SUPREME COURT

of the

STATE OF CONNECTICUT

S.C. 19464

BRIAN LEWIS AND MICHELLE LEWIS

V.

WILLIAM CLARKE

BRIEF OF PLAINTIFFS - APPELLEES
WITH ATTACHED APPENDIX

TO BE ARGUED BY:

JAMES M. HARRINGTON

JAMES M. HARRINGTON
POLITO & QUINN, LLC
567 VAUXHALL STREET EXT.
SUITE 230
WATERFORD, CT 06385
TEL. (860) 447-3300
FAX. (860) 447-3389
jharrington@politolaw.com

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TABLE OF CONTENTS

COUNTER STATEMENT OF ISSUE

I. Did the Trial Court properly deny the Defendant, William Clarke's motion to dismiss, given that because Defendant Clarke was sued in his individual capacity, and not as a representative of his employer, the Mohegan Tribe, Clarke could not extend Mohegan's sovereign immunity to shield himself from a suit wherein the Tribe is neither an actual party, nor a real party in interest.

Table of Authorities

Cases **Page(s)**

Constitutional Provisions

Statutes

Briefs

Definitions

COUNTER STATEMENT OF FACTS AND PROCEEDINGS

The issue presented by this appeal is whether an individual, such as the Defendant, William Clarke, can invoke the sovereign immunity of his tribal employer, here, the Mohegan Tribal Gaming Authority, to shield himself from suit where that employer is neither an actual party nor a real party in interest. The Defendant has characterized the individual suit against him as an "artifice" employed by the Plaintiffs, Brian and Michelle Lewis, aimed at avoiding the Mohegan Tribe's limited sovereign immunity by using a pleading farce. Brief of Defendant-Appellant at 2, Lewis v. Clarke, No. S.C. 19464 (Conn. May 18, 2015). Quite to the contrary, it is in fact the Defendant who is seeking to employ an end-around; attempting to extend the immunity of his tribal employer to a suit brought against him individually. Such an action would require stretching the Tribe's immunity beyond the boundaries which unquestionably restrict it.

In justifiably declining this invitation by the Defendant to do so, the Trial Court correctly found that the individual suit against the Defendant was void of any "implication of tribal sovereign immunity such that [the Defendant]... [would be] immune from suit." Lewis v. Clarke, No. KNLCV136019099S, 2014 WL 5354956, at *8 (Conn.Super.Ct. Sept. 10, 2014). The Trial Court properly recognized that this case is not about the extent to which a sovereign's immunity is abrogated, but rather, whether that immunity is applicable at all. Id. at *5. The Trial Court held that immunity clearly did not extend to an individual suit against the Defendant because the damages sought were not from the Mohegan Tribe, but rather from Clarke individually and therefore denied the Defendant's Motion to Dismiss. Id. at *8. The Plaintiff asks this Court to come to the same conclusion.

ARGUMENT

I. The appropriate standard of review for this Court to apply to this case is plenary review.

The question before this Court is whether this case implicates the Mohegan Tribe's sovereign immunity and by extension, whether there exists subject matter jurisdiction in this case. When determining whether subject matter jurisdiction exists, Connecticut courts have "long held that because a determination regarding a trial court's subject matter jurisdiction is a question of law, [the appropriate] review is plenary...." Ajadi v. Commissioner of Correction, 280 Conn. 514, 532 (2006) (internal brackets and citations omitted). Once the question of jurisdiction is brought up, a court must review and dispose of the question immediately, as a preliminary matter. Id. "Where a decision as to whether a court has subject matter jurisdiction is required, every presumption favoring jurisdiction should be indulged." Nationwide Mut. Ins. Co. v. Allen, 83 Conn.App. 526, 531 (2004) (internal brackets omitted).

II. Subject matter jurisdiction is dependent on whether sovereign immunity attaches to the Defendant, but here sovereign immunity cannot be extended to the Defendant for multiple reasons.

If the Defendant's argument is accepted by this Court, sovereign immunity would allow him to escape subject matter jurisdiction. It is thus critical to first examine the scope of that immunity. The Mohegan Tribe, as a tribal entity, is afforded sovereign immunity, but that sovereign immunity is one of a limited and subordinate nature to the federal government of the United States of America. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980) ("Tribal sovereignty is dependent upon, and subordinate to...the Federal Government."). Therefore, tribal

immunity exists at the allowance of Congress and is subject to "complete defeasance by Congress." Id. at 179 n.5 (internal citations omitted). Congress has restricted that grant of tribal immunity to *only* matters involving tribal self-governance. Turner v. United States, 248 U.S. 354 (1919) (emphasis added).

Immunity has not been extended "beyond what is necessary to protect tribal self-government or to control internal relations." Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997). Instead, immunity is constrained to actions which promote those traditional powers reserved to the tribe which relate to "self-sufficiency and economic development." Rice v. Rehner, 463 U.S. 713, 724 (1983). It cannot be extended without express grant by Congress. Id. It is therefore axiomatic that the Mohegan Tribe's immunity cannot be unilaterally extended beyond that which Congress originally conveyed to it. It cannot be extended to all actions by all employees of the tribe, especially those who are sued individually out of actions unrelated to tribal self-governance or governmental activities. Yet, that is precisely what the Defendant asks this Court to do. He asks this Court to extend to him the immunity afforded to his employer, the Mohegan Tribe. Clarke asks this regardless of the fact that the Mohegan Tribe is neither an actual party, nor are the damages being sought from the Defendant's tribal employer.

III. Applying Mohegan's limited grant of sovereign immunity to the Defendant would require an extension of that immunity beyond that which has been afforded to it; Mohegan is neither an actual party nor a real party in interest.

Where a suit does not affect those powers "necessary to protect tribal self-governance or to control internal relations," sovereign immunity is not implicated. Strate, 520 U.S. at 459. Where a sovereign, such as the Mohegan Tribe, is neither an actual party nor real party in interest to a suit, there is simply no basis for that tribe to argue that its sovereignty is affected. This conclusion was also recently drawn by the Ninth Circuit in Maxwell. Maxwell v. County of San Diego, 708 F.3d 1075 (9th Cir. 2013).

The remedy focused analysis employed by Maxwell looks first, and foremost, at whether the remedy sought by the plaintiff is being compensated by the Tribe itself or the employee individually; if it is the latter, then immunity does not attach. Id. at 1088. Such an analysis is consistent with the Tribe's limited grant of sovereign immunity which, as discussed *supra*, is constrained to powers which directly relate to the tribe's ability to govern self-sufficiently. See Turner v. United States, 248 U.S. 354 (1919). If the damages are not sought from the tribal entity, but rather from an employee individually, there is no basis for immunity to attach. Maxwell, 708 F.3d 1075.

