's police power to regulate the sale and distribution of alcohol is not tantamount to an authorization by Congress to waive tribal sovereign immunity for dram shop actions or common-law recklessness actions brought by private individuals."*Vanstaen Holland v. LaVigne, supra,* 47 Conn. L. Rptr. at 308.

The plaintiffs further argue that the defendants have acknowledged that they have no sovereign authority over alcohol related claims pursuant to the provisions of the Mohegan Tribe–State of Connecticut Gaming Compact (gaming compact), an agreement with the state regarding the tribe's sale and distribution of alcohol. Section 14(b) of the gaming compact provides in relevant part: "Service of alcoholic beverages within any gaming facility shall be subject to the laws and regulations of the State applicable to sale or distribution of alcoholic beverages."

"Courts consistently have applied two complementary principles to waivers: (1) a sovereign's waiver must be unambiguous, and (2) a sovereign's interest encompasses not merely whether it may be sued, but where it may be sued."(Internal quotation marks omitted.) *Chayoon v. Sherlock, supra,* 89 Conn.App. at 827, 877 A.2d 4. In *Vanstaen–Holland v. LaVigne, supra,* 47 Conn. L. Rptr. at 306, the court found that the tribe had not waived its sovereign immunity pursuant to the gaming compact because "[a]n agreement to be subject to the state's regulations on the sale and distribution of alcohol does not constitute an unequivocal waiver of tribal sovereign immunity for all actions brought by private citizens related to alcohol use and consumption," and further, "Section 14(b) does not provide where the tribe may be sued for such actions."*Id.,* at 309.This court agrees with the *Vanstaen–Holland* court's analysis, and therefore finds that the gaming compact does not impact the tribe's sovereign immunity over dram shop claims and reckless service of alcohol claims.

***5** Pursuant to the foregoing, the court holds that the MTGA is immune from liability as to the plaintiffs' claims pursuant to tribal sovereign immunity. Furthermore, as "[t]he doctrine of tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority," and the plaintiffs have not alleged any facts indicating that Crowder, as the licensed permittee of Leffingwells, acted beyond the scope of his authority, Crowder is also immune from the plaintiffs' claims pursuant to tribal sovereign immunity. (Internal quotation marks omitted.) *Kizis v. Morse Diesel International, Inc.,* 260 Conn. 46, 54, 794 A.2d 498 (2002). As a result, the defendants' motion to dismiss the plaintiffs' claims against them must be granted.

CONCLUSION

Based on the foregoing, the court hereby grants the defendants' motion to dismiss counts six, seven, thirteen and fourteen of the plaintiffs' complaint.

Footnotes

1 Joseph, Michael, Lyons, Plan "B," Patel and Fourty–Four Hersha are not parties to the present motion. Hereinafter, the term the defendants refers to Crowder and the MTGA, collectively.

2 18 U.S.C. § 1161 provides in relevant part: "The provisions of ... this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country ..."

End of Document

2011 WL 5842352
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of New London.

Michael SAULI et al.
v.
Joseph SPAZIANTE et al.

No. KNLCV106003857. | Nov. 1, 2011.

Synopsis

Background: Plaintiffs brought statutory and common law claims for reckless service of alcohol against tribal casino and one of tribe's officials, in his individual capacity, seeking damages for personal injuries allegedly sustained by defendants as result of a motor vehicle accident. Defendants filed motion to dismiss pursuant to doctrine of tribal sovereign immunity.

Holdings: The Superior Court, Judicial District of New London, Cosgrove, J., held that:

[1] defendants did not waive tribal sovereign immunity, and

[2] complaint failed to allege that the official acted beyond the scope of his authority to act on behalf of the tribe.

Motion granted.

West Headnotes (2)

[1] **Indians**
⇗ Actions

State's police power to regulate the sale and distribution of alcohol at Indian tribe's casino was not tantamount to authorization by Congress to waive tribal sovereign immunity as to plaintiffs' dram shop and common-law recklessness actions. 18 U.S.C.A. § 1161; C.G.S.A. § 30-102.

Cases that cite this headnote

[2] **Indians**
⇗ Actions

Allegations in plaintiffs' damages complaint, alleging statutory and common law claims for reckless service of alcohol against Indian tribe official, in his individual capacity, failed to allege any facts indicating that official acted beyond the scope of his authority to act on behalf of the tribe, as required to place plaintiffs' claim for damages outside scope of tribal immunity.

Cases that cite this headnote

Opinion

COSGROVE, J.

***1** On September 7, 2010, the plaintiffs, Michael Sauli and Natalie Sauli, filed an amended twenty-four-count complaint against the defendants, Joseph Spaziante, Matthew Spaziante, Gary S. Crowder, Mohegan Tribal Gaming Authority (MTGA), Patrick T. Lyons and Plan "B," LLC (Plan "B"), seeking damages for personal injuries allegedly sustained by the defendants as the result of a motor vehicle accident. [1] The plaintiffs' complaint alleges that prior to the accident, Joseph was a patron at several establishments, including Leffingwells Martini Bar at Wombi Rock (Leffingwells), a bar in the Mohegan Sun Casino Resorts in Uncasville, Connecticut, where the defendants recklessly served him alcohol. The plaintiffs' complaint further alleges that Crowder is the "duly licensed permittee" and the MTGA is the "duly licensed backer and/or owner" of Leffingwells.

