STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

ROBERT J. KOSCIELAK and
MARY J. KOSCIELAK,

Plaintiffs-Appellants,

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

Appeal No: 2011AP000364
Circuit Court No: 2010CV000273

BRIEF OF DEFENDANTS-RESPONDENTS STOCKBRIDGE-MUNSEE COMMUNITY d/b/a PINE HILLS GOLF COURSE & SUPPER CLUB and FIRST AMERICANS INSURANCE GROUP, INC.

ON APPEAL FROM THE CIRCUIT COURT FOR MENOMINEE--SHAWANO COUNTIES
THE HONORABLE JAMES R. HABECK PRESIDING

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Respondents, the Stockbridge-Munsee Community (the "Tribe") and First Americans Insurance Group, Inc. ("FAIG") respectfully submit their Brief in this appeal. The entities referenced above are referred to herein as the "Tribe" and "FAIG," respectively pursuant to Wis. Stat. §809.19(1)(i). However, where necessary to and to avoid confusion, those entities are occasionally referred to collectively as the "Respondents." References to the Record on Appeal herein will be to document and page number as follows: "(R.____:____)."

STATEMENT OF THE ISSUES ON APPEAL

1. Do the undisputed material facts establish that the Tribe, a federally recognized Indian tribe, and its subordinate economic organization, Pine Hills Golf Course and Supper Club ("Pine Hills"), are immune from suit for

personal injuries in Wisconsin state courts under the doctrine of tribal sovereign immunity?

Trial Court Decision: Yes.

2. May a claimant maintain an action under Wisconsin's direct action statute against a foreign liability insurance carrier that neither issued nor delivered a policy of insurance in the State of Wisconsin, and whose insured is absolutely immune from suit for money damages?

Trial Court Decision: No.

STATEMENT REGARDING ORAL ARGUMENT

The Tribe and FAIG do not believe oral argument is appropriate or necessary in this case. As reflected in the record, and as demonstrated in Respondents' brief, the appeal is not well-founded in law or fact. Existing Wisconsin and federal jurisprudence require that the Circuit Court's orders granting summary judgment in favor of Respondents be

affirmed. While the circumstances, if any, under which a party may maintain a personal injury action against a federally recognized Indian tribe or its insurer may be recurring issues presented by Wisconsin courts, the issues in this case are not novel and simply involve determining whether sufficient evidence was proffered to support the Circuit Court's judgment under established Wisconsin law. Thus, oral argument is not likely to aid the Court in its resolution of this appeal. Should the Court determine that oral argument would be helpful to ensure that it is fully informed, Respondents are willing and able to participate meaningfully in oral argument.

STATEMENT REGARDING PUBLICATION

Respondents do not believe the Court's opinion in this matter will meet the criteria for publication enunciated in

Wis. Stat. §809.23. The issues before the Court involve no more than the application of well-established law to a recurring fact pattern. Where, as here, the parties' briefs and the record establish conclusively that sufficient evidence exists to support the judgment, and where the Court's opinion will not create new law, or modify, clarify or criticize existing law, publication is not necessary.

STATEMENT OF THE CASE

Appellants Robert J. Koscielak and Mary J. Koscielak (collectively, the "Koscielaks") filed this action on June 1, 2010, against Respondents seeking unspecified compensatory damages. (R.1). The Koscielaks' claims arise out of a February 22, 2008 slip-and-fall. (R.1:7). On that date Mr. Koscielak allegedly slipped and fell on ice in the parking lot of the Tribe's Pine Hills facility. (Id.). The Koscielaks

contend that the slip-and-fall was due to the negligence of the Tribe and that it resulted from a violation of Wisconsin's Safe Place Statute. (R.1:8).[1]

On July 22, 2010, the Respondents timely filed their Motion to Dismiss all claims asserted against them by the Koscielaks (and the Subrogated Plaintiffs) on the grounds that the Circuit Court lacked jurisdiction over the Tribe by operation of the doctrine of tribal sovereign immunity and because the Koscielaks and the Subrogated Plaintiffs failed to

[1] The Koscielaks joined the United States Department of Health and Human Services (Medicare Part A), Wisconsin Physicians Service Insurance Corporation (Medicare Part B), and United Healthcare Services, Inc. (collectively, the "Subrogated Plaintiffs") asserting that each of the Subrogated Plaintiffs may have made payments on behalf of Mr. Koscielak for medical expenses, and thus, may have or claim a subrogation interest in the suit. (R.1:5). On June 9, 2010, United Healthcare Services, Inc. filed an Answer, Cross-Claim and Claim asserting a right of subrogation against the Koscielaks, the Tribe, and FAIG. (R.6). On June 30, 2010, the Centers for Medicare & Medicaid ("CMS"), as the real party in interest for the United States Department of Health and Human Services, filed a Statement of Law Regarding Medicare's Right to Reimbursement. (R.11). CMS did not assert any claims against the Tribe or FAIG.

state a claim against FAIG upon which relief could be granted. (R.15, 16). Specifically, the Tribe and FAIG argued that at the time of the incident giving rise to the Koscielaks' claims, the Tribe was (and remains) a federally recognized Indian tribe, immune from suit for money damages. (R.16:5-7).

The Pine Hills facility where Mr. Koscielak allegedly fell is a subordinate economic enterprise of the Tribe, owned, controlled and funded by the Tribe, for the economic benefit of the Tribal government, Tribal programs and Tribal members. (R.16:7-11). As such, Pine Hills is -- as Plaintiffs expressly acknowledge and affirmatively allege in their Complaint -- the Tribe. (R.1:4). Accordingly, the Respondents argued that Tribe's inherent sovereign immunity extends to Pine Hills. (R.16:7-11). That sovereign immunity

has not been waived. (R.16:4). Thus, the claims of the Koscielaks (and the Subrogated Plaintiffs' derivative claims against the Tribe) are barred by the doctrine of tribal sovereign immunity.

In their Motion to Dismiss, the Respondents further argued that the claims of the Koscielaks (and the Subrogated Plaintiffs) against FAIG fail because Wisconsin law does not recognize a direct cause of action against a liability insurance carrier where, as here, the insured is immune from suit, and where the direct action concerns an insurance policy which was neither issued nor delivered in Wisconsin. (R.16:15-19). Because the claims against the Tribe are barred by the doctrine of tribal sovereign immunity, and because this case concerns a non-Wisconsin insurance policy, Respondents

asserted that the purported direct action against FAIG failed as a matter of law. (Id.).