The plaintiffs in Maxwell brought state law tort claims against several employees of the Viejas Tribe in California. Id. The tribal employees were paramedics who responded to an off-reservation emergency call and allegedly were negligent in their response. Id. The employees were sued by the plaintiff in their individual capacities and the tribe was neither a party, nor did the court find that the tribe was a real party in

interest. Id. The court in Maxwell agreed with the plaintiffs' position here, ruling that a tribal employee was not immune from suit merely because he was a tribal employee, and using the remedy focused analysis, found that the suit was actually against the employee individually, not from the tribe. Id. This was because such a suit does not interfere with the immunity afforded to the tribe; that is, when it does not seek monetary damages from the tribe's treasury but rather the employee as an individual, then tribal immunity is not implicated. This is the analysis that the Trial Court employed here and that the Plaintiff asks this Court to adopt.

The Defendant first attacks Maxwell by pointing out what he describes as "very different facts" between Maxwell and those at issue here: principally, that in the former, there was a claim of gross negligence as opposed to ordinary negligence and that the tribal paramedics in Maxwell had a mutual aid agreement with a non-tribal entity. Brief of Defendant-Appellant at 20-21, Lewis v. Clarke, No. S.C. 19464 (Conn. May 18, 2015). The Defendant fails however to attempt to articulate why these nuanced distinctions bear any import upon this Court's analysis of Maxwell, as applied to the facts of this case. Id. It is clear that they bear no import.

The Defendant then attempts to mischaracterize the Maxwell decision as a renegade decision, one which seeks to eviscerate tribal sovereign immunity through a clever sleight of hand. Id. at 21. The Defendant posits a doomsday scenario in which litigants are able to circumvent tribal immunity by suing tribal employees individually as a means of actually suing the tribe. Id. The Defendant places Maxwell on an island all to itself, standing as an affront to precedent and asks this Court not to wade into the

metaphorical "swamp" which surrounds it.[1] Id.

In attempting to minimize Maxwell as an outlier, the Defendant largely ignores the careful analysis undertaken by Maxwell, which clearly cautioned against encroaching upon a tribe's right to sovereign immunity. Maxwell v. County of San Diego, 708 F.3d 1075 (9th Cir. 2013). In fact, the determination of whether a potential suit infringes upon the Tribe's sovereignty is the foundation from which the remedy focused analysis was crafted. The threshold question under Maxwell is determining who the real party in interest is. See id. at 1087-1088. This analysis is undertaken to *ensure* that tribal immunity is not infringed upon. See id. (emphasis added). The court in Maxwell noted that in following this remedy focused analysis, a court must be sensitive to whether the judgment sought would affect the treasury of the Tribe, interfere with its public administration, or if the effect of the judgment would compel or restrain the tribe from governing in some manner. Id. at 1087.

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[1] The Defendant has repeatedly misapplied this quote of the Tenth Circuit in Native American Distributing, wherein the Court states "we need not wade into this swamp" arguing that this signaled a disapproval of the Maxwell holding. Brief of Defendant-Appellant at 2, Lewis v. Clarke, No. S.C. 19464 (Conn. May 18, 2015) *quoting* Native American Distributing v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1297 (10th Cir. 2008). First, Maxwell was issued *after* Native American Distributing. So clearly Native American Distributing could not have been referring to Maxwell specifically. 546 F.3d 1288 *contra* Maxwell v. County of San Diego, 708 F.3d 1075 (9th Cir. 2013). Moreover, the court in Native American Distributing actually cited the rationale of the remedy focused analysis, taking no issue with its reasoning, nor its application, but instead determining that because the defendants in that case had not been sued individually, but rather in their official capacities, there was no need to even undertake the analysis. Native American, 546 F.3d at 1296-1298. The Court did not, as the Defendant has intimated, signal that it disfavored the remedy focused analysis employed by Maxwell. Id. The Trial Court in the present case, drew the same conclusion, labeling the Defendant's use of this quote as a "mischaracterization" of the Tenth Circuit's analysis. Lewis v. Clarke, No. KNLCV136019099S, 2014 WL 5354956, at *5 (Conn.Super.Ct. Sept. 10, 2014).

Maxwell did not seek to infringe upon sovereign immunity as the Defendant would have this Court believe, instead, it sought to protect it. Id. Maxwell, like the Trial Court in this case, simply recognized there are limits to that immunity and where a suit fails to interfere with the Tribe's functions, the fundamental basis for immunity existing in the first place is not triggered. Id; Lewis v. Clarke, No. KNLCV136019099S, 2014 WL 5354956 (Conn.Super.Ct. Sept. 10, 2014).

Consistent with that finding, and to the contrary of the Defendant's claims, Maxwell in no way conflicts with prior precedent established by this Court where the tribe's sovereignty was actually infringed upon. See Chayoon v. Sherlock, 89 Conn.App. 821 (2006); Bassett v. Mashantucket Pequot Museum & Research Ctr. Inc., 221 F. Supp. 2d 271 (D.Conn. 2002). A finding, like Maxwell, would not erode, erase, or in any way affect any of the decisions cited by the Defendant as this Court's prior precedent. The Trial Court here correctly concluded that those cases, which revolve almost exclusively around the question of tribal employees being sued as officials, and not as individuals, are distinguishable and inapplicable to the present facts. Lewis v. Clarke, No. KNLCV136019099S, 2014 WL 5354956 at *6 (Conn.Super.Ct. Sept. 10, 2014); Chayoon, 89 Conn.App. 821; Bassett, 221 F. Supp. 2d 271.

For that reason, the scope of authority analysis employed by those cases, and offered by the Defendant here as the bright line rule, is actually inapplicable to these facts. When a Defendant is sued in his individual capacity, the question of whether he was acting in the scope of the authority granted to him by his employer is not pertinent. Maxwell v. County of San Diego, 708 F.3d 1075, 1089 (9th Cir. 2013).

IV. The scope of authority analysis is applicable only in cases where tribal officials are sued in their capacity as tribal officials

The Defendant cites a number of cases which it argues establish what should be a bright line rule. Brief of Defendant-Appellant at 12, Lewis v. Clarke, No. S.C. 19464 (Conn. May 18, 2015). That is, that if a tribal employee is acting within the scope of his authority, as a tribal employee, he is immune from suit. Id. As the Trial Court determined here however, all of the cases cited by the Defendant in support of this rule are factually distinguishable from this case. Lewis v. Clarke, No. KNLCV136019099S, 2014 WL 5354956 at *6 (Conn.Super.Ct.. Sept. 10, 2014). That is, because all of those cases cited by the Defendant involved suits against tribal officials actually brought against them in their capacity as tribal officials. In none of those cases were the defendants actually sued solely as individuals, but rather they were sued because they were officials of the tribe. See Chayoon, 89 Conn.App. 821; Bassett, 221 F. Supp. 2d 271.

Under the remedy focused analysis, because defendant Clarke was sued in his individual capacity, whether he was acting within the scope of his authority is irrelevant. Maxwell, 708 F.3d 1075. Maxwell addressed this very issue and noted that the "scope of authority analysis" and the "remedy sought analysis" are not coextensive and that to conclude that they were "would be a major departure from the common law immunity doctrine that shapes tribal sovereign immunity." Id. at 1089.