Counts six, seven, eleven, twelve, eighteen, nineteen, twenty-three and twenty-four of the plaintiffs' complaint are directed toward the defendants. Counts six and seven brought by Michael, and counts eighteen and nineteen brought by Natalie, seek recovery pursuant to the Dram Shop Act, General Statutes § 30-102, for the reckless service of alcohol to Joseph by Crowder and by the MTGA, respectively. Counts eleven and twelve brought by Michael, and counts twenty-three and twenty-four brought by Natalie, seek recovery

pursuant to common-law liability for the reckless service of alcohol to Joseph by Crowder and by the MTGA, respectively.

On June 16, 2010, the defendants filed a motion to dismiss the claims against them on the ground that the court lacked subject matter jurisdiction pursuant to the doctrine of tribal sovereign immunity. The defendants submitted a memorandum of law in support of their motion. The plaintiffs filed an objection to the defendants' motion, accompanied by a memorandum in support of their motion, on July 22, 2010. On August 9, 2011, the defendants filed a reply memorandum of law in further support of their motion. The matter was argued on short calendar on August 15, 2011. Subsequent to the short calendar hearing, the plaintiffs filed a sur-reply on August 31, 2011. On September 2, 2011, the defendants filed a memorandum of law in reply to the plaintiffs' sur-reply.

DISCUSSION

"A motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court ... A motion to dismiss tests, *inter alia,* whether, on the face of the record, the court is without jurisdiction."(Internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut,* 282 Conn. 130, 134, 918 A.2d 880 (2007)."Pursuant to the rules of practice, a motion to dismiss is the appropriate motion for raising a lack of subject matter jurisdiction."*St. George v. Gordon,* 264 Conn. 538, 545, 825 A.2d 90 (2003)."When a ... court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light ... In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader."(Internal quotation marks omitted.) *Gold v. Rowland,* 296 Conn. 186, 200–01, 994 A.2d 106 (2010).

***2** "[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss."(Internal quotation marks omitted.) *Housatonic Railroad Co., Inc. v. Commissioner of Revenue Services,* 301 Conn. 268, 274, 21 A.3d 759 (2011)."[T]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised."(Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. New London,* 265 Conn. 423, 430 n. 12, 829 A.2d 801 (2003)."[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor ... clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute."(Internal quotation marks omitted.) *The St. Paul Travelers Companies, Inc. v. Kuehl,* 299 Conn. 800, 808, 12 A.3d 852 (2011).

The defendants argue that the court lacks subject matter jurisdiction over both the plaintiffs' statutory and common-law claims for reckless service of alcohol pursuant to the doctrine of tribal sovereign immunity. The defendants claim that the MTGA is immune as a federally recognized Indian tribal entity, and that tribal sovereign immunity extends to Crowder in his capacity as a tribal representative. The plaintiffs counter that tribal sovereign immunity for both statutory and common-law actions for reckless service of alcohol is waived pursuant to 18 U.S.C. § 1161 and the tribe's agreement to be bound by the state's liquor laws.

"Tribal sovereign immunity is governed by federal law ... Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers ... We begin with the premise that Indian tribes are domestic dependent nations which exercise inherent sovereign authority over their members and territories ... Tribal sovereign immunity is dependent upon neither the location nor the nature of the tribal activities."(Citations omitted, internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut, supra,* 282 Conn. at 134–35, 918 A.2d 880.

"[A]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity ... and the tribe itself has consented to suit in a specific forum ... Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity bars suits for damages against a tribe ... However, such waiver may not be implied, but must be expressed unequivocally."(Internal quotation marks omitted.) *Chayoon v. Sherlock,* 89 Conn.App. 821, 826, 877 A.2d 4 (2005)."The Mohegan Tribe is a federally recognized Indian tribe whose sovereignty renders it immune from suit, absent authorization from Congress, unless the Mohegan Tribe explicitly waives its sovereign immunity."*Paszkowski v. Chapman,* Superior Court, judicial district of Ansonia–Milford, Docket No. CV 01 0072786S (August 30, 2001, Arnold, J.).

*3 The court in *Vanstaen–Holland v. LaVigne,* Superior Court, judicial district of New London, Docket No. CV 08 5007659 (February 26, 2009, Martin, J.) (47 Conn. L. Rptr. 306), recently provided the following comprehensive analysis addressing whether tribal sovereign immunity for statutory and common-law reckless service of alcohol claims have been waived by the Mohegan Tribe pursuant to the liquor license requirements set forth in 18 U.S.C. § 1161.

