STATE OF WISCONSIN
COURT OF APPEALS
District III

ROBERT J. KOSCIELAK and
MARY J. KOSCIELAK,
Plaintiffs-Appellants,

Appeal No: 2011AP000364
Circuit Court
Case No: 2010CV000273

UNITED STATES DEPARTMENT
OF HEALTH & HUMAN SERVICES
(MEDICARE PART A), WISCONSIN
PHYSICIANS SERVICE INSURANCE
CORPORATION (MEDICARE PART B) and
UNITED HEALTHCARE SERVICES, INC.,
Subrogated-Plaintiffs,

v.

STOCKBRIDGE-MUNSEE COMMUNITY,
d/b/a PINE HILLS GOLF COURSE &
SUPPER CLUB and FIRST AMERICANS
INSURANCE GROUP, INC.
Defendants-Respondents.

BRIEF OF PLAINTIFFS-APPELLANTS ROBERT J. KOSCIELAK AND MARY J. KOSCIELAK

ON APPEAL FROM SHAWANO COUNTY CIRCUIT COURT
THE HONORABLE JAMES R. HABECK PRESIDING

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STATEMENT OF ISSUES PRESENTED

1. Is Pine Hills Golf Course and Supper Club an "arm of the tribe"?

Answered yes by the trial court.

2. If after *de novo* review, this Court agrees with the trial court's legal conclusion that Pine Hills is an "arm of the tribe," does the Stockbridge Munsee Community itself have sovereign immunity from a state tort claim not arising out of a contract with the Tribe, of a Wisconsin citizen, who is not a member of any Indian tribe,[1] to extend to Pine Hills?

Answered implicitly yes by the trial court.

3. If Stockbridge Munsee Community is found to enjoy sovereign immunity from suit for a state tort claim not arising out of a contract with the Tribe, of a Wisconsin citizen who is not a member of any Indian tribe, does the extension of such immunity violate the Wisconsin Citizen's Right to a Remedy under Article I, Section 9 of the Wisconsin Constitution?

Answered implicitly no by the trial court.

4. Is First Americans Insurance Group subject to Wisconsin's direct action statute and is FAIG precluded from invoking tribal sovereign immunity as a defense to the Koscielaks' tort claim based on its insured Tribe's legal position at the time of the "occurrence" under

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[1] By limiting this appeal to the issue of non-tribal members, the Koscielaks do not suggest in any way that non-tribal members should receive favored treatment over non-tribal members in our state courts. The distinction is made only because the facts here do present the state tort claim of a non-tribal member and for a number of reasons, in this particular context, it may not be a distinction without a difference. First, Tribal members have voting rights in their Tribe and a tribal political and judicial forum to advocate for their own protection and tort remedies that is not available to non-tribal members. Second, tribal members would be expected to be aware of the doctrine of tribal sovereign immunity to inform their decision of whether to frequent tribally owned businesses. Third, a Tribe may choose not to raise a defense of sovereign immunity to a tort claim against it or one of its businesses if brought by a tribal member. Lastly, Wisconsin courts do view wholly intra-tribal disputes as an area where assertion of State court jurisdiction or State sovereignty could interfere with tribal self-government.

an "occurrence" type policy that Pine Hills was a gaming entity under its Gaming Compact with the State of Wisconsin?

Answered no by the trial court.

STATEMENT ON ORAL ARGUMENT

Although Plaintiffs-Appellants (hereinafter "Koscielaks") believe that the defense judgment in this case is appropriate for reversal on the narrow ground that the standard for summary judgment and multi-factor analysis under *McNally* were not properly applied by the trial court leading it to incorrectly conclude that Pine Hills Golf Course and Supper Club enjoyed sovereign immunity as an arm of the Stockbridge Munsee Community, oral argument is still believed to be important for a number of reasons.

First, the trial court's ruling allows a restaurant–a type of business fraught with potential harm to the public ranging from potentially fatal E-coli food poisoning of a child to the serious injuries to an older gentlemen from a simple slip and fall on ice as occurred in this case–to be operated and open to the general public in the State of Wisconsin without any accountability whatsoever for the consequences of its negligence.

> **Our lives begin to end the day we become silent about things that matter.**
>
> Martin Luther King, Jr.

This "thing" matters–a lot. Even the trial court felt "badly" and was not "particularly happy" about a ruling that would take from Mr. Koscielak his day in court, while a similarly situated plaintiff injured at any other for profit golf course supper club in Wisconsin would not suffer the same fate. Presumably, it felt such an outcome was compelled under the doctrine of

tribal sovereign immunity as the trial court understood it to be, notwithstanding the Koscielaks best effort below to demonstrate with as much clarity as possible in an area of law characterized by "schizophrenic"[2] confusion, that existing precedent does *not* support that inevitability in the context of tort claims, as distinct from claims arising in the commercial or contract context.

The trial court, of course, was not alone in its view. Time and time again, state and federal courts around the country, echo the refrain that it is "well settled" or "beyond dispute" that "[A]n Indian tribe is not subject to suit...unless 'Congress has authorized the suit or the tribe has waived its immunity,'" and that such immunity applies to the tribe's commercial and governmental activities alike, whether on or off the reservation. *See e.g. McNally, infra,* 277 Wis. 2d at 807 (citations omitted).

If really so "well settled," there would be no need for an "arm of the tribe" analysis. Nor would a saw mill ever be "just a saw mill" subject to worker safety regulations without specific Congressional authorization, whether owned by an Indian tribe or not. *Menomonie Tribal Enterprises v. Hilda L. Solis,* 601 F.3d 669, 673-674 (7th Cir. 2010). Nor would our United States Supreme Court have exposed the questionable origin and long history of mistaken application of the doctrine by the courts, including its

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[2] "Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases." *U.S. v. Lara*, 541 U.S. 193, 124 S. Ct. 1628, 1644 (2004), Thomas, Clarence, J., *concurring.*

own, even in the commercial or contract context where it allows the doctrine to continue to be applied, fairly or not. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 118 S. Ct. 1700, 140 L.Ed.2d 981 (1998).

While content for now to await comprehensive Congressional action to abrogate or limit the doctrine in that context, even though it concedes the doctrine was a creature of judicial, not congressional creation, this now disfavored doctrine need not await congressional abrogation here, because close examination of existing precedent reveals that it has *never* been extended by the United States Supreme Court to state tort claims.

Oral argument is needed. The issues are not uncomplicated, and depending on how this Court resolves the "arm of the tribe" inquiry, may include an issue of no less importance than figuring out who really has the legal right of way at the intersection of competing claims of federal, state and tribal sovereignty. It is important that no stone be left unturned and no question that this Court may have be left unanswered.

STATEMENT ON PUBLICATION

Publication of the decision is requested. Whether the doctrine of tribal sovereign immunity exists as a defense to a state tort claim of a Wisconsin Citizen that did not arise from a contract with the Tribe, who is not a member of any Indian tribe, and is injured while a customer at a tribally owned for profit supper club open to the general public that is claimed to operate outside the remedies furnished under a gaming compact or any other law, and is not even located on reservation land, has not previously been the subject of any Wisconsin case law.

The *McNally* case, which presented a similar issue of a claim of immunity by an Indian tribe after it purchased an existing business, was noted at the time to be a case of first impression, but that case did not involve a tort claim. The defense of course claims, and the trial court apparently agreed, that there is no difference. However, the United States Constitution vests Congress with exclusive authority over tribal "commerce." Art. I, Sec. 8, Cl. 3. It does not give either Congress or an Indian Tribe authority over another autonomous state's tort claims or the greater rights that it may accord its citizens under a state constitution.

Moreover, Wisconsin courts rightfully analyze the issue of tribal sovereign immunity differently than the many foreign state and federal lower court authorities relied on almost exclusively by the defense below.

Clarity of the law by published decision in Wisconsin on the important issues raised is needed.