The Koscielaks conducted extensive written discovery on issues related to Respondents' Motion and thereafter filed a Brief in Opposition to the Motion to Dismiss on September 16, 2010. (R.24).[2] None of the Subrogated Plaintiffs filed oppositions to the Motion to Dismiss. The Respondents filed their Reply in Support of the Motion to Dismiss on October 7, 2010. (R.26).

The Circuit Court heard oral argument on the Motion to Dismiss on January 6, 2011. (R.31). At the hearing, the Circuit Court concluded that the Tribe is immune from suit and that its immunity extended to Pine Hills as an arm of the

[2] Counsel for the parties stipulated that Koscielaks would be permitted to conduct any discovery they deemed necessary to permit them to respond to the Motion to Dismiss prior to the date their Response was due. (R.23:1).

Tribe. (R.31:27-28). The Circuit Court further concluded that because the Tribe is immune from suit, the Koscielaks were barred from pursuing a direct action against the Tribe's insurer, FAIG. (R.31:28).

Following the hearing, the Koscielaks and the Respondents separately submitted proposed orders of dismissal. (R.29A, 29B). On January 26, 2011, finding no conflict in either of the parties' proposed orders with its understanding, the Circuit Court entered both orders. (R.29C, 29 and 30). The Circuit Court's Order of Dismissal included a detailed recitation of those facts which it found were undisputed and the legal principles upon which its decision was based. (R.30). This appeal followed. (R.33).

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW

Whether the Circuit Court properly granted summary judgment in favor of the Tribe and FAIG is a question of law that this Court reviews *de novo*, applying the same standards used by the Circuit Court. Olson v. Farrar, 2010 WI App 165, ¶6, 330 Wis.2d 611, 618, 794 N.W.2d 245, 249 (Ct.App. 2010). Where, as here, the material facts are undisputed and demonstrate that a party is entitled to judgment as a matter of law, the Circuit Court's decision must be affirmed.

II. THE CIRCUIT COURT CORRECTLY DISMISSED THE CLAIMS AGAINST THE TRIBE AND ITS SUBORDINATE ECONOMIC ORGANIZATION, PINE HILLS

In granting Respondents' Motion to Dismiss, the Circuit Court concluded that: (1) the Tribe is possessed of sovereign immunity; (2) the Tribe's sovereign immunity

extends to its subordinate economic organization, Pine Hills; (3) there has been no waiver of the Tribe's sovereign immunity by the Tribe, or abrogation of the Tribe's immunity by Congress, applicable to the claims of the Koscielaks or the Subrogated Plaintiffs; and (4) sovereign immunity bars the claims of the Koscielaks and the Subrogated Plaintiffs. (R.30:6-7). Nothing in the Koscielaks' Brief on Appeal or the Record on Appeal casts any doubt upon the correctness of the Circuit Court's decision. Accordingly, that decision should be affirmed in its entirety.

A. The Tribe's Inherent Sovereignty Includes Immunity From Suit for Money Damages

The Tribe "is a federally-recognized Indian Tribe organized under the Indian Reorganization Act of 1934, 48 Stat. 984 (1934)[.]" Louis v. Stockbridge-Munsee Community, No. 08-C-558, 2008 WL 4282589 *1 (E.D. Wis.

Sept. 16, 2008); (see also R.16:23). As such, the Tribe enjoys sovereign immunity from suit absent a clear waiver by the Tribe or congressional abrogation. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991); Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877, 890 (1986); see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978). The Tribe's sovereign immunity extends to tribal commercial and governmental activities both on and off the Tribe's reservation, Kiowa Tribe v. Manufacturing Technologies, Inc., 523 U.S. 751, 754-55, 760 (1998); see also Three Affiliated Tribes, 476 U.S. at 890-91; Puyallup Tribe v. Department of Game, 433 U.S. 165, 172-73 (1977); Louis, 2008 WL 4282589 *2, and operates to bar claims by both Indians and non-Indians alike. See C&B Investments v.

Wisconsin Winnebago Health Dept., 198 Wis.2d 105, 108, 542 N.W.2d 168, 169 (Ct.App. 1995) ("It is well settled that Native American tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers."). This Court has held that an Indian tribe's sovereign immunity is "beyond dispute." McNally CPA's & Consultants, S.C. v. DJ Hosts, Inc., 2004 WI App 221, ¶8, 277 Wis.2d 801, 807, 692 N.W.2d 247, 250.

On appeal, the Koscielaks do not dispute that the Tribe is a sovereign federally recognized Indian Tribe. Nonetheless, the Koscielaks contend that the Tribe's sovereign immunity should not operate to bar suit against the Tribe in this instance because this action involves a state tort claim not arising out of a contract with the Tribe. The Koscielaks' position is both factually and legally flawed.

The Koscielaks cannot cite a single case expressly supporting the notion that the tribal sovereign immunity doctrine applies to bar all suits for money damages except for state tort claims. Instead, the Koscielaks argue that, although the United States Supreme Court has never held the doctrine of sovereign immunity does not apply to state tort claims, it has never explicitly extended the doctrine to state tort claims either. Stated differently, the Koscielaks contend that because sovereign immunity has never been "granted" to tribes in the context of state tort claims, the doctrine should not apply in this case.

The Koscielaks' theory that sovereign immunity must be "granted" before it may apply completely turns the doctrine on its head. Instead of flowing from a tribe's inherent sovereignty, and only subject to diminution by an

express waiver or congressional abrogation, the Koscielaks would have this Court believe the existence of sovereign immunity depends on an affirmative grant of such immunity by the United States Supreme Court. Respectfully, this is not the law.

This Court has previously recognized that Indian tribes possess common law immunity from suit. Landreman v. Martin, 191 Wis.2d 787, 801, 530 N.W.2d 62, 67 (Ct.App. 1995). That immunity is an inherent attribute of an Indian tribe's status as a domestic dependent sovereign. Potawatomi, 498 U.S. at 509. That immunity is not conferred or granted and as the United States Supreme Court has stated, "an Indian tribe is not subject to suit in a state court ... unless 'Congress has authorized the suit or the tribe has waived its immunity.'" C & L Enters, Inc. v. Citizen Band Potawatomi

Indian Tribe, 532 U.S. 411, 414 (2001) (quoting Kiowa, 523 U.S. at 754).