At common law, tribal immunity was shaped by a desire to protect the tribe from interference with its treasury or government function, giving the tribe ability to self-govern. See id. The scope of authority analysis is only employed to extricate a negligent actor from an immunity defense by arguing that a tribal employee was acting

outside the scope of his authority and therefore he was not acting as an employee of the tribe and thus the tribe itself is not liable for that employee's actions.[2] Id. The application of the scope of authority rule presupposes that the suit was brought against the tribal official in his capacity as a tribal official.

As Maxwell noted where the suit is against an individual, not in his capacity as a tribal official, and the damages are not being sought from the tribe itself, whether that employee was acting in the scope of the tribe's authority is not germane. Id. The Tribe's sovereignty is not infringed upon by such a suit and thus immunity does not attach. Id. In such a case, the only question that remains is whether the damages sought from that individual in any way operates against the tribe, thus making the tribe the real party in interest. Id. Absent that finding, there can be no argument that the Tribe's sovereignty is threatened and therefore, immunity cannot be argued to attach. Id.

In attempting to advance the scope of authority analysis as the rule which should be employed by the Court here, the Defendant cites Chayoon and Bassett and argues

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[2] This was the argument employed in Johns v. Voebel. Johns v. Voebel, No. NNHCV116017037S, 2011 WL 4908856 at *2 (Conn.Super.Ct. Sept. 23, 2011). The plaintiff in Johns was involved in off- reservation motor vehicle accident allegedly caused by a tribal employee, the defendant. Id. at *1. The plaintiff sued the defendant individually and then argued that the employee was acting outside the scope of his employment at the time of the accident. Id. at *2. The plaintiff never challenged whether the immunity should extend to the defendant, but rather conceded that immunity existed so long as the tribal employee was acting within the scope of his tribal employer's authority. Id. The plaintiff in Johns never argued, and the Court therefore never addressed the question of whether that immunity should even extend to the defendant in the first place. Id. As the Trial Court held in the present case, Johns is therefore distinguishable because it never addressed whether tribal immunity ought to be afforded to the Defendant. Lewis v. Clarke, No. KNLCV136019099S, 2014 WL 5354956 at *6 (Conn.Super.Ct. Sept. 10, 2014). The decision in Johns is therefore irrelevant.

that their precedent would be disturbed by this Court's adoption of Maxwell. Brief of Defendant-Appellant at 12, Lewis v. Clarke, No. S.C. 19464 (Conn. May 18, 2015). The Defendant fails to recognize the factual differences between those cases and the one at issue here. The Plaintiff concedes that the scope of authority rule should be applied to suits wherein tribal officials are sued in their representative capacities as officials of the Tribe. See Chayoon v. Sherlock, 89 Conn.App. 821 (2006); Bassett v. Mashantucket Pequot Museum & Research Ctr. Inc., 221 F. Supp. 2d 271 (D.Conn. 2002). Neither Chayoon nor Bassett involved suits where the tribal employees were sued individually. Chayoon, 89 Conn.App. 821; Bassett, 221 F.Supp.2d 271. Instead, both involved suits where the tribal employees were named individually but were sued as representatives, in their official capacities, of the tribe. Chayoon, 89 Conn.App. 821; Bassett, 221 F.Supp.2d 271.

For example, in Chayoon, William Sherlock, the first named defendant was the CEO of Foxwoods. Chayoon, 89 Conn.App. at 822. This case centered on the plaintiff alleging against the defendant's wrongful termination. Id. It is evident, and the court found, that Sherlock was named as a defendant not because of his individual conduct but rather because he was a high ranking tribal official. Id. at 829. In other words, the plaintiff was not suing Sherlock for his individual conduct, but rather, *because* he was an official of the Tribe. Id. The plaintiff was simply replacing the tribe with an individual who represented the tribe. Id.

Likewise, in Bassett, the tribal officials were sued and referenced on the complaint as 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"). Bassett v. Mashantucket Pequot Museum & Research Ctr. Inc., 221 F.Supp.2d 271, 272 (D.Conn. 2002) (internal quotation marks and citations omitted). One simply cannot read the Bassett complaint and come to the conclusion that the defendants were being sued individually and not as representatives of the tribe itself. Id. The pleadings alone contradicted that.

Addressing this distinction, Maxwell noted that "[t]ribal officials are [not] immunized from individual capacity suits arising out of actions they took in their official capacities...Rather...tribal officials are immunized from suits brought against them because of their official capacities-that is, because the powers in those capacities enable them to grant the plaintiff's relief on behalf of the tribe." Maxwell v. County of San Diego, 708 F.3d 1075, 1088 (9th Cir. 2013). In other words, a plaintiff cannot do what occurred in Chayoon; sue the Tribe by merely suing a tribal official in their "professional capacity" in lieu of naming the tribe itself. Chayoon v. Sherlock, 89 Conn.App. 821, 829 (2006). Nor can they do what occurred in Bassett, and sue an official as "an authorized agent..." of the tribe. Bassett, 221 F. Supp. 2d 271. The only rationale for doing so would be because those positions carried with them the power "to grant the plaintiff's relief on behalf of the tribe." Maxwell, 708 F.3d at 1088. By doing so, the real party in interest is not the individuals, but the tribe itself.

Recognizing that distinction, the Trial Court here concluded that under Maxwell, when a tribal employee is sued in his official capacity, like was the case in Chayoon and Bassett, the remedy focused analysis is not applicable because the suit is not truly one of an individual capacity. Lewis v. Clarke, No. KNLCV136019099S, 2014 WL 5354956 at *6 (Conn.Super.Ct. Sept. 10, 2014). Thus, in those cases, undertaking the scope of

employment analysis, as was done in both Chayoon and Bassett is appropriate. Maxwell does not therefore stand at odds with either decision. Bassett, 221 F. Supp. 2d 271; Chayoon v. Sherlock, 89 Conn.App. 821 (2006).

Likewise, the claim here is not contrary to those decisions. The Defendant is not being sued in his representative or professional capacity as a tribal employee, but as an individual. The scope of authority analysis undertaken in those cases is thus not applicable to these facts. Therefore, a different analysis is required. In cases like this, the dispositive question should be whether the damages are being sought from that individual himself or from the tribe. In other words, in a true individual capacity suit the question should be who are the damages truly being sought from? If it is the individual, in his individual capacity, immunity from the tribe does not attach.

V. The Mohegan Tribe cannot extend its immunity to defendant Clarke by voluntarily creating a statute under which its claims to have a duty to indemnify Clarke.

The Defendant next argues that even if this Court adopts the Maxwell analysis, immunity attaches as the Mohegan Tribe is the real party in interest because the suit against Clarke is in effect, a suit against the tribe. In support thereof, the Defendant cites Sullins, stating that

> [w]ith respect to sovereign immunity under Connecticut 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 states; (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 v. Rodriguez, 281 Conn. 128, 133 (2007) (internal citations omitted).