"Our appellate courts have not yet addressed this issue and there exists a split of authority among other courts. The view promoted by the plaintiffs argues that Congress implicitly waived tribal sovereign immunity for alcohol related claims in its passage of 18 U.S.C. § 1161.[2] In *Rice v. Rehner,* 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983), the United States Supreme Court held that a tribal entity that sold alcohol for off-premises consumption must obtain a state liquor license pursuant to 18 U.S.C. § 1161. The court in *Schram v. Ohar,* Superior Court, judicial district of New London at Norwich, Docket No. 0114403 (November 16, 1998, Hurley, J.T.R.) (23 Conn. L. Rptr. 407), extended the holding in *Rice v. Rehner, supra,* 463 U.S. at 713, to conclude that the plaintiff's claims, which included actions pursuant to the Dram Shop Act and common-law recklessness, were not barred by tribal sovereign immunity pursuant to 18 U.S.C. § 1161 because such actions further the legitimate purpose of the state's liquor regulations. See also *Bittle v. Bahe,* 2008 OK 10, 192 P.3d 810 (2008) (finding 18 U.S.C. § 1161 constituted implicit waiver of tribal sovereign immunity for actions brought pursuant to Oklahoma's Dram Shop Act) ...

"Other courts, however, have refused to extend the waiver of tribal sovereign immunity to include additional alcohol related claims brought by private citizens. In *Greenidge v. Volvo Car Finance, Inc.,* Superior Court, complex litigation docket of New London at Norwich, Docket No. X04 CV 96 0119475 (August 25, 2000, Koletsky, J.) (28 Conn. L. Rptr. 2, 3), the court dismissed a reckless service of alcohol claim, stating that, '[f]rom the fact that a *state* may *regulate* the use and distribution of alcohol on a reservation, the leap to the conclusion that a tribe's immunity does not apply when a private party brings a private cause of action against a tribe in any situation involving the use or consumption of alcohol on a reservation is a leap which this court is unwilling to take, particularly in view of the recent affirmation of the existence (if not the logical basis) of tribal immunity from suit. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).'... Further, the court acknowledged that it was 'aware of the superior court decision *Schram v. Ohar,* [*supra,* Docket No. CV 98 0114403], in which the court denied a motion to dismiss a cause of action at the casino, but respectfully disagree[d] with the conclusion reached therein.' *Id.* See also *Van Etten v. Mashantucket Pequot Gaming Enterprise,* Superior Court, judicial district of New London, Docket No. KNL CV 04 4001587 [40 Conn. L. Rptr. 22] (October 31, 2005, Jones, J.) (finding case law supported result reached in *Greenidge* in court's dismissal of plaintiff's alcohol related negligence claims pursuant to tribal sovereign immunity) ..."

*4 "Most recently, in *Richards v. Champion,* Superior Court, judicial district of New London, Docket No. CV 07 5004614 (July 11, 2008, Abrams, J.), the plaintiffs sought recovery against the MTGA after they were struck by a motor vehicle operated by a driver who had allegedly been served alcohol at the Mohegan Sun Resorts Casino prior to the accident. After acknowledging a split in authority, the court aligned with *Greenidge v. Volvo Car Finance, Inc., supra,* 28 Conn. L. Rptr. at 2, in finding that, 'the relationship between state regulation of the sale and distribution of alcohol on tribal lands and dram shop actions brought by private parties is simply too attenuated to support a finding that § 1161 serves as a Congressional declaration of the waiver of tribal sovereign immunity as it relates to dram shop actions.' *Id.*

"Additionally, the majority of appellate courts in other states have found that private individuals cannot bring an action against a tribe pursuant to either the Dram Shop Act or common law theories of liability. See *Foxworthy v. Puyallup Tribe of Indians Assn.,* 141 Wash.App. 221, 169 P.3d 53 (2007), cert. granted, 164 Wash.2d 1019, 95 P.3d 89 (2008), *Filer v. Tohono O 'Odham Nation Gaming Enterprise,* 212 Ariz. 167, 129 P.3d 78, cert. denied, 2006 Ariz. LEXIS 117 (2006), *Holguin v. Ysleta Del Sur Pueblo,* 954 S.W.2d 843 (Tex.App. El Paso 1997, petition denied)." *Vanstaen–Holland v. LaVigne, supra,* 47 Conn. L. Rptr. at 308.

[1] Pursuant to the foregoing case law and analysis, this court joins the latter group of decisions in finding that "the state's police power to regulate the sale and distribution of alcohol is not tantamount to an authorization by Congress to waive tribal sovereign immunity for dram shop actions or common-law recklessness actions brought by private individuals." *Vanstaen–Holland v. LaVigne, supra,* 47 Conn. L. Rptr. at 308. As a result, the MTGA is immune from liability as to the plaintiffs' claims pursuant to tribal sovereign immunity.