In this case, it does not matter that the Koscielaks' claims against the Tribe are for personal injuries arising under state law. As this Court has observed, "[t]he United States Supreme Court recognizes a deeply-rooted policy of allowing Indians to be free from State jurisdiction and control." Landreman, 191 Wis.2d at 803 (citing McClanahan v. State Tax Comm'n, 411 U.S. 164, 168 (1973)). Moreover, "[t]ribal immunity is a matter of federal law and is not subject to diminution by the States." Kiowa, 523 U.S. at 756. Consequently, that the Koscielaks' claims might otherwise be actionable under Wisconsin law does not permit state courts to disregard immunity that exists pursuant to federal law.

Similarly, it is of no consequence that the Koscielaks' claims sound in tort. The United States Supreme Court has specifically addressed the Koscielaks' contention that application of tribal sovereign immunity is unfair to tort victims. In Kiowa, the Supreme Court conceded "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." Kiowa, 523 U.S. at 758 (emphasis added). Despite that observation, the United States Supreme Court nonetheless refused to limit the application of the doctrine of tribal sovereign immunity. The Kiowa Court reasoned that "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests" and that "[t]he capacity of the Legislative Branch to address the issue [of tribal immunity] by

comprehensive legislation counsels some caution by us in this area." Id. at 759.[3]

The Koscielaks do not cite any controlling authority for the proposition that the doctrine of tribal sovereign immunity does not apply in the case of state law tort claims. Indeed, courts from other jurisdictions that have considered the issue concluded that a tribe's sovereign immunity extends to tort suits. See, e.g., Sevastian v. Sevastian, 808 A.2d 1180, 1183 (Conn. App. 2002) (affirming dismissal of tort claim against Indian tribe concerning incident which occurred on

[3] In direct response to Kiowa, two bills were introduced that would have abrogated tribal immunity for most types of lawsuits. Those bills, the American Indian Contract Enforcement Act, S. 2299, 105th Cong. §2299 (1998) (conferring district court jurisdiction and waiving sovereign immunity for contract claims against tribes after noting that "the assertion of tribal sovereign immunity serves as a deterrent to economic development"), and the American Indian Tort Liability Insurance Act, S. 2302, 105th Cong., §2302 (1998) (waiving sovereign immunity for claims by tort victims in order to protect "'those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter.'") (quoting Kiowa, 523 U.S. at 758), failed to pass and did not become law.

property owned by the tribe, but located outside of the tribe's reservation); Redding Rancheria v. Shasta County Super. Ct., 88 Cal. App. 4th 384, 386 (Cal. App. 3 Dist. 2001) (holding "an Indian tribe and its commercial entity are immune from an ordinary tort suit arising outside of Indian country"); Long v. Chemehuevi Indian Reservation, 115 Cal. App. 3d 853, 858 (Cal. App. 4 Dist. 1981)(holding sovereign immunity barred personal injury suit arising from boating accident at a marina owned and operated by a tribe as a profit-seeking operation); Morgan v. Colorado River Indian Tribe, 443 P.2d 421, 424 (Ariz. 1968)(immunity barred suit for accident at a marina operated as tribal enterprise outside reservation boundaries).

Simply put, "[t]ort suits are not excepted from the general immunity rule." Rancheria, 88 Cal. App. 4th at 389.

Regardless of the claimed inequities, to date, Congress has not abrogated tribal sovereign immunity in private negligence actions or actions to enforce Wisconsin's Safe Place Act. Therefore, contrary to the Koscielaks' contention, Kiowa and its progeny support, rather than undermine, the Circuit Court's grant of summary judgment in this case.

In the present case, the Circuit Court concluded that "Indian tribes ... possess inherent sovereign immunity that prevents them from being sued without their consent," and that as a "sovereign federally recognized tribe," the Tribe "possesses the immunity from suit traditionally enjoyed by sovereign powers." (R.30:6). In order for the Koscielaks to demonstrate that the Tribe does not enjoy sovereign immunity in this context, it must show the Tribe expressly waived its immunity or Congress abrogated it. Here, the Circuit Court

concluded, based upon the undisputed evidence, the Tribe had not waived its immunity from suit, nor had the immunity been abrogated by Congress. (R.30:6). The Koscielaks do not challenge this conclusion of law on appeal, and have thus waived a challenge to the Circuit Court's finding as a result. Atkinson v. Everbrite, Inc., 224 Wis.2d 724, 730 n.2, 592 N.W.2d 299, 302 n.2 (Ct.App. 1999)("Issues not briefed on appeal are deemed waived.").[4]

B. The Tribe's Sovereign Immunity Extends to Pine Hills

1. *The Subordinate Economic Organization Doctrine*

"The sovereign immunity of [a] tribe extends to its business arms." C&B Investments, 198 Wis.2d at 108 (citing

[4] To the extent the Court wishes to examine the issues of waiver and abrogation, they are examined thoroughly in Defendants' Reply Brief in Support of Their Motion to Dismiss which is incorporated herein by reference as if again fully restated. (R.26).

Weeks Constr., Inc. v. Oglala Sioux Housing Auth., 797 F.2d 668, 670-71 (8th Cir. 1986)); see also In re Greene, 980 F.2d 590, 592-98 (9th Cir. 1992); MacArthur v. San Juan County, 391 F. Supp.2d 895, 1042 (D. Utah 2005)(Tribal sovereign immunity "embraces tribal agencies ... and subordinate economic organizations.")(citation omitted); World Touch Gaming, Inc. v. Massena Mgmt., L.L.C., 117 F. Supp.2d 271, 275 (N.D.N.Y. 2000); James Joseph Morrison Consultants, Inc. v. Sault Ste. Marie Tribe of Chippewa Indians, 1998 WL 1031492 *2 (W.D. Mich. Aug. 6, 1998); Burnham v. Pequot Pharmaceutical Network, 1998 WL 345463 *3-4 (Conn. Super. Ct. June 19, 1998); Gavle v. Little Six, Inc., 555 N.W.2d 284, 292-96 (Minn. 1996); S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Cmty., 674 P.2d 1376, 1382 (Ariz. App. 1983). Stated differently, "an action against a

tribal enterprise is, in essence, an action against the tribe itself." Barker v. Menominee Nation Casino, 897 F. Supp. 389, 393-94 (E.D. Wis. 1995)(holding that a tribal gaming commission and casino were immune from suit). Under this "subordinate economic organization" doctrine, tribes are allowed to conduct their economic affairs through subordinate entities without fear of unintended waiver of sovereign immunity. See White Mountain Apache Indian Tribe v. Shelley, 480 P.2d 654 (Ariz. 1971).