STATEMENT OF THE CASE

On June 1, 2010, the Koscielaks filed suit against Stockbridge Munsee Community, (hereinafter "the Tribe") dba Pine Hills Golf Course and Supper Club (hereinafter "Pine Hills") and First Americans Insurance Group, Inc. (hereinafter "FAIG"), for serious injuries Mr. Koscielak sustained in a slip and fall on ice in the parking lot of the supper club at Pine Hills. [R. 1]

On July 23, 2010, counsel for Pine Hills and FAIG filed a Notice of Appearance, Answer to Plaintiffs' Complaint and Affirmative Defenses, Motion to Dismiss and supporting Brief with exhibits outside the pleadings. [R. 12, 13, 15 and 16]

On September 17, 2010, Plaintiffs filed a Brief in Opposition to Defendants Motion to Dismiss [R. 24] and Affidavit of Counsel with exhibits. [R. 25]

On October 7, 2010, Pine Hills and FAIG filed a Reply Brief with additional exhibits consisting of affidavits and other documents. [R. 26:1-156] The defense conceded that its motion to dismiss was converted to a motion for summary judgment. [R. 30:2; 29:2]

A hearing on the motion to dismiss, converted to a motion for summary judgment, was held on January 6, 2011, the Honorable James R. Habeck, Shawano County Circuit Court Judge, presiding. [R. 31] The court

issued an oral ruling from the bench in favor of Pine Hills and FAIG on the issue of tribal sovereign immunity from suit and dismissed the lawsuit. It was not "particularly happy" about doing so, and felt "badly" that Mr. Koscielak was injured under such circumstances. [R. 31:27; 25-58]

The trial court correctly identified the initial narrow issue before it as determining whether Pine Hills was *really* an arm or department of the tribe or was it more of an investment? [R. 31:26] If it was an "arm of the tribe," then the trial court fairly was of the view that a basic concept of Indian law is that States don't interfere with tribal self-government. [R. 31:26]

In reaching its conclusion, the trial court stated "I am convinced that they actually have been running it as a department of the Tribe." It "looks like part of the tribal operations." [R. 31:27, 28] It articulated a number of factors to support its decision.

First, unlike the facts in *McNally,* the Tribe did not make a stock purchase of a corporation. The court saw this as a deliberate act on the part of the Tribe indicative of intent on its part not to run Pine Hills as a business, [R. 31:27] even though co-counsel for the Tribe stated at the hearing that "corporate form" was "irrelevant" and "does not matter" to the immunity question. [R. 31:10] The trial court seemed to view a tribal "investment" situation, where immunity would not be extended, as one where a Tribe purchases stock in a separate company controlled by

someone else, like the *Microsoft* example mentioned in *McNally*. [R. 31:26, Lines 4 to 14]

Second, the trial court focused on the long history of sovereign immunity, dating back to royalty, and the idea that a government makes a conscious decision to give up immunity. Since the Tribe did not do so here, it intended to run the business as a Department. [R. 31:27-28]

Third, that Fritz Shultz, Ltd., furnished labor to continue the business as it transitioned to tribal ownership was not viewed as continuation of the business under new ownership, but was just a "business arrangement" with Mr. Shultz, whom the trial court noted he had met and was "quite a man," who was well known in the area, and notwithstanding any transition, that business dissolved. [R. 31:26-27] The Court noted it was aware that governments can sometimes run golf courses as part of county operations, because he had a friend on the Waukesha Board who told the court that it did so. [R. 31:26]

Lastly, the court felt that the Tribe's claim that the profits from Pine Hills were run through the Tribe's general fund also supported the conclusion that Pine Hills was really a department of the tribe. [R. 31: 27]

By its ruling on waiver under the gaming compact—"they don't have gaming operations there," the trial court agreed with the Tribe that the Compact did not come into play, because the slot machines were located

in a different building at Pine Hills and not the supper club parking lot where Mr. Koscielak fell. [R. 31:28; 26:6] Following the hearing, defense counsel volunteered to submit a proposed order under the local five (5) day rule. [R. 31:25-28]

On January 17, 2011, defense counsel submitted the proposed order granting judgment of dismissal in favor of Pine Hills and FAIG, which proposed order also included 31 formal findings of fact and conclusions of law, which were not formally issued or requested by the trial court at the hearing. [R. 29a]

On January 19, 2011, counsel for the Koscielaks objected to the form of the order and submitted a proposed order acceptable to the Plaintiffs as to form only granting the judgment of dismissal for the reasons as stated by the trial court on the record. [R. 29b]

On January 26, 2011, the trial court sent a letter to counsel of record advising that it was signing both orders "finding no conflicts with the court's understanding." [R. 29c] The orders were signed by the trial court on January 25, 2011, [R. 29:3; R. 30:8] and filed and entered with the court on January 26, 2011. [R. 29, R. 30] On February 2, 2011, Notice of Entry of Judgment was filed by Pine Hills and FAIG. [R. 32]

On February 15, 2011, the Koscielaks timely filed a Notice of Appeal, [R. 33] and on March 22, 2011, the record was transmitted and filed with the Court of Appeals. [R. 36]

STATEMENT OF FACTS

On February 22, 2008, shortly after 6:00 p.m., Robert Koscielak, a 65 year-old retired gentleman, who is not a member of any Indian tribe, slipped and fell on an icy parking lot after having dinner with his wife at a business known as the Pine Hills Golf Course and Supper Club located in Gresham, Wisconsin. [R. 25:9] The icy conditions at issue were observed by rescue personnel at the scene and altered normal rescue procedure. [R. 25:6] Koscielak sustained serious orthopedic injuries, requiring initial in-patient hospitalization followed by inpatient rehabilitation for 10 days, before being discharged home in a wheel chair. [R. 25:11]

Pine Hills is not located on Indian reservation land. [R. 25:13, Line 18] It was not a new business originally formed or created by the Tribe. It existed as a privately owned for profit golf course and supper club under the same "Pine Hills" name that had been open to the public at the same Gresham location for many years. [R. 25:13-14] From 1977 until 1993, the business was owned and operated by a Wisconsin corporation known as Pine Hills Golf Club, Inc., which corporation was administratively dissolved in April of 1993. [R. 25:14] At some point in 1993, that

corporation sold Pine Hills to an unincorporated business entity known as Fritz Shultz, Ltd., because in July of 1993, pursuant to a Business Offer to Purchase, that entity sold the Pine Hills business and the real property on which it sits described as "Pine Hills Golf Club, Inc.," to the Stockbridge-Munsee Community, [R. 25:15-18] a federally recognized Indian tribe.

The sale included the golf course, restaurant, pro shop, the land, all personal property, and all buildings, sheds and mobile home on the property, and all equipment "necessary to the daily operation and successful running of the golf course and restaurant." [R. 25:15] The Business Offer to Purchase and accepted Counter-Offer also required Fritz Shultz, Ltd., to furnish labor after the sale to continue running the business as ownership transitioned to the Stockbridge Munsee Community. [R. 25:15, Item 3; R. 25:18, Item 8]

The tribe purchased Pine Hills with "gaming royalty funds" from the Tribe's ownership and operation of its North Star Casino in order to "diversify" its economy. [R. 25:20] In essence, the Tribe used profits from a business that it is only allowed to legally engage in under its gaming compact with the State *if* it furnishes liability insurance coverage as protection for tort victims under circumstances where its insurer is not allowed to claim sovereign immunity, [R. 25:30] to "diversify" that investment by purchasing another business where it now claims it does not

have to afford any protection or remedy at all in any forum for customers that might be injured or killed by negligence on the part of Pine Hills or its employees. [R. 25:82]

When the Tribe first purchased Pine Hills, however, it apparently had plans for it to become a gaming facility under its State Gaming Compact, because shortly after purchase, and without first obtaining consent from the State of Wisconsin to do so, it moved over 150 slot machines from its North Star casino operation to the Pine Hills location, and began conducting Class III gaming activity at Pine Hills. See *State of Wisconsin v. Stockbridge-Munsee Community, et al.,* 554 F.3d 657 (7th Cir. 2009); 67 F. Supp. 2d 990 (E.D. Wis. 1999); 366 F.Supp.2d 698, 2004 U.S.Dist. *LEXIS* 27640 (E.D.Wis. 2004).

