IN THE SUPREME COURT OF ALABAMA

CASE NO. 1130168

AMADA HARRISON, as mother and
next of friend of Benjamin C. Harrison

Appellant,

vs.

PCI GAMING d/b/a CREEK ENTERTAINMENT CENTER, et al.,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF ESCAMBIA COUNTY, ALABAMA
CIVIL ACTION NO. CV-13-900081

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SUMMARY OF THE ARGUMENT

On May 23, 2004, in *Ex parte Poarch Band of Creek Indians and PCI Gaming Authority d/b/a Creek Casino Montgomery*, 2014 WL 2139108 ___ So. 3d ___ (Ala. 2014), this Court upheld a Montgomery County Circuit Court's order denying sovereign immunity in a dram-shop action to Defendants Poarch Band of Creek Indians and PCI Gaming Authority d/b/a Creek Casino Montgomery (hereinafter referred collectively as "PBCI") because they had waived their sovereign immunity when they obtained and renewed their liquor license through the State of Alabama Alcoholic Beverage Control ("ABC") Board. *Id.* at *1. Prior to this decision, no appellate court in the State of Alabama had ever addressed whether Indian tribes in Alabama could waive sovereign immunity in a dram-shop action.

In finding that the case presented a "question of first impression," Chief Justice Moore concluded that, "because PBCI's formal covenant to assume financial responsibility in dram-shop actions constitutes an explicit waiver of its sovereign immunity from liability for such actions," PCBI had waived sovereign immunity. *Id.* at *1, 7. Chief Justice Roy Moore concluded that "the doctrine of tribal

immunity, intended in part to shield Indian tribes from exploitation by outsiders, is not also a sword tribes may wield to victimize outsiders. Pushing the doctrine to illogical extremes and employing it after the fact to repudiate freely assumed legal obligations must ultimately result in discrediting the doctrine itself." *Id.*

Ex parte Poarch Band of Creek Indians is the first Alabama appellate decision published on the waiver of sovereign immunity by an Indian tribe in dram shop actions and reflects a substantive change in Alabama law. Even though this issue was not raised by the Plaintiff in her initial brief, "the general rule is that a case pending on appeal will be subject to any change in the substantive law." *Alabama State Docks Terminal Railway v. Lyles*, 797 So.2d 432, 438 (Ala. 2001). The claims alleged here by the Plaintiff are a mirror image of the claims alleged against PCBI in *Ex parte Poarch Band of Creek Indians* and the Defendants are basically the same except that the present case dram-shop action arose out of the Wind Creek Casino located in Atmore, not the Creek Casino in Montgomery. The Defendants here would have had to comply with ABC Board rules and regulations, including maintaining dram-shop

insurance and an agreement that they would be financially responsible in dram-shop cases, in order to obtain their liquor license, just as they did in *Ex parte Poarch Band of Creek Indians*. As a result, this Court should remand this case back to the trial court to reconsider its granting of the motion to dismiss in light of the new legal precedent regarding the tribal Defendants' waiver of sovereign immunity.

Furthermore, this case is controlled by the U.S. Supreme Court's decision in *Carcieri v. Salazar,* 555 U.S. 379 (2009). Because the Poarch Band of Creek Indians do not satisfy the definitions of "Indian" and "tribe" as provided by the Indian Reorganization Act of 1934, they are not entitled to the protections of immunity afforded to properly-recognized Indian tribes. When the U.S. Supreme Court determined that the Narragansett tribe was not a "recognized tribe now under Federal jurisdiction," finding that "now" meant 1934, it necessarily found that, in order for a tribe to meet the IRA's definition of a tribe, it had to be both "recognized" and "under federal jurisdiction" at the time of the enactment of the IRA in 1934.

The Poarch Band, like the Narragansetts, was not a "recognized Indian tribe" under federal jurisdiction in 1934. The Poarch Band, recognized under the same regulatory provisions that the Narragansetts were recognized under, is situated identically to the Narragansett tribe, and does not meet the IRA's narrow definition of what comprises an Indian tribe. Because the keystone of all rights claimed by an Indian tribe is valid federal recognition, and the Poarch Band is not a validly-recognized Indian tribe, the protections of the IRA don't apply to it.