The Defendant claims that the Trial Court's findings that Clarke was an employee of the Mohegan Tribe Gaming Authority and was acting in the scope of his employment is enough to satisfy the first two prongs of the Sullins test, as set out above. Brief of Defendant-Appellant at 17, Lewis v. Clarke, No. S.C. 19464 (Conn. May 18, 2015). From the outset, the Defendant's analysis is flawed. Simply being an employee of the sovereign does not satisfy the first prong of Sullins. See Sullins, 281 Conn. 128. In other words, being employed by a sovereign does not alone make one an official of that sovereign. See id; Kelly v. City of Bridgeport, 111 Conn. 667 (1930) (Under Kelly, to satisfy being a state official under Sullins, the Supreme Court of Connecticut has defined a state or public official as an individual who holds public office.); Spring v. Constantino, 168 Conn. 563 (1975) (Under Kelly and subsequently Spring, the three characteristics "which differentiate a public office from a mere employment under contract are (1) [a]n authority conferred by law, (2) a fixed tenure of office, and (3) the power to exercise some portion of the sovereign functions of government.")

In fact, this Court has held previously that a public defender, a paid employee of the State, was *not* even a state official for purposes of applying the test outlined in Sullins. Spring v. Constantino, 168 Conn. 563 (1975).[3] Therefore, the analysis must go beyond simply whether the Defendant is an employee of the sovereign. In Kelly, and subsequently Spring, this Court held that an "official" is one whose authority is "conferred by law", who holds a fixed office, and who has the power to exercise some

[3] As articulated in Gross v. Rell, in 1976 public defenders have since been included under the definition of state officers and employees entitled to qualified immunity pursuant to Connecticut Statute § 4-165, but the analysis in regards to sovereign immunity by this Court has not changed. Gross v. Rell, 304 Conn. 234 (2012); Spring v. Constantino, 168 Conn. 563 (1975); Conn. Gen. Statutes Ann. §4-165.

portion of the sovereign functions. Id; Kelly, 111 Conn. at 671. Arguably, Clarke fails to meet any of these three criteria.

As a limousine driver, there is no indication that his position was conferred by some provision of Mohegan law. For example, a position which is conferred by Mohegan law, pursuant to Article IV, Section 1 of the Mohegan Code, the Tribe is represented by a nine-person Tribal Council. MOHEGAN TRIBE CONST. Art. IV, §1. The persons who hold these positions would almost certainly be considered officials of the Tribe under the first prong of Spring as their position and authority is conferred on them by the Constitution of their sovereign. See id; Spring, 168 Conn. 563. There is no analogous law conferring the Defendant's position as a limousine driver. That position and his authority to drive patrons of the casino home cannot be said to have been conferred by law.

Nor can it be said that the Defendant holds a fixed office. Using the same example, of the tribal council, under Mohegan law, the nine positions are filled every four years by election. MOHEGAN TRIBE CONST. Art. IV, § 2 and § 4. The position is thus fixed under Mohegan law, and requires that it be filled as a necessary function of the government structure. Mr. Clarke's position is ensured by an at-will employment contract with the tribe. His position as a limousine driver is simply not analogous to that of the tribal council nor does his employment confer on him a fixed office for purposes of the second prong of Spring.

That example leads to the next and perhaps most glaring prong of the Spring test, which the Defendant has failed to meet and that is, whether the alleged official holds the power to exercise sovereign functions. A sovereign function according to this

Court in Stage v. Mackie, is "a delegation of a portion of the sovereign power to and possession of it by the person filling the [public] office." Stage v. Mackie, 82 Conn. 398, 399 (1909) quoting United States v. Hartwell, 73 U.S. 385, 393 (1867). "It is a trust conferred by public authority for a public purposes, and involving the exercise of the powers and duties of some portion of the sovereign power." Stage, 82 Conn. at 399. These powers must be assigned by the legislature of the sovereignty either directly or impliedly. Id. A sovereign power, as defined by Black's Law Dictionary, is "the power to make and enforce laws." BLACK'S LAW DICTIONARY 712 (10th ed. 2014) (defining "sovereign power").

Turning back to the example of the Tribal Council within the Mohegan Tribe, under Mohegan law, the tribal council is granted specific powers as set forth in Article IX, Section 2 of the Mohegan Constitution. MOHEGAN TRIBE CONST. Art. IX, §2. Those powers include the power to make contracts, create ordinances, and establish a court system. Id. A member of the tribal council would clearly meet the criteria of the third prong of Spring. Id; Spring v. Constantino, 168 Conn. 563 (1975). The Defendant however, can hardly be said to be serving sovereign functions as a limousine driver because his job does not entail governmental decision-making or any task involving the power to make and enforce laws of the tribe. Nor, does his function within the tribe serve any day-to-day executive or administrative purposes for the tribe. Applying the Spring three-prong test of whether Mr. Clarke is a tribal official for purposes of the Sullins test, it is clear that he is not an official of the Mohegan Tribe. Spring, 168 Conn. 563; Sullins v. Rodriguez, 281 Conn. 128, 133 (2007). He therefore does not satisfy the first prong of the Sullins test.

Thus, because Clarke is not an official of the Mohegan Tribe, he cannot represent the Tribe in that capacity and as such, therefore he also fails the second prong of Sullins. Sullins, 281 Conn. at 133. Because the Defendant now in fact fails two prongs no further inquiry is required because Sullins requires all four criteria be satisfied to apply. Id. However, even going beyond the first two prongs, the Defendant fails to meet the third and fourth prongs of Sullins, as well. Id.

Under the third prong, it must be established that the Mohegan Tribe is the real party against whom relief is sought. Id. Then, turning to the fourth prong, whether any judgment against the employee will operate against the sovereign employer. Id.

In attempting to satisfy that third prong, the Defendant argues that a provision in the Mohegan Code requires that the Mohegan Tribe indemnify him in this suit. Brief of Defendant-Appellant at 18, Lewis v. Clarke, No. S.C. 19464 (Conn. May 18, 2015); Mohegan Tribe, Code of Laws § 4-52 & § 4-53. The Defendant argues that this unilateral and voluntarily undertaking by the Mohegan Tribe, makes the Tribe the real party in interest here and thus, satisfies the third prong of Sullins. Brief of Defendant-Appellant at 18-19, Lewis v. Clarke, No. S.C. 19464 (Conn. May 18, 2015). This Court in Sullins held that "an agreement by the state to indemnify is irrelevant" in determining who the real party in interest was. Sullins, 281 Conn. at 144. This Court further noted in a footnote 16 of Sullins that "courts have uniformly held that States may not cloak their officers with a personal Eleventh Amendment defense by promising, by statute, to indemnify them for damage awards imposed on them for actions taken in the course of their employment." Id. at n.16; see Demery v. Kupperman, 735 F.2d 1139, 1148 (9th Cir. 1984).