Pursuant to its gaming compact with the State, the Tribe was required to and did effectively waive claims of sovereign immunity to the full extent of State mandated liability insurance policy limits for the protection of persons sustaining personal injury or property damage during the terms of the gaming compact. [R. 25:30] To fulfill another requirement under the compact, the Tribe also adopted the Wisconsin Safe Place Statute by Ordinance. [R. 25:31]

After it began operating slot machines at Pine Hills, the State took enforcement action against the Tribe claiming that it was engaging in Class

III gaming at Pine Hills in violation of the terms of its compact, based on the State's position that Pine Hills was not located on reservation land, which is a requirement for gaming under the Compact. [R. 25:30] A preliminary injunction was ultimately granted requiring the Tribe to discontinue use of the slot machines located at Pine Hills until litigation pending between the parties on the issue of whether Pine Hills could be used for gaming under the compact was fully resolved. *State v. Stockbridge-Munsee Community, et al.,* 67 F. Supp. 2d 990 (E.D. Wis. 1999).

At the time of the "occurrence" in this case, that litigation was still pending and the tribe at all times maintained its legal position that Pine Hills was located on the Tribe's reservation land and could be used as a casino operation under the terms of its gaming compact. *See Wisconsin v. Stockbridge-Munsee Community, et al.,* 366 F.Supp. 698 (E.D.Wis. 2004), and *State v. Stockbridge-Munsee Community, et al.,* 554 F.3d 657, 2009 U.S.App. LEXIS 1155 (7th Cir. 2009).

Ultimately, that litigation concluded in January of 2009, almost a year after the date of Mr. Koscielak's injury, resulting in a federal appeals court decision upholding the 2004 district court ruling that Pine Hills was not located on reservation land, because the historic record established that the land had not only been diminished as a reservation, but

disestablished. Therefore, the Tribe would not be allowed to resume gaming activity at Pine Hills. *Id.*

FAIG's policy was delivered to the Tribe at its official address in Bowler, Wisconsin, which is on reservation land. The Tribe and FAIG admit that the policy provides coverage for the business "operation at Pine Hills." [R. 16:5, ¶13]

The policy is an "occurrence" policy, not a "claims made" policy, [R. 25:36] and contains a Wisconsin Endorsement, allowing "suit" against FAIG, because the Endorsement modifies the policy to render inapplicable the prohibition against legal action that would otherwise exist. [R. 25:41]

According to its Charter, the Tribe gave the newly purchased, but long-standing golf and supper club business its own name separate from the Tribe–Pine Hills Golf Course and Supper Club–and declared it to have "perpetual existence and succession *in its own name,* unless dissolved by the Tribe pursuant to tribal law." [R.25:27 (emphasis supplied)] The charter also provided that Pine Hills was assigned its own assets, did not have the power to bind or obligate the tribe or tribal members at all, and shielded all other assets of the tribe and tribal members from business activities of Pine Hills.

> ***1.7 Assets of the Golf Course.*** **The Golf Course shall have only those assets specifically assigned to it by the Tribal Council or acquired in its name by the Tribe. *No***

> ***activity of the Golf Course nor any indebtedness incurred by it shall implicate or in any way involve or effect any assets of tribal members or the Tribe*** **not assigned in writing to the Golf Course. [R. 25:28] (Emphasis supplied.)**

Despite this clear language of limited liability contained within the Pine Hills Charter formally adopted by the Tribe, the Tribe's President filed an affidavit stating precisely the opposite:

> **Additionally, because Pine Hills is not a corporation, it does not enjoy limited liability. Thus, the tribe's risk with respect to Pine Hills is not limited to its investment in Pine Hills and a suit against Pine Hills, particularly one in which Pine Hills' sovereign immunity was not recognized, would adversely affect the Tribe's financial resources. [R. 25:55]**

The Pine Hills business was operating under tribal ownership before its charter and trust land status were approved by the Bureau of Indian Affairs, (hereinafter "BIA") [R. 26:72, R. 25:21-26] because the land was not accepted as trust land until 1995, and the Charter was not approved until 1996, but the Tribe bought the property and began operating it first under a transition agreement with labor furnished by Fritz Shultz, Ltd., in 1993 with a start up on its own in 1994. [R. 25:15-18 and R. 25:27-28]

The trial court did not give much significance to the fact that the land on which Pine Hills is located is held in trust by the United States for the Tribe. [R. 31:27, Lines 8-11] The Tribe represented to BIA in its Resolution for Charter that the business was located on reservation land,

[R. 26:70] which was later judicially determined to be incorrect. *See State v. Stockbridge-Munsee Community, et al., supra.*

It also did not indicate to BIA that it intended to conduct gaming at Pine Hills. [R. 26:72; R. 25:21-26] Pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. Sec. 2701 *et seq.,* (hereinafter "IGRA") the general rule is that BIA is not to accept lands in trust for gaming if they are not located on reservation land, although exception can be made after a different level of scrutiny is applied. *See e.g. Sokaogon Chippewa Community, et al. v. U.S. Dept. of Interior, et al.,* 214 F.3d 941, 943-944 (7th Cir. 2000).

The Tribe proclaims in its Constitution formed in 1937 that it is not subject to the jurisdiction of or suit in any court, state or federal, not even in its own tribal court, and confirmed this position in discovery where the Tribe states that any non-tribal member of the public, including specifically, Mr. and Mrs. Koscielak, who sustain injury or death due to claimed negligence on the part of Pine Hills Golf Course and Supper Club would have no remedy of any kind in any forum. [R. 25:82]

For a number of years during the Tribe's ownership of Pine Hills, the business was operated by Kemper Sports Management, Inc., an Illinois corporation, under a broad management agreement, which agreement was

terminated in 2004. [R. 26:155-156] No other written management agreements were produced in discovery.

The current general manager of Pine Hills, and GM on the date of the "occurrence," Lloyd Young, is neither a tribal council member nor a tribal member. [R. 25:76-77] The Tribe went to some length to hire him, filing multiple lawsuits seeking a declaration that his position should qualify as a "specialty occupation" to allow it to sponsor an H1-B Visa for him. See *Stockbridge-Munsee Community v. United States Citizenship and Immigration Services,* Case No. 06-CV-00989 and Case No. 07-CV-00627 (E.D. Wisconsin). The Tribe described itself in the complaints filed in those cases as a "*corporation* that owns and operates the Pine Hills Golf Course and Supper Club." (Emphasis supplied.) *Id.*

STANDARD OF REVIEW

All issues raised by this appeal present questions of law subject to *de novo* review by this court. When this Court reviews a grant of summary judgment, it conducts a *de novo* review of the record using the same summary judgment methodology applied at the trial court level. *M & I First Nat'l Bank v. Episcopal Homes Management, Inc.,* 195 Wis. 2d 485, 496-497, 536 N.W.2d 175, 182 (Ct. App. 1995); *Church v. Chrysler Corp.,* 221 Wis. 2d 460, 465-466, 585 N.W.2d 685, 687 (Ct. App. 1998). Summary judgment deprives the losing party not only of his or her day in court, but

even of an evidentiary hearing, *Strasser v. Transtech Mobile Fleet Services, Inc.,* 2000 WI 87, 236 Wis. 2d 435, 449, 613 N.W.2d 142, 2000 Wisc. LEXIS 425 (2000), and is not to be granted "unless the material facts are not in dispute, no competing inferences can arise, and the law that resolves the issue is clear." *Lecus v. Amer. Mut. Ins. Co. of Boston,* 81 Wis. 2d 183, 189, 260 N.W.2d 241 (1977).

Affidavits that state ultimate facts in a conclusory fashion, which in this case, is believed to characterize many of the statements made by Tribal President Vele, [R. 16:23-24; R. 26:52-60 and R. 24:5] are to be "disregarded" in a summary judgment posture. *Hopper v. City of Madison,* 79 Wis. 2d 120, 256 N.W.2d 139, 1977 Wisc. LEXIS 1481 (1977).

Lastly, all facts and inferences that can be drawn from underlying facts, *Strasser*, 236 Wis. 2d at 450, and any reasonable doubt as to the existence of a disputed fact, must be resolved in favor of the party opposing the motion, in this case, in favor of Robert J. Koscielak and his wife, Mary. *Id.,* and *Landremann v. Martin*, 191 Wis. 2d 787, 530 N.W.2d 62 (Wis. App. 1995).