The Poarch Band claims that the "Recognition Act" governs the recognition of the tribe in this case, though it was passed a decade after the recognition of the Poarch Band by the federal government, and more than a decade after the Department of the Interior promulgated 25 C.F.R. Part 83, the scheme under which the Poarch Band was recognized. In sum, because the only proper avenue for the Poarch Band to establish its sovereign authority over territory it claims to be free from the jurisdiction of the State of Alabama is through the mechanisms of the IRA, specifically 25 U.S.C. § 465, and not 25 C.F.R. Part 83, the Poarch Band cannot establish its sovereign authority

over the territory where the matters made the subject of the Appellant's complaint occurred. *See City of Sherill, N.Y. v. Oneida Indian Nation of New York,* 544 U.S. 197, 221 (2005).

Finally, the U.S. Supreme Court's recent decision in *Michigan v. Bay Mills Indian Community, et al.*, 572 U.S. ____ (May 27, 2014) has no bearing on the current issues before this Court. The *Bay Mills* decision involved a completely different statute, i.e. the Indian Gaming Regulatory Act, and involved the interpretation of the compact between the State of Michigan and Bay Mills. It was the compact and IGRA that control the conduct of class III gaming activities. Here, there is no compact to interpret and this suit is a dram-shop action and does not implicate the Indian Gaming Regulatory Act. Nowhere in the *Bay Mills* opinion was *Carcieri* discussed or even mentioned. Further, if anything, the *Bay Mills* decision lends authority to this Court's *Ex parte Poarch Band of Creek Indians* decision because the Supreme Court reiterated that Indian tribes and States can "bargain for waiver of immunity." *Bay Mills*, 572 U.S. _____, Slip Opinion at 13 (2014). In *Ex parte Poarch Band of Creek Indians,* this Court determined that the

defendants had waived their immunity by bargaining with the ABC Board to obtain a liquor license which included accepting financial responsibility and purchasing insurance for dram-shop actions. Here, the same can be said.

Accordingly, the trial court's order dismissing the Appellant's lawsuit is due to be reversed.

ARGUMENT

I. THE TRIBAL DEFENDANTS HAVE EXPRESSLY WAIVED THEIR CLAIM OF SOVEREIGN IMMUNITY FROM LIABILITY FOR DRAM-SHOP ACTIONS THROUGH THEIR FORMAL AGREEMENT WITH THE STATE OF ALABAMA'S ALCOHOLIC BEVERAGE CONTROL BOARD TO ASSUME FINANCIAL RESPONSIBILITY IN DRAM-SHOP ACTIONS.

A. The significance of this Court's May 23rd *Ex parte Poarch Band of Creeks Indians.*

Prior to May 23, 2004, no appellate court in the State of Alabama had ever addressed whether Indian tribes in Alabama could waive sovereign immunity in a dram-shop action. That changed on May 23rd when this Court denied a Petition for Mandamus in *Ex parte Poarch Band of Creek Indians and PCI Gaming Authority d/b/a Creek Casino Montgomery*, 2014 WL 2139108 ___ So. 3d ___ (Ala. 2014). In *Ex parte Poarch Band of Creek Indians*, this Court upheld a Montgomery County Circuit Court's order denying sovereign immunity in a dram-shop action to Defendants Poarch Band of Creek Indians and PCI Gaming Authority d/b/a Creek Casino Montgomery (hereinafter referred collectively as "PBCI") because they had waived their sovereign immunity when they obtained and renewed their liquor license through the State of Alabama Alcohol Beverage Control ("ABC") Board. *Id.* at *1.

In denying the petition, Chief Justice Roy Moore wrote a special concurring opinion explaining the Court's decision to deny the mandamus. In finding that the case presented a "question of first impression," Chief Justice Moore concluded that "because PBCI's formal covenant to assume financial responsibility in dram-shop actions constitutes an explicit waiver of its sovereign immunity from liability for such actions, I can concur in denying PBCI's petition for writ of mandamus... ." *Id.* at *1, 7.