[2] The plaintiffs also argue that even if the MTGA is immune from liability for their claims, tribal sovereign immunity does not extend to Crowder, as he was sued in his individual capacity. Our Supreme Court held that "[t]he doctrine of tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority."(Internal quotation marks omitted.) *Kizis v. Morse Diesel International, Inc.*, 260 Conn. 46, 54, 794 A.2d 498 (2002)."In the tribal immunity context, a claim for damages against a tribal official lies outside the scope of tribal immunity only where the complaint pleads and it is shown—that a tribal official acted beyond the scope of his authority to act on behalf of the [t]ribe ... Claimants may not simply describe their claims against a tribal official as in his individual capacity in order to eliminate tribal immunity ... [A] tribal official—even if sued in his individual capacity—is only stripped of tribal immunity when he acts manifestly or palpably beyond his authority ... [I]n order to overcome sovereign immunity, the [plaintiff] must do more than allege that the defendants' conduct was in excess of their ... authority; [the plaintiff] also must allege or otherwise establish facts that reasonably support those allegations."(Citations omitted, internal quotation marks omitted.) *Chavoon v. Sherlock, supra*, 89 Conn.App. at 828, 877 A.2d 4.

*5 As noted herein, it is the plaintiffs' burden to allege facts clearly establishing subject matter jurisdiction. In the present case, the plaintiffs identify Crowder as the licensed permittee of Leffingwells. The plaintiffs fail to allege any facts indicating that Crowder acted beyond the scope of his authority. Therefore, as a tribal member, he is also immune from the plaintiffs' claims pursuant to tribal sovereign immunity. As a result, the defendants' motion to dismiss the plaintiffs' claims against them must be granted.

CONCLUSION

Based on the foregoing, the court hereby grants the defendants' motion to dismiss counts six, seven, eleven, twelve, eighteen, nineteen, twenty-three and twenty-four of the plaintiffs' complaint.

Footnotes

1 Joseph, Michael, Lyons and Plan "B" are not parties to the present motion. Hereinafter, the term the defendants refers to Crowder and the MTGA, collectively.

2 18 U.S.C. § 1161 provides in relevant part: "The provisions of ... this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country ..."

2009 WL 765517
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New London.

Emily VANSTAEN-HOLLAND PPA, et al.
v.
Glenn R. LAVIGNE et al.

No. CV085007659. | Feb. 26, 2009.

West KeySummary

1 Indians
Actions

Claims brought under the Dram Shop Act by a minor child who sustained injuries after she was struck by a vehicle driven by an individual who was served alcohol at a Casino run by a tribal gaming authority were dismissed for lack of jurisdiction. The Indian Gaming Regulatory Act did not waive the tribal sovereign immunity. The gaming compact provided in relevant part: "Service of alcoholic beverages within any gaming facility shall be subject to the laws and regulations of the State applicable to sale or distribution of alcoholic beverages." However, an agreement to be subject to the state's regulations on the sale and distribution of alcohol did not constitute an unequivocal waiver of tribal sovereign immunity for all actions brought by private citizens related to alcohol use and consumption. C.G.S.A. § 30-102; 25 U.S.C.A. § 2701.

Cases that cite this headnote

MARTIN, J.

FACTS

*1 On October 15, 2008, the plaintiffs, Susan Holland, ppa, Emily Vanstaen-Holland and Susan Holland, individually, filed a ten-count revised complaint against the defendants, Glenn R. LaVigne, Jane E. Nelson, Gary S. Crowder, Bruce Bozsum, Mitchell Etess, James Maloney and the Mohegan Tribal Gaming Authority (MGTA), seeking damages for personal injuries allegedly sustained by Vanstaen-Holland, the minor child, when she was struck by a motor vehicle operated by either LaVigne or Nelson on October 13, 2002 in Quaker Hill, Connecticut. [1] The plaintiffs' complaint alleges the following facts. Prior to the accident, LaVigne or Nelson was a patron of Sachem's Lounge, an establishment in the Mohegan Sun Casino Resorts in Uncasville, Connecticut, where he or she was recklessly served alcohol by the defendants. Crowder is the "duly licensed permittee" of Sachem's Lounge, Bozsum, Etess and the MGTA are the "duly licensed backers and/or owners" of Sachem's Lounge and Maloney is the "agent and/or employee of one or all of the defendants."Counts seven, eight, nine and ten of the plaintiffs' complaint are directed toward the defendants. Counts seven and eight seek recovery pursuant to the Dram Shop Act, General Statutes § 30-102, for the reckless service of alcohol to LaVigne or Nelson, respectively. Counts nine and ten seek recovery pursuant to common-law liability for the reckless service of alcohol to LaVigne or Nelson, respectively.

On September 24, 2008, the defendants filed a motion to dismiss counts seven, eight, nine and ten of the plaintiffs' complaint on the ground that the court lacked subject matter jurisdiction pursuant to the doctrine of tribal sovereign immunity. The defendants submitted a memorandum of law in support of the motion. The plaintiffs filed a memorandum of law in opposition on October 21, 2008. On October 30, 2008, the defendants filed a reply memorandum of law in further support of their motion. The matter was argued on short calendar on November 3, 2008. Subsequent to the short calendar hearing, the plaintiffs filed a sur-reply on November 17, 2008. On November 24, 2008, the defendants filed a reply to the plaintiffs' sur-reply.