The questions of law presented, such as the trial court's legal conclusion that Pine Hills was an "arm" of the Tribe, whether the doctrine of tribal sovereign immunity has been extended to state tort claims, and if so, whether a grant of such immunity violates a Wisconsin citizen's Right

to a Remedy under Article I, Section 9 of the Wisconsin Constitution, are also reviewable *de novo* without deference to the decision of the trial court. *McNally CPA's & Consulting, S.C. v. DJ Homes, Inc.,* 2004 WI App. 221, 227 Wis. 2d 801, 805, 692 N.W.2d 247, 2004 Wisc. App. *LEXIS* 960; *C&B Investments v. Wisconsin Winnebago Health Department,* 198 Wis. 2d 105, 108, 542 N.W.2d 168, 169 (Ct. App. 1995); *Farrell v. John Deere Co.,* 151 Wis. 2d 45, 62, 443 N.W.2d 50 (Ct. App. 1989).

In light of the *de novo* standard of review, the issues presented are not framed in terms of trial court error. Recognizing that appellate courts often do look to the rationale of the trial court to inform its own review, areas of claimed trial court error are included where appropriate below.

ARGUMENT

I. PINE HILLS GOLF COURSE AND SUPPER CLUB IS NOT AN "ARM OF THE TRIBE" AND THEREFORE ANY SOVEREIGN IMMUNITY TO STATE TORT CLAIMS THAT *MAY* BE ENJOYED BY THE STOCKBRIDGE-MUNSEE COMMUNITY WOULD NOT EXTEND TO PINE HILLS.

The narrow issue presented to the trial court, and to this court on *de novo* review, is whether Pine Hills Golf Course and Supper Club, which existed as a for profit business open to the general public for many years, somehow lost its character as a commercial business when ownership of Pine Hills changed hands to an Indian Tribe. Even though golfers still golf away and diners still dine, Pine Hills is now "analogous to a Tribal

governmental agency or department," according to the Tribe. [R. 26:57, ¶18]

A similar claim made by an Indian Tribe was presented to the Wisconsin Court of Appeals in the case of *McNally CPA's v. DJ Hosts, Inc.*, 277 Wis. 2d 801, 692 N.W.2d 247, 2004 WI App 221, 2004 Wisc. App. LEXIS 960. The appellate court did not view the issue as resolved simply by unilateral proclamation of the Tribe.

In *McNally,* a CPA firm sued DJ Hosts, Inc., a Wisconsin corporation for unpaid accounting services rendered. Ho Chunk Nation intervened in the action and both moved for dismissal claiming the Tribe's immunity extended to DJ Hosts, because it was wholly owned and operated by Ho Chunk Nation. The circuit court agreed and granted the motion to dismiss. The Wisconsin Court of Appeals reversed, holding as follows:

> **We conclude that when the sole facts are that an Indian tribe purchases all of the shares of an existing for-profit corporation and takes control over the operations of the corporation, tribal immunity is not conferred on the corporation.**

Id., 277 Wis. 2d at 806-807.

The treatment of the *McNally* decision in the record below is quite interesting. Even though it was the only Wisconsin case that involved a claim of sovereign immunity in the aftermath of a Tribe's purchase of a previously existing business, closely resembling the facts in this case, and

was noted to have been a case of first impression in Wisconsin, the decision did not even merit honorable mention in the Tribe's original brief on its motion. In fact, with one exception, citation to *C&B Investments v. Wisconsin Winnebago Health Dept. and Wisconsin Winnebago Business Committee,* 198 Wis. 2d 105, 542 N.W.2d 168, 1995 Wisc. App. *LEXIS* 1400, a case involving waiver of sovereign immunity, not extension of it,[1] the Tribe ignored Wisconsin case law entirely.

When the analysis in *McNally* was presented to the trial court by the Koscielaks as controlling and favorable Wisconsin law, so that there was no need for the trial court to go "spanning the globe" for guidance from the *many* foreign authorities cited by the Tribe, the Tribe then replied that the decision it ignored at the outset was now in its favor, because a fact that served to distinguish the present case from *McNally*—the absence of a stock purchase—was argued by the Tribe to be a "lynch pin" to the holding in *McNally,* "a critical fact...glaringly absent here." [R. 26:25]

A. STOCK PURCHASE OR CORPORATE FORM IS NOT A "LYNCH PIN" TO THE "ARM OF THE TRIBE" ANALYSIS UNDER McNALLY, AND EVEN IF IT WAS, PINE HILLS IS A TRIBALLY CHARTERED "CORPORATION."

[1] *C&B Investments* conceded extension of tribal sovereign immunity to the tribally chartered business enterprises in that case, and for good reason. The names of those entities—the Wisconsin Winnebago Health Department and the Wisconsin Winnebago Business Committee—truly mirrored their governmental purpose and function.

It is clear from the record the trial court agreed with the Tribe's "corporate form" argument, because it ruled that absence of a stock purchase was indicative of intent on the part of the tribe *not* to run Pine Hills as a separate business. [R. 31:27] The trial court and defense counsel authoring the "lynch pin" argument, must have both been a bit surprised to then hear new co-counsel for the Tribe argue at the hearing that "corporate form" of a business enterprise purchased by a Tribe is "irrelevant" and "does not matter." [R. 31:10]

With this backdrop, it is important to point out that the *McNally* court *did* weigh in on the significance to the case of the stock purchase aspect. While it did not view that fact as "irrelevant," it certainly did not describe it as a "lynch pin" either. The court simply noted that *if* the Tribe had purchased DJ Hosts as a straight asset purchase with corporate dissolution, rather than a stock purchase, the Tribe's "assertion of immunity from suit *might* be stronger," *Id.,* 277 Wis. 2d at 814, *n.* 7 (emphasis supplied), not that it *would* be stronger. This comment was noted to be *dicta,* because that fact situation was not before it. *Id.*

It did not buy the argument that the Tribe had created a new corporation just by changing its name after purchase. *Id.* In this case, the Tribe did not bother with a name change, and why would it? It makes

good business sense to keep continuity of "Pine Hills" for regular customers when one takes over as new owner of an established business.

As to what weight *should* be given under the "arm of the tribe" analysis to "corporate form" (or not) of an existing business at the time of purchase by a Tribe, the view of new co-counsel for the Tribe that it should be "irrelevant," or at least be given little weight, is probably about right. To hold otherwise would "elevate form over substance." See e.g. *Flynn v. Audra's Corp.*, __ *Wis. 2d* __, __ *N.W.2d*__ (Wis. App. 2011) 2011 WL 637775, 2011 Wis. App. 39 (holding legal duty of "owner" to protect patrons would not be formalistically limited to record owner of property only).

What should matter to the inquiry is not what a business is called or how it is technically organized on paper, but what the business actually does on a daily basis. New co-counsel for the Tribe no doubt understood this important distinction, and did not want precedent set that would jeopardize extending sovereign immunity to legitimate "arm of the tribe" businesses, like those described in *C&B Investments*, just because they may exist in "corporate form."

After all, labels can be confusing, especially in Indian Country where a tribe has a myriad of options for business formation. It can charter a "corporation" under its own tribal laws, or incorporate under State law, or

organize under an approved federal corporate charter, or operate a gaming entity under IGRA, or organize government service entities under the Indian Self-Determination and Education Assistance Act, or just run a business in an unincorporated form, like Mr. Shultz did when he owned Pine Hills. *See e.g. Tribal Business Structure Handbook,* U.S. Dept. of the Interior, Office of Indian Energy & Economic Development, 2008 Ed.

Notwithstanding the confusion that can be generated, the Koscielaks were accused of "baseless contentions" and "misrepresent(ing)" fact [R. 26:4-5] for calling Pine Hills a tribally chartered "corporation," as though the word is limited in customary meaning and usage only to an entity that has incorporated and issued stock under Wisconsin law or is organized under a tribe's federal corporate charter. The meaning is not so limited.

> **A body of persons granted a *charter* legally recognizing it as a separate entity having its own rights, privileges, and liabilities distinct from those of its members.**

WEBSTER'S II, New Riverside University Dictionary, Copyright @ 1984 – Houghton Mifflin Company, p. 313 (emphasis supplied). Black's Law Dictionary, Revised Fourth Edition, p. 409, adds perpetual "existence" and right of "succession" to the mix, which features were also granted to Pine Hills in the charter.