This Court's rationale in Sullins was well placed and Plaintiff asks this Court to apply the same rationale. Sullins, 281 Conn. 128. Permitting a sovereign like the Mohegan Tribe to extend its immunity by voluntarily legislating an indemnification statute would have disastrous public policy consequences. It could, in effect, make the sovereign's immunity absolute. As one court noted, it would permit the sovereign to simply manufacture immunity wherever it deemed fit. Benning v. Board of Regents of Regency Univers., 928 F.2d 775 (7th Cir. 1991). Several other jurisictions have likewise followed suit. See Sales v. Grant, 224 F.3d 293 (4th Cir. 2000); Jackson v. Georgia Dep't of Transp., 16 F.3d 1573 (11th Cir. 1994); Griess v. State of Colorado, 841 F.2d 1042 (10th Cir. 1988); Spruytte v. Walters, 753 F.2d 498 (6th Cir. 1985); Davis v. Harris, 570 F.Supp. 1136 (D. Oregon 1983).

This tactic was employed by the State of California and rightly rejected by the Ninth Circuit. Demery v. Kupperman, 735 F.2d 1139, 1148 (9th Cir. 1984). That court, like this Court in Sullins, recognized that indemnification statutes created by a lesser sovereign were not a permissible extension of immunity beyond the power which had conveyed it; in those cases, the Eleventh Amendment of the United States Constitution. Id. at 1147; Sullins v. Rodriguez, 281 Conn. 128, 144 and n.16 (2007); see also U.S. CONST. amend. XI. In Demery, California had enacted a law requiring the state pay "damage awards levied against California officials for acts performed in the course of their official duties." Demery, 735 F.2d at 1145.

The defendant in that case argued, like the Defendant does here, that the indemnification law required that any damages apportioned to him be paid from the public treasury. Id. This, in Demery, would violate California's sovereign immunity by

making it the real party in interest. Id. The Ninth Circuit rejected that argument, refusing to "accept the proposition that a state may extend sovereign immunity to state officials merely by enacting a law assuming those employees debts." Id. at 1147; see also Rochester Methodist Hosp. v. Travelers Ins. Co., 728 F.2d 1006 (8th Cir. 1984); Downing v. Williams, 624 F.2d 612 (5th Cir. 1980), *vacated on other grounds*, 645 F.2d 1226 (5th Cir.1981). The court in Demery further noted that "California's obligation to pay the damages awarded against its employees derives from an entirely collateral and voluntary undertaking on the part of the state." Demery, 735 F.2d at 1148-1149. The requirement to indemnify the employee did not arise from the actual conduct that created the cause of action, but was instead a collateral agreement between the State and its employee. Id. The court ruled that such a voluntary undertaking cannot be used to extend sovereign immunity where it otherwise did not exist. Id. at 1148.

This was particularly true because the court recognized that by doing so, a lesser sovereign could create immunity that extends beyond that which its dominate sovereign granted to it. Id. For example, in that case, the court concluded that the United States would be unable to enforce any law which would subject California officials to suit, because due to the indemnification law, a California employee would have absolute immunity from any suit in federal court. Id. Such a result could not stand because California's immunity from federal court derived solely from the Eleventh Amendment. Id. The Eleventh Amendment does not provide immunity to state officials though, only the state itself. Id. The indemnification law therefore was an end-around the Eleventh Amendment, extending the State's immunity beyond what it was originally granted. Id.

The Defendant seeks to do exactly that here. The presence of the indemnification law in the Mohegan Tribal Code cannot be the basis in which the immunity extends to him because if immunity does not exist in the absence of the indemnification law then the existence of the immunity is predicated upon the lesser sovereign having created a law which extended it. Permitting a lesser sovereign to extend its immunity unilaterally could have untold and limitless public policy ramifications. It simply cannot be the basis for a finding that Mohegan is the real party in interest and as such, the Defendant fails to meet the third prong of Sullins, as well. As Mohegan is not the real party in interest, an individual suit and eventual judgment against the Defendant it cannot operate against it, and thus, the fourth prong of Sullins likewise fails.[4]

[4] Clarke also argues that this suit will affect the Tribe's sovereignty through its insurance coverage being triggered, those rates being increased as a response to such a claim or that Mohegan's ability to hire new employees would be adversely affected by this suit. Defendant-Appellant at 18, Lewis v. Clarke, No. S.C. 19464 (Conn. May 18, 2015). Each of these arguments amount to unsubstantiated speculation. First, there is nothing on the record which demonstrates the purported insurance policy held by the MGTA would be triggered in a suit against Defendant Clarke. This Court should not even consider that argument as, without having reviewed the actual policy, it is entirely unclear whether that is even the case. Even more unclear is whether this claim could potentially increase Mohegan's insurance rates; such a conclusion would require rampant speculation and no entity, other than the insurance company itself, could possibly know whether that would even occur. Likewise, the idea that potential employees would discover from this suit that they could be personally sued for causing an accident on a Connecticut highway and on that basis decide they no longer wanted to work for Mohegan is far-fetched to say the least. Both state and federal employees can be sued individually and that seems not to have deterred either from finding and retaining employees.

VI. The Plaintiffs' individual suit against defendant Clarke in no way endangers the Mohegan court system.

In his brief, the Defendant also advances a public policy argument on behalf of his employer, arguing that the adoption of Maxwell by this Court would transform the Mohegan court system into an artifact as litigants "stampede" to the state court electing to sue tribal employees there instead of at the courts established by the Mohegan Tribe. Brief of Defendant-Appellant at 16, Lewis v. Clarke, No. S.C. 19464 (Conn. May 18, 2015). This argument ignores one critical fact which would prevent that occurrence from happening. In Kizis, this Court held that tribal employees enjoy sovereign immunity from claims arising *upon* Mohegan's reservation because pursuant to Mohegan law all disputes regarding employees that *occur on the Mohegan Gaming Enterprise Site* shall be heard only in the Gaming Disputes Court. Kizis v. Morse Diesel International, Inc., et al., 260 Conn. 46, 56 (2002) (emphasis added). The Court went on to note that the Mohegan Nation retained *exclusive* civil jurisdiction over such claims *within* the boundaries of its reservation. Id. at 57. The Plaintiffs here agree with Kizis's holding. Regardless, this accident did not occur *upon* the Mohegan Reservation; it occurred on a Connecticut interstate. The Trial Court in this case recognized that paramount distinction, stating that the facts of Kizis are "readily distinguishable" from the present case. Lewis v. Clarke, No. KNLCV136019099S, 2014 WL 5354956 at *6 (Conn.Super.Ct. Sept. 10, 2014).