2. *The Koscielaks' Reliance on McNally is Misplaced*

On the undisputed material facts before it, the Circuit Court concluded Pine Hills is a subordinate economic arm of the Tribe and, as a matter of law, is entitled to the benefit of the Tribe's sovereign immunity. (R.30:6). On appeal, the Koscielaks do not dispute that an economic arm of the Tribe

is entitled to the same immunity as the Tribe itself. (See Appellant's Brief at 2). ("If [Pine Hills] 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."). Rather, the Koscielaks argue that Pine Hills is not an arm of the Tribe. This argument is based entirely upon a misconstruction of this Court's decision in McNally.

In McNally, an Indian tribe purchased 100% of the shares of an existing, for-profit Wisconsin corporation. Thereafter, an accounting firm sued the corporation for money owed. Id. at 803. The Trial Court dismissed the accounting firm's action based on tribal sovereign immunity; specifically, that the Indian tribe's immunity from suit extended to the corporation. The accounting firm appealed.

On appeal, this Court stated that "the narrow question we address is whether tribal immunity is conferred on a corporation when all of the shares of that corporation are purchased by an Indian tribe." Id. at 806. The McNally Court concluded "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. (emphasis added). The Court reasoned that if a corporation whose shares were purchased by a tribe were immune from suit, all pre-existing creditors of the corporation would be left without a remedy without having had an opportunity to seek a waiver. Id. at 809. The Court further reasoned that the traditional policies of autonomy and economic development advanced by treating tribal enterprises

as part of the tribe for immunity purposes are not furthered when a tribe purchases stock in an existing corporation, because where the tribe purchases stock of an existing corporation it limits its risk to its investment in the stock. Id. at 809-11. The Court opined that purchasing stock in an ongoing for-profit business might be deemed an activity too far removed from tribal interests to be seen as an extension of the tribe itself. Id. at 812 Finally, the Court noted under the specific facts of McNally, there was no termination of the corporate existence prior to its shares being acquired by the Indian tribe such that the corporation could be deemed created by the tribe. Id. at 813.

The lynch pin of the Court's decision in McNally is the purchase, by an Indian tribe, of all of the stock of an existing for-profit business. That critical fact is glaringly

absent here. In the present case, the Tribe did not purchase the stock of any corporation. (R.26:54). Rather, the Tribe purchased real property, improvements and equipment from Fritz Shulz, Ltd. (R.26:53). The corporation from whom the Koscielaks claimed the Tribe acquired Pine Hills had, in fact, been administratively dissolved several months before the Tribe's purchase of those assets. (R.26:61-62). After purchasing the property, Pine Hills was chartered by the Tribe, not as a corporation, but as a subordinate economic organization of the Tribe. (R.26:38-39, 54, 70-72). Simply put, Pine Hills is not a corporation nor is it the continuation of a for-profit corporation. (R.26:54-55).[5] The undisputed

[5] The Koscielaks claim for the first time on appeal that the Tribe referred to itself as a corporation in a Complaint for Declaratory Relief seeking to establish the position of Golf Club Manager as a "specialty occupation" under 8 U.S.C. §1101(a)(15)(H)(i)(b). (See Appellants' Brief at 12, 21). This argument was not presented in the Circuit Court and should not be considered on appeal. Gruber v. Village of North Fond du Lac, 2003 WI

evidence before the Circuit Court[6] established conclusively that since purchasing the property more than fifteen (15) years ago, the Tribe has managed and controlled Pine Hills

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App 217, ¶27, 267 Wis.2d 368, 384, 671 N.W.2d 692. Moreover, the passing reference to the Tribe as a "corporation" in that unrelated case does not create a genuine issue of material fact. Tribal subordinate economic organizations which are incorporated are nonetheless entitled to the benefit of tribal sovereign immunity. See e.g., Trudgeon v. Fantasy Springs Casino, 84 Cal. Rptr.2d 65, 71 Cal. App. 4th 632, 635 (1999); Gavle, 555 N.W.2d at 287; In re Ransom v. St. Regis Mohawk Education & Community Fund, Inc., 658 N.E.2d 989, 991, 995 (N.Y. 1985). Additionally, the issue addressed by McNally was not whether a subordinate economic organization can use the corporate form, but rather, when an Indian tribe purchased all of the stock of an existing, for-profit corporation, does that existing corporation acquire the tribe's sovereign immunity from suit.

[6] The Koscielaks contend that "[a]ffidavits that state ultimate facts in a conclusory fashion ... are to be disregarded." (Appellants' Brief at 13). However, affidavits containing evidentiary facts of which the affiant has personal knowledge will be evaluated by the court and, if undisputed, can form the basis of a grant of summary judgment. See Town of Delafield v. Sharpley, 212 Wis.2d 332, 341, 568 N.W. 779 (Ct.App. 1997) ("[F]ailure to oppose ... affidavits signal[s] to the trial court that the evidentiary facts, as outlined in the ... affidavit, are undisputed[] [and] [f]ull summary judgment ... [is] appropriate."). Although the Koscielaks were given ample opportunity to conduct discovery on these evidentiary points, and could have attempted to submit contrary affidavits of their own, they opted not to do so. Therefore, the Koscielaks have failed to create an issue of material fact precluding summary judgment.

for the benefit of the Tribe, Tribal programs and Tribal members. (R.26:55). In fact, the building the Koscielaks were visiting on the date of the incident did not even exist at the time the Tribe purchased Pine Hills. (R.26:57). The Tribe built that facility in 1999, some six (6) years after it acquired the Pine Hills property. (Id.). The Koscielaks cannot seriously argue that Pine Hills was the mere continuation of a previously privately-held, for-profit, corporation as was the case in McNally. Therefore, the Court's narrow holding in McNally, which was premised entirely upon an Indian tribe's purchase of all of the stock in an ongoing, for-profit business, has no application in the case at bar.[7]

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[7] The McNally Court, in fact, clearly recognized a distinction between a tribe's purchase of all of the stock in an existing corporation, and a tribe's purchase of assets or property for purposes of deciding whether to

3. *Even If McNally Applies In This Case, Its Reasoning Supports A Finding That Pine Hills Is An Arm Of The Tribe*

Even if this Court concludes McNally is applicable, the Court's reasoning confirms Pine Hills is an economic arm of the tribe entitled to sovereign immunity. The McNally Court clearly recognized that tribal sovereign immunity extends to business enterprises established by an Indian tribe. McNally, 277 Wis.2d at 807. To determine whether a tribe's immunity should be extended to a tribally-owned corporation in that case, the McNally Court identified nine (9) criteria to be considered. Those criteria are as follows:

> (1) Whether the corporation is organized under the tribe's laws or constitution;

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extend tribal immunity to a tribal enterprise. McNally, 277 Wis.2d at 814 n.7.