The facts of *Ex parte Poarch Band* are sadly and tragically similar to most other dram-shop actions, including the present case. The Complaint alleged that PCBI furnished alcoholic beverages to Elfago Ramirez while at the Creek Casino in Montgomery knowing that he was visibly intoxicated. Thereafter, Elfago Ramirez left the casino, got in his vehicle and crossed the center line on Wares Ferry Road and collided head on with a vehicle traveling in the opposite lane, causing injuries to Adrian Kelly and Edward Gilbert, the Plaintiffs. *Id.* at *1

The Plaintiffs sued PCBI for violation of Alabama's dram-shop laws. PCBI filed a motion to dismiss based upon tribal sovereign immunity. In denying the motion, the

trial court found that PCBI's agreement to maintain dram-shop insurance as a condition of receiving a liquor license for Creek Casino in Montgomery constituted an express waiver of any immunity from suit based on a violation of Alabama's dram-shop act. In upholding the trial court's order, Justice Moore wrote a lengthy opinion explaining the reasoning. *Id.*

The opinion first acknowledged that the waiver of sovereign immunity could only happen when it is "unequivocally expressed." *Id.* The plaintiffs argued that "the acceptance of the financial-responsibility provision as a condition for obtaining an alcoholic-beverage license operates as an expressed waiver of the defense of sovereign immunity in a dram-shop action." *Id.* at *2. The ABC Board financial-responsibility provision states as follows:

> "(1) All retail licensees of the ABC Board shall maintain, at all times, liquor liability (dram shop) insurance described below and shall comply with the following conditions of requirements of Financial Responsibility.
>
> "(a) Prior to the issuance or renewal of any retail alcoholic beverage license, each applicant must provide the ABC Board with sufficient information that it has liquor liability (dram shop) insurance coverage in the amount of at least one hundred thousand dollars ($100,000.00) per occurrence, exclusive of, and separate from, any attorney fees or other costs incurred *in the*

defense of any claim asserted against the insured."

Id. (emphasis in the original) The plaintiffs contended that by allowing tribal immunity to shield the tribal defendants from a dram-shop action, would nullify the insurance provisions of the state liquor law that the defendants agreed to observe as a condition for licensing. *Id.*

In analyzing the Tribal Code of the Poarch Band of Creek Indians, Justice Moore was greatly concerned about the "no-forum conundrum." *Id.* at *3. PCBI argued that the proper remedy for plaintiffs' action lied in the tribal court, not in the state courts of Alabama. However, Chief Justice Moore explained that the Poarch Band Tribal Code allowed the tribal courts to assert the same defenses to a cause of action including tribal sovereignty and jurisdiction. "Thus, although the plaintiffs could formally file a dram-shop action in Poarch Band Tribal Court, PBCI would instantly have recourse to the defense of sovereign immunity." *Id.* Justice Moore pointed out that "if the plaintiffs have no remedy against PBCI in a state court, they likely have no remedy against PBCI anywhere." *Id.*

Further, after noting that most courts across the country have "uniformly" held that sovereign immunity protects Indian tribes from private dram-shop action, Justice Moore opined that there were certain "countervailing factors" in the Alabama case which mandated the denial of the petition for mandamus. *Id.* at *4. Those three countervailing forces were:

1) Immunity is minimal in the area of alcohol regulation.

"Because tribal immunity derives from tribal sovereignty, PBCI's assertion of immunity to thwart state law in the area of alcohol regulation has little, if any, weight, especially when the activity whose regulation PBCI seeks to evade - - over-serving gaming customers - - has a substantial impact beyond the reservation." *Id.* at *5. Thus, "tribal immunity is at its weakest in the context of alcohol regulation." *Id.* at *4.

2) PCBI's covenant of financial responsibility with the ABC Board.

> "By purchasing dram-shop insurance as a condition for obtaining a liquor license, PBCI expressly agreed to in writing to be financially responsible in damages for serving alcohol to any apparently intoxicated person. PBCI cannot both assume financial responsibility for compensating victims of its own wrongdoing and at the same time disclaim its responsibility for providing such compensation. An agreement to be financially

> responsible is an expressed declaration that excludes, i.e. waives the alternative of being financially irresponsible. Otherwise, the assumption of financial responsible would be meaningless
>
> ...
>
> Likewise, in this case the financial-responsibility covenant PBCI made with the ABC Board as a condition for obtaining a liquor license had "a real world objective": the protection of the general public from drunk drivers and improvidently overserved in the casino. This agreement was not designed as a game lacking practical consequences..."

Id. at *5-6

3) The no-forum conundrum

"Because the Poarch Band has structured its tribal code to prevent dram-shop claims from being heard in the tribal court, its claim of immunity from a state-court action is accordingly diminished." *Id.* at *6.