Therefore, permitting a suit against the Defendant for an injury that occurred on a Connecticut interstate would in no way serve as a precedent to bring suit in Connecticut Superior Court for injuries occurring on the Mohegan Reservation. The holding of this Court in Kizis would largely prevent that. See Kizis, 260 Conn. 46. There is little doubt that the vast majority of the cases pending before the Mohegan Gaming Disputes Court stem from incidents involving direct claims against Mohegan or its employees which occurred at the Mohegan casino or on its reservation. This case poses absolutely no threat to Mohegan's exclusive jurisdiction over those claims and thus the alleged risk to the vitality of Mohegan's court system is grossly exaggerated. At most, this case would create concurrent jurisdiction between Mohegan and State Court in a limited number of actions which have occurred off the reservation.[5]

In that same strand, the Defendant also posits that this suit could have been brought in the Mohegan Tribal Court. Brief of Defendant-Appellant at 15-16, Lewis v. Clarke, No. S.C. 19464 (Conn. May 18, 2015). The Defendant then charges that the Plaintiffs are forum shopping. Id. at 14-16. In a sense, the Defendant is correct. However, it is not for the nefarious reasons the defendant has intimated.

There are very important and practical reasons why a plaintiff whose claim falls outside the scope of Kizis, and who has the legal basis to file in either the Tribal Court or the Superior Court, would elect the latter. Paramount amongst them is the fact that there is no right to a jury for civil cases at the Mohegan Tribal Court. The Mohegan

[5] The Mohegan court system and the Connecticut Superior Court already share concurrent jurisdiction over some claims. Ellis v. Allied Snow Plow Removal Inc., et al., 81 Conn. App. 110 (2004) For example, where a non-tribal defendant causes injury to a casino patron the plaintiff can elect to sue that defendant in either the Mohegan Tribal Court or Connecticut Superior Court .

Torts Code specifically states that, "[n]o person or entity shall have a right pursuant to this Code to the trial of any matter before a jury." MOHEGAN TRIBE CODE. Art. III, §3-248(d). Thus, by bringing this suit within the Mohegan court system, the Plaintiffs would have been deprived of the opportunity for a jury trial, which they unquestionably are afforded in State Court.

In fact, our Appellate Court has embraced this rationale in a case where it held that concurrent jurisdiction existed between the Superior Court and the Mashantucket Tribal Court. Ellis v. Allied Snow Plow Removal Inc., et al., 81 Conn. App. 110 (2004) The Court in Ellis, found that "although the plaintiff might have pursued her claim in the tribal court, she was not obligated to do so." Id. at 115. The Appellate Court then signaled in the corresponding footnote that the absence of a jury trial was a compelling basis for why a plaintiff might not elect to proceed in the tribal court. Id. at n.5

VII. The Defendant has failed to establish that the individual suit against him operates against his employer, the Mohegan Tribe, and thus has not established that its sovereignty is implicated by this suit.

Tribal sovereign immunity is a shield, not a sword. Automotive United Trades Organization v. State, 175 Wash. 2d 214 (2012). At common law, its invocation stemmed from a desire to protect the tribe from outside interference with its sovereign functions. Kizis v. Morse Diesel International, Inc., 260 Conn. 46, 52-53 (2002). A suit which does not infringe upon those functions however requires no such shield. See Sullins v. Rodriguez, 281 Conn. 128 (2007). The Defendant has failed to establish that the sovereign functions of his employer, the Mohegan Tribe, are in anyway adversely affected by the individual suit brought against him. As such, he has failed to provide a basis for why Mohegan's immunity should be extended to this suit.

The Plaintiffs, Brian and Michelle Lewis, brought suit against the Defendant, William Clarke, as a consequence of his negligent operation of a motor vehicle. The Defendant, was not sued in his capacity as an employee of the Mohegan Tribe, but rather as an individual operating a motor vehicle on a Connecticut interstate. Unlike those cases discussed *supra*, where tribal employees were sued in their representative capacities as tribal officials, the Defendant at present was not. Therefore, whether the Defendant was acting outside the scope of his employment is an analysis unnecessary to this suit. Still the Plaintiff concedes that, any action, which even by operation would infringe upon tribal immunity, must be analyzed appropriately. Consistent with the common law tradition which has shaped tribal immunity, and with other jurisdictions such as the Maxwell opinion, the practical approach in such cases is to first look at where the damages are being sought from. Maxwell v. County of San Diego, 708 F.3d 1075 (9th Cir. 2013).

In analyzing that question, the Trial Court here correctly determined that there was no implication of sovereign immunity because the damages sought were not from Mohegan, but rather from the Defendant individually. Lewis v. Clarke, No. KNLCV136019099S, 2014 WL 5354956 at *6 (Conn.Super.Ct. Sept. 10, 2014). The Trial Court further recognized that the Defendant's only legitimate basis for arguing that the Mohegan Tribe is the real party in interest is predicated upon the use of an indemnification statute Mohegan unilaterally and voluntarily created itself. As discussed *supra*, a sovereign cannot extend its immunity to an employee by voluntarily assuming that employee's debts.

Thus, while there is no question that the Mohegan Tribe has been granted use of King Arthur's shield, it has no claim to Excalibur, and as such, the Defendant, William Clarke, has no legal basis in which to wield it here.

CONCLUSION

For the forgoing reasons, the decision of the Trial Court should be affirmed.

THE PLAINTIFFS/APPELLEES

BY_____
James M. Harrington
Polito & Quinn, LLC

SUPREME COURT

of the

STATE OF CONNECTICUT

S.C. 19464

BRIAN LEWIS AND MICHELLE LEWIS

V.

WILLIAM CLARKE

APPENDIX

Appendix Table of Contents

Section 1. - [Governance by The People, Tribal Council, and Council of Elders.]

The Mohegan Tribe shall be governed by The Mohegan People, and represented by a Tribal Council, consisting of nine tribal members, and a Council of Elders, consisting of seven Tribal Members, unless and until said number of members is increased through the enactment of a joint ordinance, approved by a majority of The Tribal Council and a majority of The Council of Elders.

Section 2. - [Membership in Councils.]

Members of The Tribal Council and Council of Elders shall serve for four-year staggered terms, subject to the provisions of Article VI, Section 3.

Section 4. - [Election of Officers of Tribal Council.]

The Officers of The Tribal Council shall be elected in the following manner: At the first regular meeting at which the newly elected members of The Tribal Council convene following the first election after the adoption of this Amendment [September 6, 2003], The Tribal Council shall elect from among the membership of The Tribal Council a Chair, a Vice-Chair, a Recording Secretary, a Corresponding Secretary, and a Treasurer. Those members who are elected to these positions shall have such additional powers and duties as are hereinafter enumerated. Thereafter, at its first regular meeting following every general election, the newly constituted Tribal Council, including its newly-sworn members, shall fill, by majority vote, any officer positions vacated by incumbents whose terms expired. Incumbents winning reelection may be reappointed to officer positions only upon majority vote of the newly constituted Tribal Council.

Section 2. - [Specific Powers.]