(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. at 810. Consideration of these factors clearly supports the Circuit Court's decision that the Tribe's immunity from suit extends to Pine Hills.

(a) Pine Hills is Organized Under the Tribe's Constitution

The Circuit Court found that Pine Hills was chartered by the Tribal Council pursuant to its authority under the Tribal Constitution. (R.30:4). Unlike the corporation at issue in McNally which was organized as a for-profit Wisconsin corporation, Pine Hills was chartered by the Tribal Council pursuant to the Tribe's Constitution. (R.26:38-39, 53-56, 63-72). The Koscielaks, in fact, concede this factor is satisfied. (See Appellant's Brief at 28).

(b) Pine Hill's Purposes Are Similar to and Serve the Tribe

The Circuit Court concluded Pine Hills "serves a governmental purpose" and "is solely owned and operated by the Tribe for the economic benefit of the Tribal government, Tribal programs, and Tribal members." (R.30:4). Pine Hills is expressly identified in the Charter as "a governmental enterprise of the Tribe" and has been delegated "the right to exercise certain governmental functions of the Tribe, including policy making authority for the purposes of operating a safe and productive business, consistent with all applicable laws." (R.26:70). Pine Hills "is solely owned and operated by the [Tribe] for the economic benefit of the Tribal government, tribal programs, and tribal members[.]" (R.26:38-39). Pine Hills is critical to the Tribe's diversification efforts and its ability to raise the revenue

necessary to fund its Tribal programs and provide for its members. (R.26:56). Thus, as the Circuit Court concluded, Pine Hills is clearly designed to further the economic interests of the Tribe as opposed to private, individual investors. (Id.); see also Gavle, 555 N.W.2d at 294; Barker, 897 F. Supp. at 393.

(c) Pine Hill's Governing Body Is Comprised Solely of Tribal Officials

While the Tribe employs a General Manager to oversee the day-to-day operations of Pine Hills, Pine Hills' governing body (like that of the Tribe) is the Tribal Council. (R.26:55-56). In fact, Pine Hills' Charter expressly reserves the right of the Tribal Council "to review the actions of [Pine Hills]." (R.26:56, 70). Each member of the Tribal Council is also a member of the Tribe. (R.26:55).

(d) The Tribal Council Has Authority to Dismiss Employees of Pine Hills

Unlike the corporation at issue in McNally, Pine Hills does not have corporate officers. Rather, the day-to-day operations of Pine Hills are conducted by Tribal employees, including the Pine Hills General Manager. (R.26:56). The Tribal Council has the power to dismiss those employees including the Pine Hills General Manager. (Id.). The Circuit Court so found (R.30:4), and the Koscielaks concede this factor is satisfied. (See Appellant's Brief at 28).

(e) Any Revenue or Profits Pine Hills Generates Is That of The Tribe

The revenue and profits, if any, generated by Pine Hills are not retained by Pine Hills. Rather, they are placed in the Tribe's General Fund to be allocated to the Tribe's health, educational and social programs by the Tribal Council.

(R.26:55). Thus, unlike business corporations organized under the corporate laws of Wisconsin, the ownership of which is typically vested in private citizens for their own personal benefit, the revenue generated by Pine Hills is that of the Tribe. See Gavle, 555 N.W.2d at 295. No private citizen has any claim to the revenue or profits of Pine Hills. (R.26:57). The Circuit Court agreed, finding that "Pine Hills ... has no owners or investors other than the Tribe, and has no existence separate and apart from the Tribe." (R.30:4). The Koscielaks have simply offered no evidence to the contrary.

(f) Suits Against Pine Hills Affect the Tribe's Fiscal Resources

The Circuit Court found that Pine Hills "has no existence separate and apart from the Tribe." (R.30:4). Clearly, suits against Pine Hills affect the Tribe's fiscal resources. Unlike the corporation at issue in McNally, the

Tribe's risk is not limited to its investment in the stock of Pine Hills because Pine Hills does not issue stock. Moreover, Pine Hills owns no assets of its own. Rather, the assets of Pine Hills are owned by the Tribe and specifically assigned to Pine Hills, or acquired by the Tribe in Pine Hills' name. (R.26:56, 71). Thus, any suit that might potentially deplete Pine Hills' assets will necessarily deplete the Tribe's resources.

(g) Pine Hills Has Authority to Bind or Obligate the Funds of the Tribe

As further evidence of the close link between Pine Hills and the Tribe, the General Manager of Pine Hills has been delegated authority to bind or obligate the funds of the Tribe. Specifically, the Tribal Council has delegated contract signing authority to the Pine Hills General Manager. (R.26:56, 70). The Tribal Council reserved for itself only the

authority to enter into contracts which: (i) contain a waiver of sovereign immunity; (ii) involve the sale, lease or disposition of Tribal property; and (iii) or concern goods or services which exceed Pine Hills' Tribal Council-approved budget. (R.26:56, 70).

(h) Pine Hills Was Established to Enhance the Health, Education and Welfare of the Tribe

The Circuit Court easily concluded that "Pine Hills' purpose is to provide economic diversity to fund Tribal programs and provide health, education and welfare services for Tribal members[.]" (R.30:4). Pine Hills was clearly established to enhance the health, education and welfare of the Tribe. Pine Hills "is solely owned and operated by the [Tribe] for the economic benefit of the Tribal government, tribal programs, and tribal members[.]" (R.26:38-39). As the

Record on Appeal plainly demonstrates, Pine Hills is critical to the Tribe's diversification efforts and its ability to raise the revenue necessary to fund its Tribal programs and provide for its members. (R.26:55). The profits, if any, that Pine Hills generates are deposited into the Tribe's General Fund to be allocated by the Tribal Council to fund the Tribe's operations including its health and social services programs. (R.26:57). Thus, Pine Hills is designed to further the economic interests of the Tribe. (R.26:55).

(i) Pine Hills is a Tribal Governmental Agency

Unlike the corporation at issue in McNally, Pine Hills is expressly identified in its Charter as "a governmental enterprise of the Tribe" and has been delegated "the right to exercise certain governmental functions of the Tribe, including policy making authority for the purposes of

operating a safe and productive business, consistent with all applicable laws." (R.26:70). Thus, the Koscielaks cannot seriously argue that Pine Hills is analogous to "a commercial enterprise instituted for the purpose of generating profits for its private owners." McNally, 277 Wis.2d at 810. Based upon the undisputed evidence before it, the Circuit Court concluded as much, finding that Pine Hills "serves a governmental purpose" and "has no existence separate and apart from the Tribe." (R.30:4).