In addition to the above, as noted in *McNally,* the real hallmark of a "corporation" is the "limited liability attribute...hailed as the ultimate

significance of the corporate form." *McNally,* 692 N.W.2d at 252. That hallmark was also included in the Pine Hills Charter:

> **No activity of the Golf Course nor any indebtedness incurred by it shall implicate or in any way involve or effect any assets of tribal members or the Tribe not assigned in writing to the Golf Course. [R. 25:28 at Sec. 1.7]**

Those are the reasons Pine Hills was referred to by the Koscielaks as a "tribally chartered corporation." The description fits so well that even counsel for the Tribe had a hard time not calling Pine Hills a "corporate" charter. [R. 31:10, Lines 23-25]

As to the attempt by Tribal President Vele to disavow by affidavit the limited liability granted in the Charter, since no explanation for that contradiction was provided, the statement should be given about the same weight as a "sham affidavit." *See e.g. Yahnke v. Carson,* 236 Wis. 2d 257, 613 N.W.2d 102 (2000).

Contradictory positions, depending on what the Tribe is seeking to accomplish, seem to be a continuing trend.

> **The Tribe, *despite taking a contrary position when advocating for the legislation*, now reads this statement to be a reaffirmation of the 1856 reservation and its boundaries.**

State v. Stockbridge-Munsee Community, et al., 554 F.3d 657, 663 (7th Cir. 2009) (emphasis supplied). In this case, not only does President Vele contradict the express limited liability terms of the Tribe's Charter, but co-

counsel contradict each other as to the legal significance to be given "corporate form" under *McNally,* and the contradictions don't stop there.

When seeking BIA approvals, the Tribe took the position that Pine Hills was located on reservation land, when it was not. It did not disclose plans to use Pine Hills as a casino. Now it claims that Pine Hills "never" was a casino under its Compact [R. 31:12] because it is not on reservation land, as though the Tribe's contrary legal position in federal court at the time of the "occurrence" here can just be erased from history.

Beyond that, while verbally lambasting Koscielaks' counsel for associating the word "corporation" with Pine Hills in any way, when the Tribe wanted to be perceived as a U.S. company to sponsor a visa to hire Mr. Young as General Manager for Pine Hills, it referred to the Tribe itself as a "*corporation* that owns and operates Pine Hills Golf Course and Supper Club," *See e.g. Complaints filed in Stockbridge- Munsee Community v. U.S. Citizenship and Immigration Services,* 06-CV-00989 and 07-CV-00627 (E.D. Wisconsin)(emphasis supplied), even though it claimed below that the Tribe did not form Pine Hills under its federal corporate charter. If true, how could it claim in a lawsuit that the Tribe owned Pine Hills in a corporate, rather than tribal, capacity?

In conclusion, corporate form or stock purchase when a Tribe buys a previously existing business, was not set forth in McNally as a threshold

test to be satisfied before a court can proceed with the multi-factor analysis, nor was it a "lynch pin" to the *McNally* court's decision not to extend immunity to the tribally owned business in the case before it. If this Court should hold to the contrary, the record shows that Pine Hills satisfies any "corporate form" requirement, because its attributes reveal it to be a "corporation" chartered under tribal law, or at minimum, a disputed issue of material fact on that issue is presented.

A. BASED ON A *DE* NOVO REVIEW AND PROPER APPLICATION OF THE MULTI-FACTOR ANALYSIS UNDER McNALLY, PINE HILLS GOLF COURSE AND SUPPER CLUB IS NOT AN "ARM OF THE TRIBE."

Fair reading of *McNally* shows that what form is adopted or name given when a Tribe buys and takes control of an already existing business, are just a couple of the many factors that courts are to consider when determining whether any sovereign immunity enjoyed by a Tribe will extend to the business. The "non-exclusive" list of those factors are:

> **(1) Whether the corporation is organized under the tribe's laws or constitution;**
> **(2) Whether the corporation's purposes are similar to or serve those of the tribal government;**
> **(3) whether the corporation's governing body is comprised mainly or solely of tribal officials;**
> **(4) Whether the tribe's governing body has the power to dismiss corporate officers;**
> **(5) Whether the corporate entity generates its own revenue;**
> **(6) Whether a suit against the corporation will affect the tribe's fiscal resources;**
> **(7) Whether the corporation has the power to bind or**

> **obligate the funds of the tribe;**
> **(8) Whether the corporation was established to enhance the health, education, or welfare of tribe members, a function traditionally shouldered by tribal governments; and**
> **(9) Whether the corporation is analogous to a tribal governmental agency or instead more like a commercial enterprise instituted for the purpose of generating profits for its private owners.**

Id., 277 Wis. 2d at 810.

In some jurisdictions, one particular factor—whether a suit against the business entity will reach the tribe's fiscal assets or whether the business entity has the power to obligate and bind the tribe—is deemed to be of "paramount importance," and likely dispositive, *Runyon ex rel. B.R. v. Ass'n of Village Council Presidents,* 84 P.3d 437, 440 (Alaska 2004), and in others, is viewed as "one of the most important factors," *Ransom v. St. Regis Mohawk Education & Community Fund, Inc.,* 86 N.Y.2d 553, 559, 658 N.E.2d 989, 635 N.Y.S.2d 116 (1996), because this factor reveals whether the business entity or the Tribe itself is the real party in interest.

The charter here specifies that Pine Hills does indeed have a name, identity, perpetual existence, right of succession, and asset structure separate from the Tribe. It was not given the power to obligate or bind the Tribe. All separate assets of the Tribe and its members, other than those assigned in writing to Pine Hills in its own name are shielded from the business activities of Pine Hills. Therefore, an important, and in some

jurisdictions controlling factor, should have been seen by the trial court as weighing heavily in favor of the Koscielaks.

The fact that the Tribe went so far as to submit an affidavit to re-write the limited liability language in the Charter, reflects tacit recognition on the part of the Tribe of just how important this factor is to the "arm of the tribe" analysis. If the actions of Pine Hills really are an extension of the exercise of sovereignty by the Tribe through its "governmental agency," the Tribe would have embraced the activities of Pine Hills as its own, not legally distanced itself from them.

Even in the area of income taxation, a tribally owned business will not be found exempt like a tribe, unless "substantial" sovereign powers have been delegated to it such as police powers, the power to tax, or the power of eminent domain. See e.g. IRS Rev. Rul. 84-37. The Tribe did not delegate "substantial" sovereign powers to Pine Hills. It retained those powers for itself. Tribal President Vele's affidavit refers only to "certain," not "substantial," sovereign powers being delegated, which under the Charter, is "policy-making authority for the purpose of operating a safe and productive business," [R. 25:27] which is expected of any business, private or governmental.

Beyond the above factors, the inquiry under *McNally* asks the court to examine all factors to determine if the business is so "closely allied with and dependent upon the tribe that it is entitled to the protection of tribal sovereign immunity." *McNally,* 277 Wis. 2d at 811-812, *quoting In re Ransom v. St. Regis Mohawk Education and Community Fund, Inc.,* 86 N.Y.2d 553, 658 N.E.2d 989, 635 N.Y.S.2d 116 (N.Y. 1995). How can it be said that Pine Hills is dependent upon the Stockbridge-Munsee Community, when the business was already in existence and operating independently for many years before the Tribe purchased it?

What's next? Will the Tribe buy and charter as a self-proclaimed "subordinate economic enterprise" a local McDonald's or Burger King franchise and then claim those businesses now enjoy sovereign immunity from tort claims as well? Proper application of the multi-factor analysis under *McNally* should answer that question, and the question presently before the court, with a resounding "No."

In distinguishing the facts in *McNally* from those in other jurisdictions where courts found the business entity at issue to share a tribe's immunity, the court noted that those entities held "a place on the other end of the spectrum" from the for profit business at hand, *McNally,* 277 Wis. 2d at 812, such as the non-profit in *Ransom* that was *created* by the tribe to provide social services to tribal members, or the Health

Department or Business Committee in *C&B Investments,* originally *created* by the Tribe to perform those governmental functions.