When considering these countervailing factors against a finding of immunity, Chief Justice Moore concluded that "the doctrine of tribal immunity, intended in part to shield Indian tribes from exploitation by outsiders, is not also a sword tribes may wield to victimize outsiders. Pushing the doctrine to illogical extremes and employing it after the fact to repudiate freely assumed legal

obligations must ultimately result in discrediting the doctrine itself." *Id.*

B. <u>Although not raised in the initial brief, this Court is required to apply *Ex parte Poarch Band of Creek Indians* because it was a case of first impression and reflects a change in the substantive law while this case was pending on appeal.</u>

"The general rule is that a case pending on appeal will be subject to any change in the substantive law." *Alabama State Docks Terminal Railway v. Lyles*, 797 So.2d 432, 438 (Ala. 2001).

> The United States Supreme Court has stated, in regard to federal courts that are applying state law: 'the dominant principal is that *nisi prius* and appellate tribunals alike should conform their orders to the state law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered.'

Alabama State Docks, 797 So.2d at 438 (quoting *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941)). Just recently, the Alabama Court of Civil Appeals reaffirmed this principle in *Morgan v. Morgan*, 2014 WL 1508693 (Ala. Civ. App. April 18, 2014). There, the Court noted that, although the general rule is that an argument not asserted in an initial brief but instead raised for the first time in a reply brief would not be considered by an appellate court, there is an exception to the rule when a

change in law has occurred. "[B]ecause of the unusual circumstances in this case involving *a change in the law* in the period after the appellant's initial brief was due but before the due date of the reply brief, we will address the husband's argument on this issue." *Morgan*, 2014 WL 1508693, at n. 8 (emphasis added).

Here, the appellant filed her initial brief on March 25, 2014. The appellees' brief and an amicus brief were filed on May 13, 2014. This Court granted the Appellant an extension of time to file her reply brief until June 6th. *Ex parte Poarch Band of Creek Indian* was not released until May 23, 2014. Prior to the release of this case, Alabama courts had never addressed the sovereign immunity of the tribal defendants in a dram-shop action. Chief Justice Moore explained that, because it was a "question of first impression," he felt compelled to examine the law. Furthermore, Justice Moore noted that courts across the country had found "uniformly" that sovereign immunity protected Indian tribes from private dram-shop actions. *Id.* at *4. Thus, *Ex parte Poarch Board of Creek Indians* reflects a substantive change in Alabama law addressing the sovereign immunity of Indian tribes in dram-shop actions.

Ex parte Poarch Band of Creek Indians is the first decision published on the very issue pending before this Court here. The Supreme Court of Alabama upheld the trial court's denial of a motion to dismiss based on sovereign immunity in a dram-shop action against the same tribal defendants as are in the present case. Chief Justice Moore's opinion reflects the legal analysis conducted by the Court in upholding the trial court's finding that these defendants had waived their right to claim sovereign immunity in a dram-shop action. The decision reflects the first word attorneys handling dram-shop actions against the tribal defendants have on sovereign immunity in the State of Alabama. Thus, the decision reflects a substantive change in the law because now there is law where there was none before in Alabama.

C. As a result of *Ex parte Poarch Band of Creek Indians*, this Court should remand this case to the trial court for reconsideration of the granting of the motion to dismiss in light of the change in law.

Here, the Plaintiff sued the Defendants PCI Gaming, Wind Creek Casino and Hotel, Creek Indian Enterprises and the Poarch Band of Creek Indians (collectively hereinafter referred to as the "tribal defendants") for violation of Alabama's dram-shop act. The claims alleged here mirror the

claims alleged against PCBI in *Ex parte Poarch Band of Creek Indians*. In reality, the Defendants are basically the same except that the present case dram-shop action arose out of the Wind Creek Casino located in Atmore, not the Creek Casino in Montgomery. The tribal defendants here held an Alabama liquor license. And, although the Plaintiff has not been able to obtain discovery on this point yet, this Court could take judicial notice that the Defendants would have had to comply with ABC Board rules and regulations, including maintaining dram-shop insurance and an agreement that they would be financially responsible in dram-shop cases, in order to obtain their liquor license. Just as in *Ex parte Poarch Band of Creek Indians*, in order to obtain a license, the tribal defendants here would have had to comply with ABC Regulation No. 20-X-5-.14 entitled "Requirements of Financial Responsibility by Licensees" and which states as follows:

> (1) All retail licensees of the ABC Board shall maintain, at all times, liquor liability (dram shop) insurance described below and shall comply with the following conditions of requirements of Financial Responsibility.
>
> (a) Prior to the issuance or renewal of any retail alcoholic beverage license, **each applicant must provide the ABC Board with sufficient information that it has liquor liability (dram shop) insurance**

coverage in the amount of at least one hundred thousand dollars ($100,000.00) per occurrence, exclusive of, and separate from, any attorney fees or other costs incurred **in the defense of any claim asserted against the insured.**

(b) This information may be provided as follows:

1. **A certificate of liability insurance from a reputable insurance company showing that the applicant has liquor liability (dram shop) insurance** of at least one hundred thousand dollars ($100,000.00) for each occurrence, that the certificate is **for liability coverage** only exclusive of, and separate from, any attorney fees or other costs incurred **in the defense of any claim asserted against the insured** and that coverage is valid for the license year for which the application is being submitted; or

2. Other method as may be required by the ABC Board.

c) A certificate of liability insurance also will show that the insurer will advise the Alabama ABC Board expiration date thereof.

(2) It shall be unlawful to represent to the ABC Board or to any other person that current insurance coverage exists when the policy has been cancelled or otherwise is not in force for any reason.

(a) A copy of a certificate of liability insurance showing the current coverage shall be retained on the licensed premises and readily available for inspection by agents of the Board or other law enforcement officers.

(b) The Board may verify the liability insurance coverage of any licensee at any time.

(3) No application for a new retail license or the renewal of an existing retail license shall be approved unless the application shows affirmatively that the requirements contained herein are met. Failure to comply with the requirements contained herein shall be cause for suspension or revocation of the license.

(4) A retail licensee shall notify the ABC Board immediately at any time that its liquor liability insurance is canceled.

(5) In the event of cancellation, termination or other invalidation of its liquor liability insurance, the licensee must comply with the requirement of this Financial Responsibility regulation within fifteen (15) days from the date of such cancellation, termination or other invalidation. After the fifteenth day, if the licensee has not complied, the subject license shall be suspended immediately. Any license which has been suspended for failure to abide by this regulation shall not be reinstated until compliance with Section 1 is met.

(6) A licensee may be cited administratively for violation of this regulation if proper insurance coverage if not maintained.

Administrative Code 20-X-5-.14 (emphasis added)

Here, the tribal defendants were required to purchase "liquor liability (dram-shop) insurance" and to be financially responsible in order to get a liquor license. If the tribe had taken the position with the ABC Board, like it is taking with this Court, that it is immune from liability in dram-shop cases and that it does not have to be financially responsible, the tribe would not have

obtained a liquor license. ABC Regulation No. 20-X-5-.14 ("no application for a new retail license or the renewal of an existing retail license shall be approved unless the application shows affirmatively that the requirements contained herein are met.")

As a general rule, a motion to dismiss can only be granted "when it appears beyond a doubt that the plaintiff can prove no set of facts entitling him to relief." *Patton v. Black*, 646 So. 2d 8, 10 (Ala. 1994). In *Patton*, this Court discussed the standard of review applicable to the dismissal of a Complaint where a defendant raised the defense of immunity. "When a Rule 12(b)(6) motion has been granted and this Court is called upon to review the dismissal of the Complaint, we must examine the allegations contained therein and construe them so as to resolve all doubts concerning the sufficiency of the Complaint in favor of the plaintiff. In so doing, this Court does not consider whether the plaintiff will ultimately prevail, only whether he has stated a claim under which he may possibly prevail." *Patton*, 646 So. 2d at 10.

Applying this standard of review and *Ex parte Poarch Band of Creek Indians*, the Plaintiff has set forth viable

dram-shop claims against the tribal defendants and there is a possibility that the Plaintiff may prevail because the Defendants have waived immunity. As a result, this Court should remand this case back to the trial court to reconsider its granting of the motion to dismiss in light of the new legal precedent regarding the tribal Defendants waiver of sovereign immunity.

II. *CARCIERI* DIRECTLY IMPACTS TRIBAL IMMUNITY IN THIS CASE.

The tribal defendants argue that *Carcieri* does not affect tribal immunity. On the contrary, *Carcieri's* broadest impact is to the tribal immunity claimed by tribes situated similarly to the Defendants. *Carcieri* is ultimately more important for how it defines "Indian" and "tribe" than for the specific dispute the U.S. Supreme Court addressed in the case.