In sum, the Circuit Court found that each of the factors identified in McNally to determine whether a Tribal enterprise is entitled to the benefit of the Tribe's immunity are satisfied in this case. The evidence offered in support of each of those factors is further undisputed. The Tribe is undoubtedly authorized to charter and operate businesses in

the form of subordinate enterprises for economic purposes. The Tribal Council did, in fact, charter Pine Hills as a subordinate organization and economic enterprise of the Tribe. That Charter was approved by the United States Department of the Interior on April 16, 1996. Pine Hills is funded and managed by the Tribe for the economic benefit of the Tribal government, Tribal programs, and Tribal members. As the Circuit Court correctly found, Pine Hills was clearly organized for a governmental purpose, is closely linked to the Tribe, and Tribal autonomy would be served by extension of the Tribe's immunity to Pine Hills. The contrary position urged by the Koscielaks on appeal finds no support in law or fact and should be summarily rejected.

C. The Circuit Court's Application of Tribal Sovereign Immunity to Bar the Koscielaks' Claims Against the Tribe, Including Pine Hills, Does Not Violate the Wisconsin Constitution

The Koscielaks argue that application of the Tribe's sovereign immunity to bar their claims violates Article I, §9 of the Wisconsin Constitution. That section provides that "every 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 ..." Id. The Koscielaks are incorrect.

At the outset, the Koscielaks' argument fails to recognize that "tribal immunity is a matter of federal law and is not subject to diminution by the States." Kiowa, 523 U.S. at 756. Accordingly, the relationship between Congress and Indian tribes is central to the determination of whether there has been an abrogation of tribal sovereign immunity for private tort actions in Wisconsin state courts by non-Indians

against Indian tribes. For this reason, it is of no consequence that Article I, §9 of the Wisconsin Constitution purports to guarantee every person a remedy for every wrong. A state's constitutional provisions cannot accomplish what is expressly a Congressional prerogative. Id.; see also Bryan v. Itasca County, 426 U.S. 373, 376 n.2 (1976).

Nonetheless, the Koscielaks urge this Court to disregard controlling federal law and fashion a remedy for the alleged injuries in circumvention of the Tribe's immunity and in reliance upon Dry Creek Lodge v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980). However, Dry Creek is a federal case of dubious precedential value[8] not involving

[8] The Tenth Circuit has stated that Dry Creek has "minimal precedential value and in the twenty-six years since Dry Creek, with the exception of Dry Creek itself, we have never found the rule to apply." Walton v. Tesuque Pueblo, 443 F.3d 1274, 1278 (10th Cir. 2006); see also Nakai v. Ho-Chunk Nation, No. 03-C-0331-C, 2004 WL 1085214 *2-3 (W.D.

Wisconsin law, but concerning the jurisdiction of federal courts to hear claims against Indian tribes under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §1302, where the dispute involves a non-Indian, does not involve internal tribal affairs, and there is no tribal forum to hear the dispute. The Koscielaks' reliance on Dry Creek is misplaced.

Dry Creek does not stand for the proposition that a plaintiff may avoid a sovereign immunity challenge in a personal injury suit for money damages. Rather, Dry Creek merely provides plaintiffs with an alternate forum for adjudication of ICRA claims assuming certain conditions are met. See Ordinance 59 Ass'n v. United States Dept. of Interior Secretary, 163 F.3d 1150, 1156 (10th Cir. 1998).

Wis. May 7, 2004) (describing Dry Creek as an "anomaly" and questioning whether Dry Creek remains good law).

Nowhere in their Brief do the Koscielaks suggest that the Tribe violated the ICRA.

Moreover, the Dry Creek exception only confers jurisdiction to hear ICRA claims upon federal courts. Obviously, Appellants did not commence this action in federal court and cannot cite any authority for the proposition that Dry Creek confers subject matter jurisdiction over claims arising under the ICRA to Wisconsin state courts.

Additionally, even were Dry Creek applicable in this forum, the Koscielaks have not demonstrated that their claims meet its stringent requirements. At a minimum, a party seeking to invoke federal jurisdiction over an ICRA claim must demonstrate the absence of a tribal forum. "[T]he tribal remedy must be shown to be nonexistent by an actual attempt before a federal court will have jurisdiction." White v.

Pueblo of San Juan, 728 F.2d 1307, 1313 (10th Cir. 1984) (emphasis added). Although the Koscielaks' claims against the Tribe would also be barred in Tribal court, a tribal forum does exist. (R.26:127). Nevertheless, the Koscielaks have made no actual attempt to invoke the Tribal court's jurisdiction.

Because the Koscielaks have made no claim against the Tribe for alleged violations of the ICRA, because the ICRA did not abrogate the Tribe's immunity from suit, and because the Koscielaks have failed to satisfy the Dry Creek requirements, the Circuit Court's holding was correct as a matter of law and should be affirmed on appeal.

III. THE KOSCIELAKS CANNOT MAINTAIN A DIRECT ACTION AGAINST FAIG

The Circuit Court found as a matter of law that the Koscielaks had failed to assert a viable cause of action against

FAIG because an insured's immunity from suit precludes an action against its insurer, and because direct actions are only available against insurers issuing or delivering insurance policies in the State of Wisconsin. (R.30:7). The Koscielaks continue to argue on appeal that even though the Tribe is not and will never be liable, they may nonetheless pursue a direct action against FAIG. These arguments must fail.

A. A Direct Action Against FAIG Cannot Be Maintained In The Absence Of A Viable Claim Against The Tribe

A direct action in Wisconsin involves both substantive and procedural components. The substantive component provides:

> Any bond or policy of insurance covering liability to others for negligence makes the insurer liable, up to the amounts stated in the bond or policy, to the persons entitled to recover against the insured for the death of any person or for injury to persons or property, irrespective of whether the liability is presently established or is contingent and to become fixed or certain by final judgment against the insured.