Pine Hills Golf Course and Supper Club is also "on the other end of the spectrum"[2] from a business enterprise that truly functions as an "arm of the tribe." While the chosen name of an entity will not always reveal its nature, in this case, the Tribe's retention of the old name—Pine Hills Golf Course and Supper Club—reflects what it is, a for profit golf course and supper club, just like a commercial saw mill can indeed be "just a saw mill." See e.g. *Menomonie Tribal Enterprises v. Hilda L. Solis,* 601 F.3d 669, 673-674 (7th Cir. 2010)(reference made by the court in describing why worker safety rules under OSHA would apply to a commercial saw mill that employed tribal and non-tribal member employees even in the absence of

[2] The idea of a "spectrum" of tribally owned enterprises, as the Koscielaks see it, would place on one side, the tribal government itself, if it opted to organize in a business form under an approved federal corporate charter. Next to it and proceeding down the line on the spectrum would be all of the many important departments that are the heart and soul of government, such as a tribal housing authority, education department, health clinic, welfare division, economic, cultural, and social development commissions, land use agencies, tax authorities, law enforcement, etc. Smack dab in the middle of the spectrum, and what the Koscielaks argue should be the "tipping point," under the "arm of the tribe" analysis, would be the Tribe's casino operations properly formed under IGRA. While casino operations are indeed "for profit" commercial enterprises, they are positioned within the "arm of the tribe" line on the spectrum, because as a matter of federal public policy, Indian gaming has been endowed with a unique tribal footprint, and is viewed as essential to economic survival and revitalization of Indian tribes after a long and difficult history of federal policy toward Native American Tribes and their people. The fact that Indian Gaming has been endowed with such a purpose, should not open the door for a Tribe to claim that all "for profit" businesses that enhance economic stability of the Tribe should now also be viewed as governmental, rather than commercial. To the right of Indian casino operations on the spectrum would be all other non-casino for profit commercial businesses, where the "arm of the tribe" analysis under *McNally* is very important to determine if a claim of extension of immunity is valid or is unfairly stretching the "arm" like silly putty.

express congressional authorization and without offending any claimed sovereignty of its Indian Tribe owner).

In the present case, the factors the trial court looked at were: the profits of the business going into the Tribe's general fund; the absence of a stock purchase; and, the Tribe did not make a conscious decision to "give up immunity," which of course goes to the issue of waiver, not extension of immunity. Overall, the trial court seemed of the view that the only kind of "investment" situation where sovereign immunity would *not* extend, would be where a tribe just has a marginal stake in a big conglomerate, like the Microsoft example it referenced from *McNally.*

While the *McNally* court did mention "Microsoft," it is believed it did so just to show how far afield a claim of extension of tribal sovereign immunity can get, like the McDonald's and Burger King examples set forth by the Koscielaks. After all, in *McNally,* the court found tribal immunity did *not* extend to a commercial business that was wholly owned and operated by the Tribe itself, which is not a Microsoft situation.

As to the absence of a stock purchase reflecting intent, at the time the Tribe bought the Pine Hills business, there was no corporate stock available to purchase. Mr. Shultz was running the business in an unincorporated form when he sold it to the Tribe.

Intent of the Tribe or where the profits go, were not listed in *McNally* as factors to be applied, although the Court noted the list was not

exclusive. Intent, however, would already be taken into consideration in the first factor under *McNally* when a Tribe self-proclaims a business to be a "subordinate economic enterprise," and unilaterally extends its sovereignty to the business in the organizing documents, as was done here. The whole point of *McNally,* is to allow a court to look beyond a tribe's unilateral declaration to make sure that the powerful shield of immunity is being extended only to "arms" of a Tribe, and not to its ankles, knees and toes as well.

As to Pine Hills profits going to the Tribe's general fund, where else are they supposed to go? The whole reason an "owner," private or governmental, buys a commercial "for profit" business, is to hopefully make money for that owner. Net profit from Pine Hills running through a general tribal accounting where it might later be distributed to support the work of *real* "arm of the Tribe" entities, such as a tribal housing authority or health clinic, for example, does not transform the "for profit" business into one of those entities performing that work.

Similar to the court's view in *McNally* that few factors weighed in favor of immunizing the business at issue, in the present case, there are really only two out of the nine factors listed that weigh in favor of the Tribe. The first factor, which asks if the corporation was organized under the tribe's charter and constitution, which it was, and the fourth factor, which asks if the Tribe has power to dismiss corporate officers, which it did. In

this case, since Tribal Council did not "govern" day-to-day operations at Pine Hills, the governing body is viewed as the General Manager of the business, Lloyd Young, who is neither a tribal member nor a tribal council member, and Kemper Management before him; an individual and entity hired by the Tribe not for expertise in providing tribal government services, but for their business acumen in successfully running a for profit golf course and supper club.

In conclusion, Pine Hills Golf Course and Supper Club is what its name suggests, and is on the "other end of the spectrum" from a true "arm of the tribe." Therefore, any sovereignty immunity to the tort claim of the Koscielaks that *may* be enjoyed by the Tribe itself should not extend to Pine Hills.

II. THE STOCKBRIDGE-MUNSEE COMMUNITY ITSELF DOES NOT ENJOY SOVEREIGN IMMUNITY FROM A STATE TORT CLAIM NOT ARISING OUT OF A CONTRACT WITH THE TRIBE, OF A WISCONSIN CITIZEN, WHO IS NOT A MEMBER OF ANY INDIAN TRIBE, TO EXTEND TO PINE HILLS *IF* IT IS DETERMINED BY THIS COURT TO BE AN "ARM OF THE TRIBE."

The above "(not) an arm of the tribe" argument put the "cart before the horse" and assumed *arguendo* that the Stockbridge-Munsee Community itself would have tribal sovereign immunity from suit against a tort claim filed in state court by a Wisconsin citizen who is not a member of any Indian tribe. The same approach was taken before the trial court, because as a practical matter, if the court determines that Pine Hills Golf

Course and Supper Club is not an arm of the tribe, there is no need to resolve the additional issues raised.

The Tribe mischaracterized the Koscielaks argument below as nothing more than a call for abrogation of the doctrine of tribal sovereign immunity. It is hoped that this Court is able to see that far from a call for abrogation, the Koscielaks ask only that the doctrine not be wrongfully expanded beyond what is compelled by existing precedent of our nation's highest court.

A. THE UNITED STATES SUPREME COURT HAS NEVER EXTENDED THE JUDICIALLY CREATED DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY TO A STATE TORT CLAIM NOT ARISING OUT OF A CONTRACT WITH A TRIBE.

It is true that courts often echo the refrain that it is "well settled" or "beyond dispute" that "[A]n Indian tribe is not subject to suit in a state court...unless 'Congress has authorized the suit or the tribe has waived its immunity,'" and that such immunity applies to the tribe's commercial and governmental activities alike, whether on or off the reservation. *McNally*, 277 Wis.2d at 807, *citing and quoting C&L Enters, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 414, 149 L.Ed.2d 623, 121 S.Ct. 1589 (2001) and *Kiowa Tribe v. Manufacturing Techs., Inc.*, 523 U.S. 751, 754, 140 L.Ed. 981, 118 S.Ct. 1700 (1998).

The lesson to be learned, however, from the decision of the United States Supreme Court in *Kiowa,* is that courts and litigants alike should be *very* careful about just parroting "well-settled" law without analysis.

After the revelation in *Kiowa* about the origins of the tribal sovereign immunity doctrine, and after declining "in (that) case" to revisit case law or draw any distinction based on whether a Tribe's activity is commercial rather than governmental, or on or off the reservation, and after expressly noting that as to harm done to those in this "economic context" 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," such considerations "might suggest a need to abrogate tribal immunity," a remedy specifically not asked for in that case, it went on to state its *narrow* holding:

> ***Tribes 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 petitioner waived it, so the immunity governs *this* case.**

Kiowa, supra, 523 U.S. at 760 (emphasis supplied).

The distinction is an important one, because in the "contractual context," courts have "justified" the "seemingly unfair effects" by blaming the person or entity voluntarily entering into business transactions or

contracts with Indian tribes for not having negotiated a waiver of sovereign immunity. *McNally, supra*, 277 Wis.2d at 809 (citations omitted).

As noted by Justice Stevens in his dissent in *Kiowa*, applying sovereign immunity to tort claims would be "unjust." He wanted the majority to use language in its decision to clarify that its holding was limited to lawsuits arising out of voluntary contractual relationships, *Kiowa, supra*, 523 U.S. at 761-762, *Stevens, J., dissenting,* but all one has to do is read the narrow holding to see that this is exactly what the majority said. It is also clear from the extensive review of the court's prior precedent in *Kiowa,* that it has never ruled on the application of the tribal sovereign immunity doctrine in the context of a state tort claim not arising from a contract with a tribe, filed in state court against an Indian tribe by a non-tribal member tort victim. As a result, any comment in *Kiowa* or elsewhere on that point are by definition *dicta,* and any lower court decisions proclaiming a Tribe's immunity from suit against such a claim to be "well-settled" is speculative at best.