The *Carcieri* case wasn't explicitly about immunity only because immunity wasn't the issue addressed in the case. Although *Carcieri* dealt initially with the question of whether the U.S. Department of the Interior possessed the legal authority to accept land in trust pursuant to a provision of the 1934 Indian Reorganization Act ("IRA") for a Rhode Island Indian tribe, the Narragansetts, the U.S.

Supreme Court's interpretation of the definitions of "Indian," "tribe" and "now" in the IRA of 1934 is where the greatest impact of *Carcieri* occurred. *Carcieri,* 555 U.S. 379, 387-388.

The *Carcieri* case began innocuously enough, as a dispute concerning the Narragansett Indians' refusal to submit to the requirements of local building codes. *See Carcieri,* 555 U.S. at 385; (C. 10-25). The *Carcieri* Court ultimately ruled that the Department of the Interior acted beyond its authority when it took land into trust for the Narragansetts, specifically finding that the Narragansetts were not an Indian tribe as contemplated by the definitions of "Indian" and "tribe" in the IRA of 1934. *See Carcieri,* 555 U.S. at 396.

The reasoning behind *Carcieri* is what is important because it applies to a whole slew of rights that are claimed by Indian tribes situated similarly to the Poarch Band. If the Poarch Band does not fit the definitions of "Indian" and "tribe" contained within the IRA of 1934, then the Poarch Band is not a validly-recognized Indian tribe under that Act, and cannot properly take advantage of the right to convey land in trust to the Department of the

Interior, codified in § 5 of the IRA. The act of taking land into trust in conformity with § 5 of the IRA, once again, has enormous consequences. The land becomes exempt from state and local taxes. *See Cass County, Minnesota v. Leech Lake Band of Chippewa Indians,* 524 U.S. 103, 114 (1998). The land becomes exempt from local zoning and regulatory requirements. *See* 25 C.F.R. § 1.4(a) (2008). Indian trust land may not be condemned or alienated without either Congressional approval or tribal consent. *See* 25 U.S.C. § 177. Furthermore, and most importantly to the Poarch Band's interests in this case, tribal trust land becomes a haven from state civil and criminal jurisdiction. *See* 25 U.S.C. §§ 1321(a), 1322(a).

The linchpin to all of the rights claimed by an Indian tribe is valid federal recognition, and when the U.S. Supreme Court determined that the Narragansetts were not a "recognized Indian tribe now under Federal jurisdiction," the Court necessarily found that, in order for a tribe to meet the IRA's definition of a tribe, the tribe had to be both "recognized" and "under federal jurisdiction" at the time of the enactment of the IRA in 1934. *Carcieri,* 555 U.S. 379, 388. The Poarch Band was not a "recognized Indian

tribe" under federal jurisdiction in 1934, and does not meet the IRA's narrow definition of what comprises an Indian tribe. If a tribe does not meet the basic definition of an Indian tribe set out by Congress and the U.S. Supreme Court, then not only is it not entitled to define its lands as Indian Country, it may not claim the protection of tribal immunity, because it does not meet the U.S. Supreme Court's limited definition of an "Indian tribe" in the first place. This is the reason that *Carcieri* matters to the question of tribal immunity.

The Poarch Band argues that it was recognized by the federal government, pursuant to 25 C.F.R. Part 83 and 25 U.S.C. § 479 a(2). This argument, taken alone, is of little consequence; the Narragansett tribe was also recognized under this regulation, and the U.S. Supreme Court had little trouble finding that the Department of the Interior acted beyond its authority under the law when it took land into trust for that tribe, because, despite the broader definition of "Indian tribe" contained in 25 C.F.R. Part 83, tribes that seek the protections afforded by the IRA must meet the IRA's definition of an "Indian tribe." *See City of Sherill, N.Y. v. Oneida Indian Nation of New York,*

544 U.S. 197, 221 (2005); *See also Examining Executive Branch Authority to Acquire Trust Lands for Indian Tribes: Hearing Before the Senate Committee on Indian Affairs,* 111th Cong. 15 (2009) (statement of Hon. Edward P. Lazarus).