Wis. Stat. §632.24 (emphasis added). The procedural component, set forth in §803.04(2)(a), reads in relevant part:

> In any action for damage caused by negligence, any insurer which has an interest in the outcome of such controversy adverse to the plaintiff or any of the parties to such controversy, or which by its policy of insurance assumes or reserves the right to control the prosecution, defense or settlement of the claim or action, or which by its policy agrees to prosecute or defend the action brought by plaintiff or any of the parties to such action, or agrees to engage counsel to prosecute or defend said action or agrees to pay the costs of such litigation, is by this section made a proper party defendant in any action brought by plaintiff in this state on account of any claim against the insured. If the policy of insurance was issued or delivered outside this state, the insurer is by this paragraph made a proper party defendant only if the accident, injury or negligence occurred in this state.

Wis. Stat. §803.04(2)(a) (emphasis added).

It is clear that Wisconsin's direct action statutory scheme imposes no liability on the insurer for damage or injuries that would not otherwise be covered by the policy. See Verhein v. South Bend Lathe, Inc., 598 F.2d 1061, 1064 (7th Cir. 1979)(applying Wisconsin law). In Engebretson v.

Humana Ins. Co., No. 03-C-0553, 2006 WL 2871824 (E.D. Wis. Oct. 6, 2006), the Court examined the language of §803.04(2)(a) to determine the viability of a direct action against an insurer when the insured is an entity that has lost its legal status. In this regard, §803.04(2)(a) states that an insurer is "made a proper party defendant in any action brought by plaintiff in this state on account of any claim against the insured." Id. at *6 (emphasis original)(quoting Wis. Stat. §803.04(2)(a)). The Court concluded that, "[t]he words 'on account of any claim against the insured' suggest the need for a valid claim against the insured, and the word 'brought' suggests the focus, for determining whether a valid claim is made, is the time when suit against the insured is filed." Id.

The Wisconsin Supreme Court has likewise found it "quite impossible to read into the statutes an intent to create a liability on the part of the insurance carrier completely disassociated from the liability of the insured." Wiechmann v. Huber, 211 Wis. 333, 336, 248 N.W. 112, 113 (1933). Thus, in the absence of a viable claim against the Tribe, the Koscielaks' direct action against FAIG fails as a matter of law. See Wild v. Subscription Plus, Inc., 292 F.3d 526, 532 (7th Cir. 2002)(holding that where insureds were properly dismissed for lack of personal jurisdiction, "out with them went their two insurers."); Barnes v. Black, No. 03-C-703-C, 2004 WL 1253294 *1 (W.D. Wis. June 4, 2004) (same); Kenison v. Wellington Ins. Co., 218 Wis.2d 700, 711, 582 N.W.2d 69, 73 (Ct.App. 1998)(holding where plaintiff's claims against insureds were dismissed for lack of timely

service such that insureds "are not parties to the case" plaintiff could not maintain a direct action against the insurer).

As set forth above, the claims against the Tribe are barred by the Tribe's sovereign immunity from suit. Thus, the Tribe is not, and has never been, a proper party to the case. As the Circuit Court correctly held, the absence of a viable claim against the Tribe also bars the Koscielaks' direct action against the Tribe's insurer, FAIG. See Gonzalez v. City of Franklin, 137 Wis.2d 109, 126, 403 N.W.2d 747, 754 (1987)("Liability under the direct action statute is wholly predicated upon the liability of the insured. Unless the insured is liable, the insurer cannot be held liable."). Consequently, the Circuit Court's holding with regard to

Appellants' direct action against FAIG was correct and should be affirmed on appeal.

Nonetheless, the Koscielaks briefly suggest, without citing any supporting authority, that pursuant to a gaming compact entered into between the Tribe and the State of Wisconsin, the Tribe has waived its sovereign immunity which permits the Koscielaks to pursue an action against the Tribe's insurer, FAIG. This argument must be rejected. As the undisputed evidence establishes, Pine Hills is not a gaming facility to which any waiver contained in a gaming compact would apply. (R.26:58).

Pursuant to the Indian Gaming Regulatory Act ("IGRA"), the Tribe entered into a Gaming Compact (the "Compact") with the State of Wisconsin. See 25 U.S.C. §2701 et seq.; Wis. Stat. §14.035. By its express terms, the

Compact governs the terms and conditions by which the Tribe may conduct Class III gaming on Tribal lands. (R.26:77). The Compact covers only Class III gaming facilities on Tribal lands within the State of Wisconsin. (R.26:77-78); Wisconsin v. Stockbridge-Munsee Community, 554 F.3d 657, 659 (7th Cir. 2009). Under the terms of the Compact, the Tribe agreed to maintain public liability insurance with certain limits. (R.26:109). The Tribe did not waive its sovereign immunity from suit by tort claimants in the Compact. (R.26:109).

Moreover, contrary to the Koscielaks' allegations, the Tribe has never operated or maintained any slot machines or other gaming devices at Pine Hills and has never claimed that the Pine Hills was a Class III gaming facility covered by its Gaming Compact with the State of Wisconsin. (R.26:57). Therefore, even if the Compact contains a limited waiver of

sovereign immunity, such a waiver would not extend to the Koscielaks' claims for injuries allegedly sustained at Pine Hills because it is not a Class III gaming facility to which the Compact applies.

The Koscielaks also assert on appeal that at the time of the occurrence giving rise to this litigation, the Tribe was claiming, in unrelated legal proceedings, that Pine Hills was a gaming entity under its Compact with the State of Wisconsin. (See Appellants' Brief at 42). The Koscielaks' assertions are in error as reference to the undisputed facts makes clear.

The property at issue in Wisconsin v. Stockbridge-Munsee Community, 554 F. 3d 657 (7th Cir. 2009), was the former clubhouse for Pine Hills Golf Course. That facility is located approximately one (1) mile from the location where Mr. Koscielak was injured. That facility is also owned and

operated by the Tribe as The Many Trails Banquet Hall albeit under a separate Tribal charter from Pine Hills. (R.26:57).

Moreover, the incident giving rise to this litigation occurred on February 22, 2008. (R.1:7). The Tribe has not operated gaming machines at The Many Trails Banquet Hall since 1999, some 8 years prior to the incident at issue. (R.26:57). The Tribe has never conducted any Class III gaming at the location where Mr. Kosceilak was allegedly injured on February 22, 2008, nor has the Tribe ever claimed that the Pine Hills facility was covered by its Gaming Compact with the State of Wisconsin. (R.26:58).

Because the Koscielaks cannot maintain a viable cause of action against the Tribe, including Pine Hills, by virtue of the Tribe's sovereign immunity, they may not maintain a cause of action against the Tribe's insurer, FAIG, under

Wisconsin's direct action statute. As a result, the Circuit Court's grant of summary judgment on this issue should be affirmed on appeal.