Close examination of the majority decision in *Kiowa,* reveals exactly why the majority could not honor Justice Stevens' request for more clarity than its narrow holding already provided. To do so would require the court to weigh in on application of the doctrine outside the "economic context" and in the abstract without a developed record before it. The reason why the majority was unwilling to do so, beyond establishing *dicta,* is also

apparent in *Kiowa.* The majority expressed deep concern about the damage already done by courts taking its narrow holdings in one setting and broadly extending, applying and interpreting them beyond all recognition, as it noted to have occurred not only in the development of *tribal* sovereign immunity doctrine in the commercial context in which it now exists, but previously in the area of sovereign immunity of foreign nations as well.

> **While the holding was narrow, 'that opinion came to be regarded as extending virtually absolute immunity to foreign sovereigns.'"**

Kiowa, 523 U.S. 751, 118 S. Ct. 1700, 140 L.Ed.2d 981(1998)(citations omitted).

In other words, enough is enough, is the message all should have received from *Kiowa*. Instead, in this very case, the Tribe now asks this court to take our highest court's prior narrow rulings on the tribal sovereign immunity doctrine in the commercial context, and extend them to accord "virtually absolute immunity" to the Tribe in all areas. It would be an insult to the carefully worded majority decision in *Kiowa* to do so.

In conclusion, the judicially created doctrine of tribal sovereign immunity has *not* been extended by the United States Supreme Court beyond the contract and commercial setting, and is now disfavored by our highest court even in that setting. There is no need to await congressional action to abrogate or limit an immunity that the Tribe was never granted.

The Stockbridge-Munsee Community itself does not have sovereign immunity from the Koscielaks state tort claim to extend to Pine Hills.

B. EXTENSION OF THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY TO A STATE TORT CLAIM OF A WISCONSIN CITIZEN WHO IS NOT A MEMBER OF ANY INDIAN TRIBE WOULD VIOLATE HIS OR HER RIGHT TO A REMEDY UNDER ARTICLE I, SECTION 9 OF THE WISCONSIN CONSTITUTION.

There are a number of reasons why the precise constitutional issue now before this court has not been raised before. First, most personal injury claims by non-tribal members against Indian tribes no doubt arise at their casino operations, which typically include state compacts that mandate liability insurance protection as a remedy for tort victims and preclude a Tribe's insurer from raising sovereign immunity as a defense.

Second, exposure that Indian tribes have to tort claims arising from traditional governmental functions, such as enterprises that provide for food, shelter, education, health and social services, are often formed under the Indian Self-Determination and Education Assistance Act, which Act also affords a remedy for persons injured due to the negligence of Indian tribes or contractors under the Federal Tort Claims Act. *See e.g. and generally Federal Tort Claims Act – Issues Affecting Coverage for Tribal Self-Determination Contracts*, GAO/RCED-00-169, July 2000.

Third, for tort claims against an Indian tribe or Indian enterprise that arise outside the above-noted areas where a tort remedy is already provided, most Indian tribes are opting to either resolve such claims or

defend them on the merits, rather than raise the defense of tribal sovereign immunity, because to do so is perceived to be poor business and risky legal strategy. *See e.g. Galanda, G.,* Northwest Indian Law & Business Advisor, *Tribes & Insurance Defense Lawyers Should Avoid Asserting Sovereign Immunity*, Published by Williams Kastner Tribal Practice Group.

The Tribe and its insurer in this case obviously hold a different view. As a result, the court has before it a claim by the Tribe and its insurer that under the doctrine of tribal sovereign immunity any customer of Pine Hills injured or killed due to negligence on the part of Pine Hills or its employees is without a remedy of any kind in any forum.

Article I, Section 9 of the Wisconsin Constitution provides:

> **[E]very person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformable to the laws.**

If the Tribe's interpretation of the current reach of the tribal sovereign immunity doctrine is held by this Court to be correct, this court is presented with a unique situation of competing claims of sovereignty.

> **An Indian tribe's assertion of immunity in a state judicial proceeding is unique because it implicates the law of three different sovereigns: the tribe itself, the State, and the Federal Government.**

Kiowa, *supra*, Stevens, J., *dissenting,* Ginsburg, J. and Thomas, J., *joining,* 523 U.S. at 761. Specifically, the interest of both federal and state governments, and their courts, to not deprive their own citizens, who are not tribal members and do not enjoy voting rights in the Tribe involved, of their own federal and state constitutional rights and access to their courts when faced with claims by an Indian tribe, such as those made here, that it is immune from suit in any forum for any wrong claimed.

A similar dilemma was addressed by at least one court on the federal level in the case of *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 623 F.2d 682, 19980 U.S. App. LEXIS 16445. The case involved an access road dispute brought by non-Indians against an Indian tribe. The claimant built a guest lodge after being told by the Tribe that an access road that non-Indian and Indian landowners had been using for over 80 years would be available to them for use, but the Tribe then closed the road the day after the costly lodge was opened. For a time people were literally unable to leave. The Indian tribe asserted its sovereignty and claimed, similar to the Tribe in this case, that the lodge owner had no remedy against it in any forum. In response to such a state of affairs, the 10th Circuit stated:

> **There has to be a forum where the dispute can be settled...To hold that (plaintiffs) have access to no court is to hold that they have constitutional rights but have no remedy.**

Id., 623 F.2d at 685.

The Court distinguished the holding in *Santa Clara Pueblo v. Martinez*, 436 U.D. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106, the rendering of which decision at the time resulted in the trial court dismissing the case after a jury awarded damages, as wholly intra-tribal involving tribal members with Indian voting rights concerning internal tribal matters. It found support instead from other United States Supreme Court precedent:

> **But the tribe's retained powers are not such that they are limited *only* by specific restrictions in treaties or congressional enactments...Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and *those powers 'inconsistent with their status.'***

Dry Creek, 623 F.2d at 684, *quoting Oliphant v. Squamish Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (emphasis supplied and in original).

The *Dry Creek* court went on to quote other language from *Oliphant* to the effect that just as an Indian tribe may assert its sovereign powers for the protection of its people and territory within its political boundaries, the United States has "manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty." *Id., quoting Oliphant.* The same sentiment of course exists as to the "solicitude" that states and their courts have for the rights of their citizens, and are not "helpless" to defend those rights from attack

under state sovereignty principles if greater rights have been accorded under the state constitution than exist under the federal counterpart. [3]

The *Dry Creek* case has been commented upon and distinguished in some Wisconsin federal court decisions as an "anomaly," and if valid, a very narrow exception to the supposedly "well-settled" law on tribal sovereign immunity, available only to non-tribal members who have no tribal remedy or forum about issues unrelated to internal tribal matters. *See Nakai v. Ho-Chunk Nation*, 2004 U.S. Dist. LEXIS 8965 (W.D. Wis. 2004; *Barker v. Menomonie Nation Casino*, 897 F.Supp. 389 (E.D. Wis. 1995) and *Miller v. Coyhis*, 877 F. Supp. 1262 (E.D. Wis. 1995).

While it may be narrow, it is an exception that would certainly fit here where the claim meets all of the conditions required. The Koscielaks, however, do not need to rely on a *Dry Creek* exception, i.e. to fashion a "remedy" in order to realize *other* constitutional or civil rights under federal law. The Koscielaks claim is grounded in Article I, Section 9 of the Wisconsin Constitution, which uniquely provides the remedy itself as *the* constitutional right to be protected, under a state constitution that does

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[3] *See e.g. Granite Valley Hotel Limited Partnership, dba Granite Vally Hotel v. Jackpot Junction Bingo and Casino, a Business Enterprise of the Lower Sioux Indian Community*, 559 N.W.2d 135, 1997 Minn. App. LEXIS 201, *J. Randall, concurring*, and in a lengthy opinion stating that "[T]he fifty semi-sovereign states in our federal union are not helpless" in addressing the mess that has been created by perpetuation of the myth that an Indian Tribe is a sovereign nation, as all states are of course free to give its citizens, Indians and non-Indians alike, more rights than are granted under the federal constitution.

accord greater protection for that remedy than the United States Constitution.