DISCUSSION

"A motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should

be heard by the court ... A motion to dismiss tests, *inter alia,* whether, on the face of the record, the court is without jurisdiction."(Internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut,* 282 Conn. 130, 134, 918 A.2d 880 (2007)."Pursuant to the rules of practice, a motion to dismiss is the appropriate motion for raising a lack of subject matter jurisdiction."*St. George v. Gordon,* 264 Conn. 538, 545, 825 A.2d 90 (2003)."When a ... court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light ... In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader."(Internal quotation marks omitted.) *Cogswell v. American Transit Ins. Co.,* 282 Conn. 505, 516, 923 A.2d 638 (2007).

***2** "[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss."(Internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut,* 282 Conn. 130, 134, 918 A.2d 880 (2007)."[T]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised."(Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. New London,* 265 Conn. 423, 430 n. 12, 829 A 2d 801 (2003)."The burden rests with the party who seeks the exercise of jurisdiction in his favor ... clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute."(Internal quotation marks omitted.) *Goodyear v. Discala,* 269 Conn. 507, 511, 849 A.2d 791 (2004).

The defendants argue that the court lacks subject matter jurisdiction over both the plaintiffs' statutory and common-law claims for reckless service of alcohol pursuant to the doctrine of tribal sovereign immunity. The defendants claim that the MGTA is immune as a federally recognized Indian tribal entity and that tribal sovereign immunity extends to the individual defendants in their capacity as tribal representatives. The plaintiffs counter that tribal sovereign immunity has been both congressionally abrogated and explicitly waived for their claims. The plaintiffs also claim that tribal sovereign immunity does not extend to the individual defendants. The plaintiffs further argue that the court should permit additional discovery before determining the motion to dismiss for the individual defendants.

"The Mohegan Tribe is a federally recognized Indian tribe."*Paszkowski v. Chapman,* Superior Court, judicial district of Ansonia-Milford, Docket No. CV 01 0072786S (August 30, 2001, Arnold, J.)."Tribal sovereign immunity is governed by federal law ... Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers ... We begin with the premise that Indian tribes are domestic dependent nations which exercise inherent sovereign authority over their members and territories ... Tribal sovereign immunity is dependent upon neither the location nor the nature of the tribal activities ... [*Beecher v. Mohegan Tribe of Indians of Connecticut, supra,* 282 Conn. at 130, 134-35]." (Internal quotation marks omitted.) ***Terry v. Mohegan Tribal Gaming Authority,*** Superior Court, judicial district of New London at Norwich, Docket No. 4107163 (May 16, 2008, Peck, J.) (45 Conn. L. Rptr. 502, 503).

"[A]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity ... and the tribe itself has consented to suit in a specific forum ... Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity bars suits for damages against a tribe ... However, such waiver may not be implied, but must be expressed unequivocally."(Internal quotation marks omitted.) *Chayoon v. Sherlock,* 89 Conn.App. 821, 826, 877 A.2d 4 (2005).

***3** The plaintiffs argue that tribal sovereign immunity for both statutory and common-law actions for reckless service of alcohol is waived pursuant to the state's police power to regulate the reservation's alcohol sales. The defendants counter that the state's ability to govern the tribe's alcohol distribution does not constitute a waiver of tribal sovereign immunity to all alcohol-related actions brought by private individuals.

Our appellate courts have not yet addressed this issue and there exists a split of authority among other courts. The view promoted by the plaintiffs argues that Congress implicitly waived tribal sovereign immunity for alcohol-related claims in its passage of 18 U S.C. § 1161.[2] In *Rice v. Rehner,* 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983), the United States Supreme Court held that a tribal entity that sold alcohol for off-premises consumption must obtain a state liquor license pursuant to 18 U.S.C. § 1161. The court in *Schram v. Ohar,* Superior Court, judicial district of New London at Norwich, Docket No. 0114403 (November 16, 1998, Hurley, J.T.R.) (23 Conn. L. Rptr. 407), extended the holding in *Rice v. Rehner, supra,* 463 U.S. at 713, to conclude

that the plaintiff's claims, which included actions pursuant to the Dram Shop Act and common-law recklessness, were not barred by tribal sovereign immunity pursuant to 18 U.S.C. § 1161 because such actions further the legitimate purpose of the state's liquor regulations. See also *Bittle v. Bahe*, 2008 OK 10, 192 P.3d 810 (2008) (finding 18 U.S.C. § 1161 constituted implicit waiver of tribal sovereign immunity for actions brought pursuant to Oklahoma's Dram Shop Act).