The Defendants state that "[f]ederal recognition is governed not by the IRA, but by a different statute, the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454 (108 Stat. 4791), codified at 25 U.S.C. § 479a *et seq.* (the 'Recognition Act') and regulations promulgated by the Secretary at 25 C.F.R. Part 83." The "Recognition Act" was passed a decade after the Poarch Band sought and obtained recognition under 25 C.F.R. Part 83, and could not possibly govern the legitimacy of the Poarch Band's recognition in 1984.

The reality that the tribal defendants do not confront is that the only proper avenue for the tribe to establish its sovereign authority over territory it claims to be free from the jurisdiction of the State of Alabama is through the mechanisms of the IRA, specifically 25 U.S.C. § 465, and not 25 C.F.R. Part 83. *See City of Sherill, N.Y. v. Oneida Indian Nation of New York,* 544 U.S. 197, 221 (2005).

After *Oneida Indian Nation*, this statutory section is the Defendants' *only potential source of protection from state jurisdiction*, and after *Carcieri*, it is even clearer that the Defendants are not entitled to the protections afforded by the IRA. *See Id.*

III. THE INDIAN DEFENDANTS' LANDHOLDINGS ARE NOT PROPERLY RECOGNIZED "INDIAN LANDS" SUCH THAT THEY ARE OUTSIDE THE STATE'S JURISDICTION.

Although this dispute may have arisen from activities that occurred on land owned by the Poarch Band of Creek Indians, the land was part of the State of Alabama at the time of the State's founding. In light of *Carcieri*, the federal government had the power to remove that land from the State's jurisdiction only if the Poarch Band was "under federal jurisdiction" in 1934, when the applicable federal statute was enacted. It is undisputed that the Defendants were not under federal jurisdiction in 1934. Accordingly, the trial court had subject-matter jurisdiction.

The tribal defendants' argument against subject-matter jurisdiction is premised on the notion that the federal government has taken the land at issue into trust and thus converted it into what the federal code refers to as "Indian Lands." Defendants further argue that Federal law

prohibits state and local governments from affecting much of what happens on "Indian Lands" that the federal government has taken into "trust" for the benefit of a tribe or an individual Indian. *See* 25 U.S.C. § 465. Thus, the designation of land as "Indian Lands" is a necessary precondition to that land being used for casino gambling under the Indian Gaming Regulatory Act. *See* 25 U.S.C. § 2710 (b) (1), (2); 2710(d) (1), (2).

The tribal defendants never established that the property on which the alleged incident occurred here is properly recognized "Indian Lands." Although the United States recognized the Poarch Band of Creek Indians in June of 1984, and the Secretary of the Interior purported to take certain lands into trust on the Tribe's behalf, including the property at issue here, in the years since 1984, unless the Poarch Band was "under federal jurisdiction" as of 1934, the Secretary had no authority under federal law to take the Poarch Band's landholdings into trust, and its actions were null and void. The U.S. Supreme Court held as much in *Carcieri v. Salazar,* 555 U.S. 379 (2009).

We agree with petitioners and hold that, for

> purposes of § 479 [of the Indian Reorganization Act], the phrase "now under Federal jurisdiction" refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, § 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934.

Carcieri, 555 U.S. at 382; *cf. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2212 (2012) (litigants may challenge Secretary's trust decisions as violating *Carcieri*).

The upshot of *Carcieri* is that the tribal defendants should be treated just like any other landowner for the purposes of state-court subject-matter jurisdiction, unless they were "under federal jurisdiction" in 1934. There is no evidence in the record here that the Defendants' lands at issue here were properly recognized "Indian Lands." To the contrary, it is undisputed that the United States did not recognize the Poarch Band of Creek Indians as a tribe until June of 1984 -- 50 years too late for the Secretary to be able to take land into trust on the tribe's behalf. *See* 49 Fed. Reg. 24083 (June 11, 1984). That fact by itself "rais[es] the serious issue of whether the Secretary ha[d]

any authority, absent Congressional action, to take lands into trust for [the] tribe." *KG Urban Enter., LLC v. Patrick,* 693 F.3d 1, 11 (1st Cir. 2012).

Thus, the trial court had subject matter jurisdiction.