The Tribe in this case is not in a position to complain about either a *Dry Creek* type exception or the Koscielaks' right to a remedy under Article I, Section 9, because it has not seen fit to exercise its own sovereign powers to provide a forum and remedy for tort claims against it or its business enterprises under tribal law. Since it has no "tradition of self-regulation" in this area, tribal sovereignty is neither offended nor violated. *County of Vilas v. Chapman*, 122 Wis.2d 211, 217-218, 361 N.W.2d 699 (1985).

III. WISCONSIN'S DIRECT ACTION STATUTE IS APPLICABLE TO FAIG AND IT IS PRECLUDED FROM INVOKING TRIBAL SOVEREIGN IMMUNITY AS A DEFENSE TO THE KOSCIELAKS TORT CLAIM.

A. Wisconsin's direct action statute applies to FAIG.

Wisconsin's direct action statute applies to all insurance policies "delivered or issued for delivery in the State of Wisconsin," and even to policies delivered outside the State if the policy covers "business operations" located in the State or the accident itself occurred in the State. See Wis. Stat. Sec. 632.24, 631.01 and 803.04(2)(a). The defense claims that since Pine Hills is on federal trust land, and the Tribe's office where the policy was delivered, is on reservation land, that neither are to be considered "in the State of Wisconsin" under the direct action statute.

Even if the Court were to agree that Pine Hills and the Tribe's office are located on foreign soil even though within the boundaries of the State, the direct action statute still applies for the following reasons.

First, if the legislature wanted to exclude from the direct action statute policies delivered to offices in, or policies covering business operations within the State, but on Indian reservation or federal trust land, it would have said so. It did not.

Second, Wisconsin law is unique in its analysis of application of state law in Indian Country. It does not start with the notion that based on Indian sovereignty principles, non-discriminatory state laws of general application will not apply without express Congressional authorization. To the contrary, such laws will apply on Indian reservation and federal trust land unless Congress or the Tribe itself by ordinance has specifically preempted the law or area of the law involved. *See e.g. Landremann v. Martin,* 191 Wis. 2d 787, 530 N.W.2d 62 (1995)(holding that service of process pursuant to state statute on reservation land did not violate tribal sovereignty as neither Congress nor the Tribe had preempted the statute); *see also County of Vilas v.* Chapman, 122 Wis. 2d 211, 361 N.W.2d 699 (1985)(holding that tribal sovereignty is not offended or violated by application of state law where the Tribe has no "tradition of self-regulation" in the area).

Finally, the best evidence that FAIG is not only subject to, but

intended to be subject to, Wisconsin's direct action statute, is its inclusion of a Wisconsin Endorsement to modify the policy. If FAIG really believed its policy was a foreign policy of any kind, it would not have included a Wisconsin Endorsement consenting to be sued and conforming the terms of the policy to Wisconsin law. [R. 25:41]

B. FAIG IS PRECLUDED FROM INVOKING TRIBAL SOVEREIGN IMMUNITY AS A DEFENSE TO THE KOSCIELAKS TORT CLAIM BASED ON ITS INSURED TRIBE'S LEGAL POSITION AT THE TIME OF THE "OCCURRENCE" UNDER AN "OCCURRENCE" TYPE POLICY THAT PINE HILLS WAS A GAMING ENTITY UNDER ITS STATE COMPACT.

The Wisconsin Supreme Court recognizes that the purpose of liability insurance is not just a mechanism to protect the assets of a tortfeasor, but is well known "to be used openly and extensively as a device for insurance compensation to victims." *Mercado v. Mitchell*, 83 Wis.2d 17, 264 N.W.2d 532 (1978). It has long extolled the virtues of sovereign governments purchasing such protection for tort victims, both from a liability they may have and even for a liability that does not exist at law. *See e.g. Marshall v. Green Bay*, 18 Wis.2d 496, 188 N.W.2d 715 (1963) (overruling *Pohland v. City of Sheboygan*, 251 Wis. 20, 27 N.W.2d 736 (1947), which held that a city did not have the power to enter into an indemnity contract for damages beyond that for which it could be held legally responsible.)

These cases reflect a strong public policy in the State of Wisconsin of "compensating its residents who are victims of torts," which policy is reflected in insurance coverage decisions, and has not diminished with the passage of time. *State Farm v. Gillette, et al.*, 251 Wis. 2d 561, 641 N.W.2d 662, 678 (2002).

The liability policy at issue is an "occurrence" policy, not a "claims made" policy. Therefore, for the limited purpose of interpreting the existence of coverage under that policy only, the facts and law as they existed on the date of the "occurrence" control.

At the time of the "occurrence" in this case, the Tribe claimed in legal proceedings that Pine Hills was a gaming entity under its Compact with the State. Pursuant to that compact, the Tribe's insurer is precluded from raising a sovereign immunity defense to the extent of the policy limits for the protection of persons, like Mr. Koscielak, who may sustain injury at Pine Hills.

The fact that it was later judicially determined that the Tribe's claim that Pine Hills was on reservation land was incorrect, should not be allowed to retroactively render ineffective coverage otherwise mandated and available under the Compact for his protection.

CONCLUSION

Mr. Koscielak's case may be a bit more complicated than most, but the facts and law set forth above show that there is no valid reason why he

should be treated differently than all other persons seriously injured in slip and fall incidents on icy conditions at local Wisconsin businesses who have been allowed to have their day in court. That is all he asks. The trial court's grant of summary judgment in favor of the Tribe dba Pine Hills Golf Course and Supper Club should be reversed.

Respectfully submitted,
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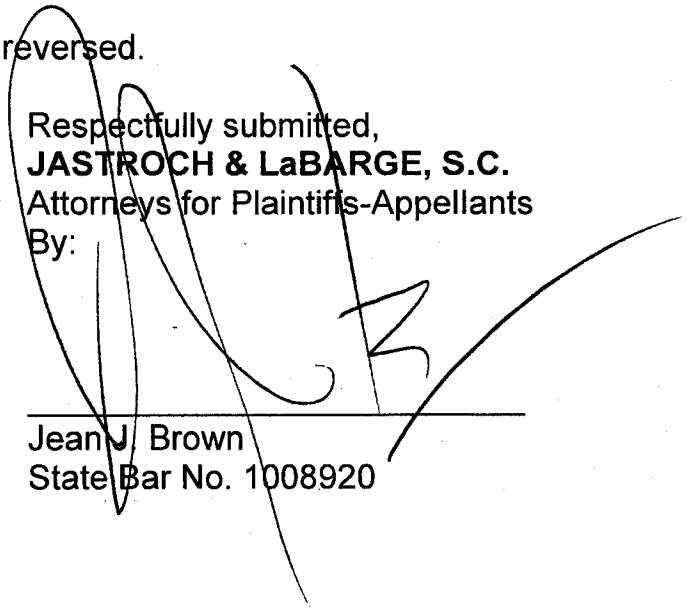

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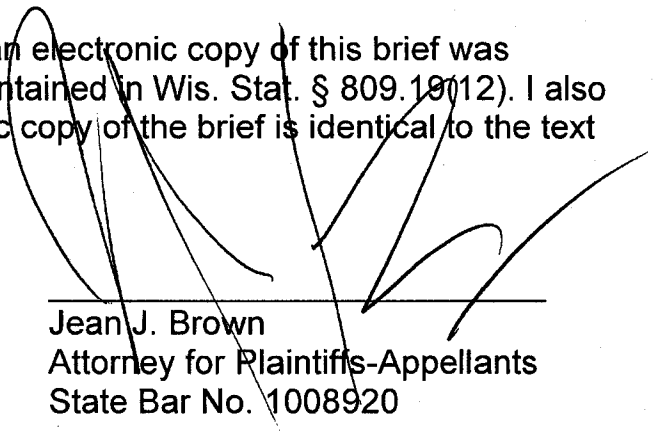
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 43 pages. It contains 10,440 words from the Statement of the Case through the final page, inclusive of all text in footnotes.

I hereby further certify that an electronic copy of this brief was submitted pursuant to the rules contained in Wis. Stat. § 809.19(12). I also certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.



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