Other courts, however, have refused to extend the waiver of tribal sovereign immunity to include additional alcohol-related claims brought by private citizens. In *Greenidge v. Volvo Car Finance, Inc.*, Superior Court, complex litigation docket of New London at Norwich, Docket No. X04 CV 96 0119475 (August 25, 2000, Koletsky, J.) (28 Conn. L. Rptr. 2, 3), the court dismissed a reckless service of alcohol claim, stating that, "[f]rom the fact that a *state* may *regulate* the use and distribution of alcohol on a reservation, the leap to the conclusion that a tribe's immunity does not apply when a private party brings a private cause of action against a tribe in any situation involving the use or consumption of alcohol on a reservation is a leap which this court is unwilling to take, particularly in view of the recent affirmation of the existence (if not the logical basis) of tribal immunity from suit.*Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)." (Emphasis in original.) Further, the court acknowledged that it was "aware of the superior court decision *Schram v. Ohar*, [*supra*, at Docket No. CV 98 0114403], in which the court denied a motion to dismiss a cause of action at the casino, but respectfully disagree[d] with the conclusion reached therein."*Id.* See also *Van Etten v. Mashantucket Pequot Gaming Enterprise*, Superior Court, judicial district of New London, Docket No. KNL CV 04 4001587 (October 31, 2005, Jones, J.) (finding case law supported result reached in *Greenidge* in court's dismissal of plaintiff's alcohol-related negligence claims pursuant to tribal sovereign immunity).

*4 Most recently, in *Richards v. Champion*, Superior Court, judicial district of New London, Docket No. CV 07 5004614 (July 11, 2008, Abrams, J.), the plaintiffs sought recovery against the MGTA after they were struck by a motor vehicle operated by a driver who had allegedly been served alcohol at the Mohegan Sun Resorts Casino prior to the accident. After acknowledging a split in authority, the court aligned with *Greenidge v. Volvo Car Finance, Inc.*, *supra*, 28 Conn. L. Rptr. at 2, in finding that, "the relationship between state regulation of the sale and distribution of alcohol on tribal lands and dram shop actions brought by private parties is simply too attenuated to support a finding that § 1161 serves as a Congressional declaration of the waiver of tribal sovereign immunity as it relates to dram shop actions."*Id.*

Additionally, the majority of appellate courts in other states have found that private individuals cannot bring an action against a tribe pursuant to either the Dram Shop Act or common law theories of liability. See *Foxworthy v. Puyallup Tribe of Indians Ass'n.*, 141 Wash.App. 221, 169 P.3d 53 (2007), cert. granted, 164 Wash.2d 1019, 95 P.3d 89 (2008), *Filer v. Tohono O'Odham Nation Gaming Enterprise*, 212 Ariz. 167, 129 P.3d 78, cert. denied, 2006 Ariz. LEXIS 117 (2006), *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843 (Tex.App.-El Paso 1997, petition denied). This court joins the latter group of decisions in finding that the state's police power to regulate the sale and distribution of alcohol is not tantamount to an authorization by Congress to waive tribal sovereign immunity for dram shop actions or common-law recklessness actions brought by private individuals.

The plaintiffs further argue that tribal sovereign immunity should not extend to their claims against the defendants because the state has a strong interest in keeping its roadways safe for travel. The plaintiffs note that unlike the Mashantucket Pequot Tribal Nation, the MTGA has not taken steps to address the issue. The United States Supreme Court, however, has indicated that the decision to abrogate tribal sovereign immunity is properly left to Congress."[T]he [United States] Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case ... The Supreme Court has stated that there are reasons to doubt the wisdom of tribal sovereign immunity, for example, the fact that it can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims ... To the extent, however, that [t]hese considerations might suggest a need to abrogate tribal immunity, courts must defer to the role Congress may wish to exercise in this important judgment [*Beecher v. Mohegan Tribe of Indians*, 282 Conn. 130, 136-38, 918 A.2d 880 (2007)]." (Internal quotation marks omitted.) *Terry v. Mohegan Tribal Gaining Authority*, Superior Court, *supra*, 45 Conn. L. Rptr. at 503.Moreover, while the court in *Richards v. Champion, supra*, at Docket No. CV 07 5004614, expressed trepidation at the public policy impact of allowing the defendants to escape liability for the plaintiffs' dram shop action after finding no evidence that

the MGTA had taken any action to address such claims, it acknowledged that the resolution rests with the legislature, not the judiciary. Therefore, the defendants' tribal sovereign immunity defense against the plaintiffs' claims has not been congressionally abrogated.

*5 The plaintiffs also argue that the Mohegan Tribe waived its tribal sovereign immunity to alcohol-related actions in the Mohegan Tribe-State of Connecticut Gaming Compact (gaming compact), an agreement with the state regarding the tribe's sale and distribution of alcohol. Specifically, the plaintiffs allege that Section 14(b) of the gaming compact constitutes an explicit waiver of immunity. The defendants counter that this section does not provide an explicit waiver.

"[C]ourts consistently have applied two complementary principles to waivers: (1) a sovereign's waiver must be unambiguous, and (2) a sovereign's interest encompasses not merely whether it may be sued, but where it may be sued."(Internal quotation marks omitted.) *Chayoon v. Sherlock, supra,* 89 Conn.App. at 827, 877 A.2d 4.