The powers of The Tribal Council shall include all executive and legislative powers reasonable and necessary to achieve the tribal goals recited in the Preamble hereof, and shall further specifically include, but not be limited to, the following powers:

(a) to negotiate with and to approve or disapprove contracts or agreements with tribal, foreign, federal, state, or local governments, with private persons or with corporate bodies;

(b) to approve or disapprove any sale, disposition, lease or encumbrance of tribal lands, interests in land, tribal funds or other tribal assets or resources with or without advertisement for any period not in excess of the period provided for by federal law;

(c) to establish procedures for the conduct of all tribal government and business operations except where elsewhere precluded in this Constitution;

(d) to advise the Secretary of the Interior with regard to all appropriation estimates of the Department of the Interior which are submitted for the benefit of The Mohegan Tribe of Indians of Connecticut prior to the submission of such estimates to the Office of Management and Budget or to Congress;

(e) to employ and pay legal counsel for The Mohegan Tribe, subject to the approval of the Secretary of the Interior to the extent that such approval is required by federal law;

(f) to appropriate available tribal funds for the benefit of The Tribe;

(g) to approve or disapprove operating budgets submitted by The Tribal Chair;

(h)

to review the budget submitted annually by The Council of Elders and, in the event that said budget is approved by a majority of the members of The Tribal Council, to allocate the funds called for by said budget;

(i) to approve or disapprove allocations or disbursements of tribal funds (or grant or contract funds under the administrative control of The Tribe) not specifically appropriated or authorized in a budget approved by The Tribal Council;

(j) to establish and enforce rules, consistent with applicable federal statutes and the applicable regulations of the Secretary of the Interior, for the management of tribal lands, including but not limited to, the making and revocation of assignments, and the disposition of timber, oil, and mineral resources;

(k) to create, or to provide by ordinance for the creation of organizations, including public and private corporations, for any lawful purpose, which may be nonprofit or profit-making, and to regulate the activities of such organizations by ordinance;

(l) to promote and protect the health, peace, morals, education, and general welfare of The Tribe and its members;

(m) to borrow money from any source whatsoever without limit as to amount, and on such terms and conditions and for such consideration and periods of time as The Tribal Council shall determine; to use all funds thus obtained to promote the welfare and betterment of The Tribe and its members; to finance tribal enterprises; or to lend money thus borrowed;

(n) to establish and enforce all ordinances governing tribal members, including, but not limited to, ordinances regarding tribal elections, ordinances establishing the civil and criminal jurisdiction of The Mohegan Tribal Court System, ordinances delineating the civil and criminal laws of The Mohegan Tribe, and ordinances providing for the maintenance of law, order and the administration of justice within The Mohegan Indian Reservation;

(o) to establish a tribal court system, defining the powers and duties of that court system;

(p) to regulate wholesale, retail, commercial or industrial activities on tribal lands;

(q) to establish a basic departmental structure for the executive branch of the tribal government; and to establish governmental subdivisions and agencies and delegate appropriate powers to such subdivisions and agencies;

(r) to establish policies relating to tribal economic affairs and enterprises in accordance with this Constitution;

(s) to levy and collect taxes and raise revenue to meet with needs of The Tribe or to support tribal government operations;

(t) to pass any ordinances and resolutions necessary or incidental to the exercise of any of the foregoing powers and duties; to waive the sovereign immunity of The Tribe subject to such limitations and restrictions on the extent and enforcement thereof as The Tribal Council may determine; and to adopt and to do such acts of a governmental and/or public nature as are not prohibited by applicable laws or by this Constitution.

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)

Sec. 3-248. - Procedure.

(a) Any person who, wherever located, sustains an injury as defined in this Code that arises from or out of the Gaming Facilities or that is allegedly caused directly or indirectly by acts or omissions of the MTGA (or its authorized representatives), and who seeks recovery from the MTGA for such alleged injury, may file a complaint with the Gaming Disputes Trial Court, together with the required filing fee, pursuant to the Rules of Procedure of the Gaming Disputes Court.

(b) Any person who, wherever located, sustains an injury as defined in this Code and who seeks to recover for said injury from any Mohegan Tribal Entity (or its authorized representatives) allegedly caused directly or indirectly by acts or omissions of a Mohegan Tribal Entity other than the MTGA (or its authorized representatives), may file a Complaint with the Mohegan Tribal Court, together with the required filing fee, pursuant to the Rules of Procedure of the Mohegan Tribal Court.

(c) Every complaint filed under this Code shall contain the following:

(1) The name and address of the claimant and the name and address of the claimant's attorney, if any;

(2) A concise statement, in consecutively numbered paragraphs, of the facts giving rise to the complaint;

(3) The date(s), time(s), and location(s) of the alleged injury, if known;

(4) The name of any individual(s) alleged to have caused the alleged injury, and their relationship, if known, to a Mohegan Tribal Entity;

(5) The name of the Mohegan Tribal Entity that is considered liable to the Claimant for the alleged injury;

(6) A concise statement of the nature and extent of any alleged injury sustained by the Claimant; and

(7) If the Complaint is brought by a personal representative of a person under a disability (as defined in this Code), the name of such personal representative and a copy of any officially-dated document probative of the appointment of such personal representative.

(d) No person or entity shall have a right pursuant to this Code to the trial of any matter before a jury.

(e) A final judgment of a Mohegan Trial Court in any action brought under this Code may be appealed pursuant to the applicable Rules of the Mohegan Court in which final judgment [is] entered.

(Ord. No. 2005-02, § 8, 6-22-2005; Res. No. 2007-17, 4-18-2007; Res. No. 2009-34, 3-25-2009; Res. No. TGA 2009-09, 3-25-2009)

Sec. 4-165. Immunity of state officers and employees from personal liability. (a) No state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment. Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter.

(b) For the purposes of this section, (1) "scope of employment" includes but is not limited to, (A) representation by an attorney appointed by the Public Defender Services Commission as a public defender, assistant public defender or deputy assistant public defender or an attorney appointed by the court as Division of Public Defender Services assigned counsel of an indigent accused or of a child on a petition of delinquency, (B) representation by such other attorneys, referred to in section 4-141, of state officers and employees in actions brought against such officers and employees in their official and individual capacities, (C) the discharge of duties as a trustee of the state employees retirement system, (D) the discharge of duties of a commissioner of the Superior Court hearing small claims matters or acting as a fact-finder, arbitrator or magistrate or acting in any other quasi-judicial position, (E) the discharge of duties of a person appointed to a committee established by law for the purpose of rendering services to the Judicial Department, including, but not limited to, the Legal Specialization Screening Committee, the State-Wide Grievance Committee, the Client Security Fund Committee, the advisory committee appointed pursuant to section 51-81d and the State Bar Examining Committee, (F) military duty performed by the armed forces of the state while under state active duty, and (G) representation by an individual appointed by the Public Defender Services Commission, or by the court, as a guardian ad litem or attorney for a party in a neglect, abuse, termination of parental rights, delinquency or family with service needs proceeding; provided the actions described in subparagraphs (A) to (G), inclusive, of this subdivision arise out of the discharge of the duties or within the scope of employment of such officers or employees, and (2) "state employee" includes a member or employee of the soil and water district boards established pursuant to section 22a-315.