B. The Koscielaks' Direct Action Against FAIG Also Fails Because The Insuring Agreement Was Neither Issued Nor Delivered in Wisconsin

Even if the Koscielaks could theoretically maintain an action against FAIG despite the Tribe's sovereign immunity, it is well established that an insurer may only be liable under Wisconsin's direct action statute if the insurance policy was issued or delivered in Wisconsin. Kenison, 218 Wis.2d at 710. Indeed, Wis. Stat. §631.01 expressly provides that "[t]his chapter and ch. 632 apply to all insurance policies and group certificates delivered or issued for delivery in this state ... ." (emphasis added).

In Kenison, this Court held that "the unambiguous language of §631.01, Stats., limits the application of §632.24, Stats., to insurance policies delivered or issued for delivery in this state." Id. The Kenison Court made clear that the requirement in Wis. Stat. §631.01(1) that the insurance policy be issued for delivery or delivered within Wisconsin is a prerequisite to the applicability of the insurance statutes. Id. at 710. Here, the policy issued by FAIG to the Tribe was neither issued for delivery nor delivered within the state of Wisconsin. The policy was issued by FAIG at its offices in Nebraska for delivery to the Tribe's headquarters on the Tribe's reservation. (R.26:53, 119). The policy was, in fact, delivered to the Tribe at its headquarters on the Tribe's reservation. (R.26:119). Where, as here, the policy was not issued or delivered in Wisconsin, the Koscielaks simply

cannot avail themselves of Wisconsin's direct action statute. Casper v. American Int'l. South Ins. Co., 2010 WI App 2, ¶29, 323 Wis.2d 80, 103, 779 N.W.2d 444, 456.

During the relevant time, FAIG insured the Tribe pursuant to a commercial general liability insurance policy. (R.26:119). That policy was issued by FAIG at its principal place of business in Grand Island, Nebraska, not in Wisconsin. (Id.)[9] Moreover, the policy was delivered to the Tribe at its address on the Stockbridge-Munsee Reservation. (Id.). The Tribe's official address on Stockbridge-Munsee

[9] In their Complaint, the Koscielaks alleged that FAIG is licensed to do business in Wisconsin. (R.1:7). However, the undisputed evidence in the Record on Appeal establishes that FAIG is not licensed to do business in Wisconsin. (R.26:119). FAIG is a corporation organized under the laws of the Kaw Nation of Oklahoma and maintains its principal place of business in Grand Island, Nebraska. (Id.). FAIG conducts no business in Wisconsin, owns no property in Wisconsin and has no employees in Wisconsin. (Id.). Instead, FAIG only sells its insurance products to Indian tribes or tribal entities or enterprises. (Id.).

Reservation is not "in Wisconsin" within the meaning of Wisconsin's direct action statute. (R.26:53). Indeed, the Stockbridge-Munsee Reservation and the State of Wisconsin are distinct political communities with their own territorial boundaries notwithstanding that the Tribe's Reservation is physically within the exterior boundaries of the State of Wisconsin. Accordingly, the fact that the FAIG policy was neither issued or delivered in Wisconsin bars a direct action against FAIG as a matter of law. See Casper, 2010 WI App. 2 ¶29; Barnes, 2004 WL 1253294 *1; Kenison, 218 Wis.2d at 711.

The Koscielaks attempt to revive their direct action against FAIG arguing that if the Wisconsin Legislature wanted to exclude from its reach policies delivered on Indian land located within the State of Wisconsin it could have done

so. This argument, however, overlooks the limits of the authority of the Wisconsin Legislature. The Legislature could no more enact laws governing the disposition of insurance policies on the Tribe's reservation than it could legislate regarding policies issued in Washington, D.C. or France. See Bryan, 426 U.S. at 388-89. As the Circuit Court correctly observed, the failure of the Legislature to expressly recognize the reasonable limits of its own jurisdiction does not, despite the Koscielaks' arguments to the contrary, lend that jurisdiction unlimited reach.

C. The Wisconsin Endorsement To The Policy Does Not Extend The Reach Of Wisconsin's Direct Action Statute

Finally, the Koscielaks contend on appeal that the Wisconsin Endorsement issued in conjunction with the policy constitutes FAIG's consent to be subject to Wisconsin's direct action statute. However, the existence of the

Endorsement is irrelevant. The Endorsement does not contain any provision that would expand the limits of coverage beyond the provisions of Wisconsin's direct action law. Indeed, the Endorsement cannot serve to expand the reach of Wisconsin's direct action statute, which extends only to policies issued for delivery or delivered in Wisconsin. See Kenison, 218 Wis.2d at 710. The Koscielaks ignore the simple fact that the policy was not issued or delivered in Wisconsin. The Koscielaks have made no effort to demonstrate how the Endorsement serves to extend the jurisdiction of Wisconsin courts beyond the limits established by the Wisconsin Legislature.

Similarly, the Endorsement does not suffice as FAIG's consent to suit in Wisconsin particularly where, as here, FAIG's insured is not, and will never be, liable for the

Koscielaks' claims. See Wiechmann, 211 Wis. at 336 ("It is quite impossible to read into the statutes an intent to create a liability on the part of the insurance carrier completely dissociated from the liability of the insured. The terms of this policy are as positive as may be to the effect that the liability of the insurer depends upon the liability of the insured."). Because there has been no waiver of sovereign immunity by the Tribe or FAIG and because the Endorsement cannot and does not extend the reach of Wisconsin's direct action statute, the Koscielaks cannot maintain their claims against either FAIG or the Tribe. Accordingly, the Circuit Court's decision should be affirmed in its entirety.

CONCLUSION

Because the Stockbridge-Munsee Community is a federally recognized Indian tribe endowed with immunity

from suit and because that immunity extends to Pine Hills Golf Course & Supper Club, a subordinate economic arm of the Tribe, the Koscielaks' claims against the Tribe fail as a matter of law. Furthermore, the Koscielaks cannot maintain a cause of action against FAIG because its insured, the Tribe, is immune from suit and because it neither delivered nor issued for delivery an insurance policy in the State of Wisconsin. For these reasons, Respondents respectfully request this Court affirm the Circuit Court's grant of summary judgment in their favor in its entirety.

Respectfully submitted this 1st day of June, 2011.

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this Brief is 8,912 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 1st day of June, 2011, a true and correct copy of the above and foregoing Brief of Defendants-Respondents Stockbridge-Munsee Community d/b/a Pine Hills Golf Course & Supper Club and First Americans Insurance Group, Inc. was sent via Federal Express:

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