"The Indian Gaming Regulatory Act (gaming act); 25 U.S.C. § 2701 et seq. (1994); regulates gaming operations on tribal land. The gaming act permits a recognized tribe to conduct 'Class III' gaming only when the gaming operation is conducted in accordance with a gaming compact with a state and approved by the United States Secretary of the Interior. See 25 U.S.C. § 2710(d)(1)(c) and (8) (1004). The [Mohegan] tribe has been recognized by an act of Congress and by the State of Connecticut. In accordance with the gaming act, the tribe and the state of Connecticut entered into the Mohegan Tribe-State of Connecticut Gaming Compact (gaming compact), which governs gaming operations on the tribe's reservation. The gaming compact was approved by the Secretary of the Interior and was incorporated by reference into federal law. See 25 U.S.C. § 1775 (1994).General Statutes § 47-65b allows '[t]he state of Connecticut [to assume] ... civil regulatory jurisdiction pursuant to the May 17, 1994, Agreement and the May 17, 1994, Gaming Compact between the state of Connecticut and the Mohegan Tribe of Indians of Connecticut and Public Law 103-377.' " *Kizis v. Morse Diesel International, Inc.*, 260 Conn. 46, 54-55, 794 A.2d 498 (2002).

Section 14(b) of the gaming compact provides in relevant part: "Service of alcoholic beverages within any gaming facility shall be subject to the laws and regulations of the State applicable to sale or distribution of alcoholic beverages."The defendants argue that this language does not constitute an explicit waiver by identifying Section 13(c), which discusses the consequences of a gaming compact violation, as an example of an explicit waiver. Section 13(c) provides in relevant part: "The Tribe hereby waives any defense which it may have by virtue of its sovereign immunity from suit with respect to any such action in the United States District Courts to enforce the provisions of this Compact, and consents to the exercise of jurisdiction over such action and over the Tribe by the United States District Courts with respect to such actions to enforce the provisions of this Compact."Unlike Section 13(c), Section 14(b) does not unambiguously waive the tribe's sovereign immunity. An agreement to be subject to the state's regulations on the sale and distribution of alcohol does not constitute an unequivocal waiver of tribal sovereign immunity for all actions brought by private citizens related to alcohol use and consumption. Moreover, Section 14(b) does not provide where the tribe may be sued for such actions. Therefore, the court finds that the defendants' tribal sovereign immunity has not been explicitly waived for the plaintiffs' claims in the gaming compact.

*6 The plaintiffs also argue that even if the MGTA is immune from liability for their claims, tribal sovereign immunity does not extend to the individual defendants. Our Supreme Court stated that, "[t]he doctrine of tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority."(Internal quotation marks omitted.) *Kizis v. Morse Diesel International, Inc., supra,* 260 Conn. at 54, 794 A.2d 498. "Tribal immunity has been held to extend, not only to tribal officials, but also to tribal employees acting in a representative capacity and within the scope of their authority."*Van Etten v. Mashantucket Pequot Gaming Enterprise, supra,* at Docket No. KNL CV 044001587.

"In the tribal immunity context, a claim for damages against a tribal official lies outside the scope of tribal immunity only where the complaint pleads-and it is shown that a tribal official acted beyond the scope of his authority to act on behalf of the Tribe."*Basset v. Mashantucket Pequot Museum & Research Center, Inc.*, 221 F.Sup.2d 271, 280 (D.Conn.2002)."Claimants may not simply describe their claims against a tribal official as in his 'individual capacity' in order to eliminate tribal immunity."*Id* . A court should "examine the *actions* of the individual tribal defendants ... [A] tribal official even if sued in his individual capacity is only stripped of tribal immunity when he acts manifestly or palpably beyond his authority ..." (Internal quotation marks

omitted.) *Id.*; see *Oneida Indian Nation of New York v. Sherrill*, 337 F.3d 139, 169 (2d Cir.2003). Further, "[i]n order to overcome sovereign immunity, the [plaintiff] must do more than allege that the defendants' conduct was in excess of their ... authority; they also must allege or otherwise establish facts that reasonably support those allegations."*Hultman v. Blumenthal*, 67 Conn.App. 613, 624, 787 A.2d 666,cert. denied, 259 Conn. 929, 793 A.2d 253 (2002).

As previously noted, it is the party seeking the exercise of the court's jurisdiction to allege facts clearly establishing subject matter jurisdiction. In the present case, the plaintiffs identify Crowder as the licensed permittee of Sachem's Lounge, and Bozsum and Etess as the licensed owners of the establishment. The plaintiffs made no allegations that Crowder, Bozsum or Etess were not acting in their representative capacities. Therefore, as tribal members, they are immune from the plaintiffs' claims pursuant to tribal sovereign immunity. Additionally, in their complaint, the plaintiffs allege that Maloney "was in the course and scope of his agency and/or employment at [Sachem's Lounge]." Therefore, according to the facts alleged by the plaintiffs, Maloney's conduct was within the scope of his employment. Because the plaintiffs have failed to plead that the individual defendants were not acting in a representative capacity and outside the scope of their authority, this court finds that tribal sovereign immunity extends to the individual defendants.