(1959, P.A. 685, S. 25; P.A. 76-371, S. 2, 5; P.A. 80-153, S. 2; 80-197, S. 2; 80-394, S. 6, 13; P.A. 83-464, S. 1, 5; 83-533, S. 45, 54; P.A. 84-45, S. 1, 2; 84-397, S. 2, 7; 84-546, S. 10, 173; P.A. 85-152, S. 2; P.A. 99-215, S. 2; P.A. 04-257, S. 3; May Sp. Sess. P.A. 04-2, S. 20; P.A. 05-79, S. 1; P.A. 11-51, S. 10, 19; 11-152, S. 8.)

History: P.A. 76-371 defined "scope of employment" for purposes of section; P.A. 80-153 added performance of duties of superior court commissioner in hearing small claims matter to definition of "scope of employment"; P.A. 80-197 included representation by assistant public defenders or court-appointed special assistant public defender in definition of "scope of employment"; P.A. 80-394 included court security officers as state employees for purposes of section; P.A. 83-464 replaced "performance of his duties" with "discharge of his duties" and replaced "wilful" with "reckless or malicious"; P.A. 83-533 amended section to include performance of duties as a trustee of the state employees' retirement system; P.A. 84-45 included members or employees of the soil and water district boards as state employees for purposes of section; P.A. 84-397 deleted provision that included court security officers as state employees for purposes of section; P.A. 84-546 made technical change substituting "discharge" for "performance" of duties; P.A. 85-152 included discharge of duties of commissioner of superior court acting as fact-finder, arbitrator, magistrate or in other quasi-judicial position and discharge of certain appointees rendering services to judicial department in definition of "scope of employment"; P.A. 99-215 added phrase "including, but not limited to, the Legal Specialization Screening Committee, the State-

Wide Grievance Committee, the Client Security Fund Committee and the State Bar Examining Committee"; P.A. 04-257 made technical changes, effective June 14, 2004; May Sp. Sess. P.A. 04-2 added provision re advisory committee appointed pursuant to Sec. 51-81d and made technical changes; P.A. 05-79 divided section into Subsecs. (a) and (b), making technical changes in Subsec. (a) for the purposes of gender neutrality, and in newly designated Subsec. (b) inserted Subdiv. indicators for each of the existing activities enumerated in the definition of "scope of employment", and added new provision to said definition, designated as Subdiv. (F), concerning "military duty performed by the armed forces of the state while under state active duty", and made technical changes, effective June 2, 2005; P.A. 11-51 substituted "Division of Public Defender Services assigned counsel" for "a special assistant public defender", effective July 1, 2011; pursuant to P.A. 11-51, "Commission on Child Protection" was changed editorially by the Revisors to "Public Services Defender Commission" in Subsec. (b), effective July 1, 2011; P.A. 11-152 added Subsec. (b)(1)(G) to redefine "scope of employment" to include representation by individual appointed by Public Defender Services Commission, or by the court, as guardian ad litem or attorney in a neglect, abuse, termination of parental rights, delinquency or family with service needs proceeding and made a conforming change.

See Sec. 5-141d re indemnification of state officers and employees.

See Sec. 10-235 re indemnification of teachers and certain educational board members and employees.

Section does not apply to teachers in local school systems. 180 C. 96. Specific language of statute prevails over general language of Sec. 31-293a as applied to fellow state employees. 185 C. 616. Cited. 186 C. 300; 187 C. 53. Issue of unconstitutionality of statute not resolved at this time because it was not properly before the court. 189 C. 550. Cited. 209 C. 679; 210 C. 531; 229 C. 479; 234 C. 539. Plaintiffs in their role as foster parents were "employees" of the state as that term is used in section. 238 C. 146. Wanton, reckless or malicious actions are of highly unreasonable conduct, a vast departure from what is viewed as ordinary care and without concern of risk of safety to others or the disregarding of other's rights. 253 C. 134. Action against police officers for alleged misconduct while they sought to arrest plaintiff, execute search warrant and conduct search was barred by immunity provision of section because such actions were within the scope of the officers' employment and plaintiff did not show that their conduct was wanton, reckless or malicious. 261 C. 372. Provision of statutory immunity to state employees has twofold purpose: To avoid placing a burden on state employment and to make clear that remedy available to plaintiff who has suffered harm from negligence of a state employee acting in the scope of his or her employment must bring a claim under the provisions of chapter. 265 C. 301. Trial court properly granted motion to strike negligence action for lack of subject matter jurisdiction; defendant had statutory immunity because she was performing one of her job duties at the time of the collision; Secs. 27-70 and 4-142(2) do not negate the statutory immunity afforded a state employee under this section. 297 C. 317.

Cited. 12 CA 449; 40 CA 460. Where plaintiff's suit against a state officer was dismissed due to immunity under section, the two-year statute of limitations in Sec. 52-584 applies in subsequent suit against state and the exception under Sec. 52-593 for failure to name the right person as defendant does not apply. 62 CA 545. If defendant has established a defense of sovereign immunity, it is not necessary to demonstrate compliance with section. 64 CA 433. Standard in statute is inapplicable because liability under statute only applies when defendant has not established a defense of sovereign immunity. 67 CA 613. Defendants cannot avail themselves of immunity under section when they acted intentionally to underreport plaintiff's qualifications for tenure position at state university. 69 CA 106. Common law

sovereign immunity does not bar claim against state agency where suit is brought under statute against state officers and employees in their personal capacity. 74 CA 264. Court's denial of motion for summary judgment, as it relates to claim that statutory immunity is a protection against liability for actions in individual capacity, is an immediately appealable final judgment. 94 CA 103. In action brought against defendants in their official capacities, trial court improperly granted defendants' motion to dismiss on the ground of statutory immunity, which applies when claims are brought against state employees acting in their individual capacities; only immunity defense available to defendants was sovereign immunity. 96 CA 123. Trial court properly dismissed plaintiff's action against defendants, chief of habeas corpus services, director of special public defenders, and a special public defender, on the basis of sovereign immunity. 98 CA 333.

Cited. 33 CS 546.

Cited. 4 Conn. Cir. Ct. 119.

CERTIFICATION

I hereby certify, pursuant to Practice Book § 67-2, that (1) the electronically submitted brief with attached appendix has been delivered electronically on July 15, 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 July 15, 2015 copies of the brief with attached appendix has 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
New London Superior Court
70 Huntington Street
New London, CT 06320

Daniel J. Krisch, Esquire – kirsch@halloransage.com
Halloran & Sage, LLP
One Goodwin Square
225 Asylum Street
Hartford, CT 06103
Tel 860-297-4630 / Fax 860-548-0006

Robert A. Rhodes, Esquire – rhodes@halloransage.com
Halloran & Sage, LLP
315 Post Road West
Westport, CT 06880
Tel 203-227-2855/ Fax 203-227-6992

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

James M. Harrington
Commissioner of Superior Court