IV. MICHIGAN V. BAY MILLS INDIAN COMMUNITY, ET AL. HAS NO BEARING ON THE ISSUES BEFORE THIS COURT.

On May 27, 2014, the United States Supreme Court issued *Michigan v. Bay Mills Indian Community, et al.*, 572 U.S. ____ (May 27, 2014). If this Court recalls, the parties filed a motion to extend the briefing schedule on April 10, 2014. The Defendants contended that the *Bay Mills* opinion would address certain issues regarding the "scope and extent of the doctrine of tribal sovereign immunity standard." [See Joint Motion to Extend Briefing Schedule at ¶ 4] The *Bay Mills* opinion was not issued until after the Defendants' initial brief was due. However, the Plaintiff will take this opportunity in her reply brief to address the holding.

In *Bay Mills*, the State of Michigan sued the Bay Mills Indian Community for violation of their compact agreement. [Slip Op. at 3]. The Bay Mills tribe opened a Class III gaming casino on land it had purchased through a congressionally established land trust. *Id.* Bay Mills

claimed it could operate a casino there because the property qualified as "Indian land." Michigan disagreed and sued the tribe arguing that the defendants were operating a casino outside of the Indian lands and in violation of the tribal-state compact. In response, Bay Mills argued that the Michigan suit was barred by the doctrine of tribal sovereign immunity. *Id.*

The United States Supreme Court held that tribal sovereign immunity barred the suit, explaining that the Indian Gaming Regulatory Act ("IGRA") only authorized suits to enjoin gaming activity located "on Indian lands," whereas Michigan's complaint alleged the casino was outside such territory. *Id.* at 1-2. The Court held that the IGRA by its plain terms did not authorize the Michigan suit because the doctrine of tribal immunity is only abrogated with respect to Class III gaming located "on Indian land." *Id.* at 8-14. But because the territory of the casino was outside of Indian lands, tribal sovereign immunity is not abrogated and the suit was barred. *Id.* at 21.

Additionally, the State of Michigan urged the Court to overrule the *Kiowa* decision by finding that tribal immunity did not apply to commercial activity outside Indian

territory. The Court rejected Michigan's plea and noted that it was Congress' job to determine whether and how to limit tribal immunity. *Id.* at 17.

The *Bay Mills* decision has no effect on the issues before this Court. The *Bay Mills* decision involved a completely different statute, i.e. the Indian Gaming Regulatory Act, and involved the interpretation of the compact between the State of Michigan and Bay Mills. It was the compact and IGRA that control the conduct of class III gaming activities. Here, there is no compact to interpret as this suit is a dram-shop action and does not implicate the Indian Gaming Regulatory Act. Further, nowhere in the *Bay Mills* opinion was *Carcieri* discussed or even mentioned. Thus, it has no effect on the holding in *Carcieri*.

Moreover, if anything, the *Bay Mills* decision lends authority to this Court's *Ex parte Poarch Band of Creek Indians* decision because the Supreme Court reiterated that Indian tribes and States can "bargain for waiver of immunity." *Bay Mills*, 572 U.S. _____, Slip Opinion at 13 (2014). In *Ex parte Poarch Band of Creek Indians*, this Court determined that the defendants had waived their immunity by bargaining with the ABC Board to obtain a

liquor license which included accepting financial responsibility and purchasing insurance for dram-shop actions. Here, the same can be said. The same defendants bargained for a liquor license for their Wind Creek Casino in Atmore, which included the acceptance of financial responsibility for dram-shop actions. Thus, they waived immunity.

CONCLUSION

This case highlights a very dangerous and frightening situation that is going on at the tribal defendants' Casinos in this State. The Defendants' practices reflect a policy that employees are to serve alcoholic beverages to visibly intoxicated persons. Their policy is to encourage patrons to gamble more by encouraging them to drink more. They know full well that when people drink more, the patrons lose their inhibitions and gamble more. They also know that their patrons drive to their Casinos and will drive away, many in an intoxicated condition.

It would be one thing for the Defendants to defend this case on the merits; every defendant has that right. However, to come before this Court and boldly tell it that the courts of Alabama have no jurisdiction and to ask this

Court give a stamp of approval on their dangerous, unlawful conduct is wrong, legally and morally.

Based upon the above, the Plaintiff respectfully requests this Court to reverse the trial court's granting of the motion to dismiss based upon tribal immunity and, consistent with *Ex parte Poarch Band of Creek Indians*, remand this case so that discovery may proceed and the case can be decided on its merits.

Dated this the 6th day of June, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing motion by email on each counsel of record.

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