***7** The plaintiffs further argue that the court should hold an evidentiary hearing before dismissing the plaintiffs' claims against the individual defendants. "When issues of fact are necessary to the determination of a court's jurisdiction due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses."*Golodner v. Women's Center of Southeastern Connecticut, Inc.*, 281 Conn. 819, 826, 917 A.2d 959 (2007). On the other hand, "the due process requirement of a hearing is *required only when issues of facts are disputed.*" (Emphasis in original.) *Weihing v. Dodsworth*, 100 Conn.App. 29, 38, 917 A.2d 53 (2007). The plaintiffs argue that Maloney was not acting within the scope of his employment by serving alcohol to an intoxicated individual. The plaintiffs also argue that the arrest warrant will show that Maloney refused to discuss the events leading up to the accident with the police because LaVigne was a tribal member and he did not want to risk losing his employment. According to the plaintiffs, this additional information would prove that Maloney was acting on behalf of his own self-interest on the evening of the accident.

"In order to circumvent tribal immunity, the plaintiff must have alleged and proven ... that the defendants acted 'without any colorable claim of authority.' " *Chayoon v. Sherlock, supra*, 89 Conn.App. at 830, 877 A.2d 4. "The vital inquiry in determining if an individual acted within his scope of employment is whether the employee acted, at least in part, to serve the employer or, alternatively, whether his conduct was disobedient or unfaithful to the employer's business. *A-G Foods v. Pepperidge Farm*, 216 Conn. 200, 210, 579 A.2d 69 (1990)." (Internal quotation marks omitted.) ***Van Etten v. Mashantucket Pequot Gaming Enterprise, supra,*** at Docket No. KNL CV 04 4001587. "In determining whether an employee has acted within the scope of employment, courts look to whether the employee's conduct: (1) occurs primarily within the employer's authorized time and space limits; (2) is of the type that the employee is employed to perform; and (3) is motivated, at least in part, by a purpose to serve the employer." *Harp v. King*, 266 Conn. 747, 782-83, 835 A.2d 953 (2003).

"In *Puyallup Tribe, Inc. v. Dept. of Game of Washington*, [433 U.S. 165, 97 S.Ct. 2616], the United States Supreme Court determined that, when engaged in the conduct of fishing, tribal officials were acting as fisherman rather than as tribal officials and were acting outside the scope of their authority. The court concluded, therefore, the tribal sovereign immunity did not reach tribal officials while they were fishing. *Id.*, at 173.In that instance, the tribal officials' conduct was unrelated to the performance of the official duties for the tribe."(Citation removed.) *Chayoon v. Sherlock, supra*, 89 Conn. at 829, 96 A. 153.

By contrast, in the present case, even taking into consideration the additional information alleged by the plaintiffs, the plaintiffs have failed to show that Maloney was acting without any colorable claim of authority on the night of the accident. Maloney's alleged conduct was not disobedient or unfaithful to Sachem's Lounge. His alleged actions occurred while he was working at the lounge, involved the type of conduct that he is employed to perform and were motivated by a purpose to serve the establishment. As a result, the plaintiffs have failed to establish that Maloney's conduct was unrelated to the performance of his official duties. Therefore, the court may base its determinations on the allegations in the complaint, without additional discovery or a hearing.

CONCLUSION

*8 Based on the foregoing, the court hereby grants the defendants' motion to dismiss counts seven, eight, nine and ten of the plaintiffs' complaint.

Parallel Citations

47 Conn. L. Rptr. 306

Footnotes

1 LaVigne and Nelson are not parties to this motion. Hereinafter, the term "the defendants" refers to Crowder, Bozsum, Etess, Maloney and the MGTA, collectively.

2 18 U.S.C. § 1161 provides in relevant part: "The provisions of ... this title shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country ..."

End of Document

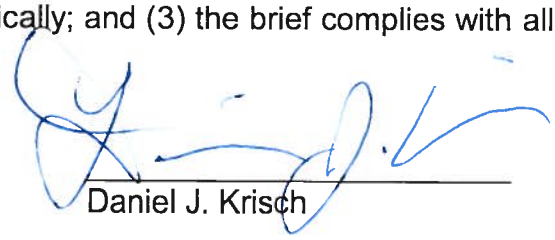
CERTIFICATION PURSUANT TO PRACTICE BOOK §§ 62-7 & 67-2

I hereby certify, pursuant to Practice Book § 67-2, that (1) the electronically submitted brief with attached appendices have been delivered electronically on May 18, 2015, to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and (2) on May 18, 2015, a copies of the brief with attached appendices have been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7:

The Honorable Leeland Cole-Chu
SUPERIOR COURT
70 Huntington Street
New London, CT 06320

James M. Harrington, Esq.
Polito & Quinn, LLC
567 Vauxhall Street, Suite 230
Waterford, CT 06385
Tel. (860) 447-3300
Fax (860) 447-3389
jharrington@politoandquinn.com

I further certify, pursuant to § 67-2, that: (1) the electronically submitted brief with attached appendices and the filed paper brief with attached appendices have been redacted or do not contain any names or other personal identifying information prohibited from disclosure by rule, statute, court order or case law; (2) the brief with attached appendices being filed with the appellate clerk are true copies of the brief with attached appendices that were submitted electronically; and (3) the brief complies with all provisions of this rule and the font used is Arial 12.



Daniel J. Krisch