FILED
10/23/2017 3:35 PM
Court of Appeals
Division I
State of Washington

NO. 77007-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WENDELL LONG, an individual,

Appellant,

v.

SNOQUALMIE GAMING COMMISSION, a political subdivision of the Snoqualmie Indian Tribe,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

For nearly a year, Wendell Long ("Mr. Long" or "Appellant") simultaneously defended two actions alleging the same claims and stemming from the same underlying facts: 1) An administrative action brought by the Snoqualmie Gaming Commission ("SGC" or "Respondent") addressing potential revocation of Mr. Long's gaming license; and 2) A lawsuit in King County Superior Court between Mr. Long and the Snoqualmie Indian Tribe ("Tribe") involving claims arising from Mr. Long's service as CEO of the Snoqualmie Indian Casino. *See Tribe v. Long*, King County Cause No. 15-2-31112-3 SEA. At mediation between Mr. Long and the Tribe held on January 4, 2017, the parties memorialized a Settlement Agreement that released "any and all claims" by the Tribe "or agencies claiming" by or through the Tribe. Although the Tribe honored the Settlement Agreement and dismissed the pending lawsuit, the SGC refused to do so, and continued with the administrative action against Mr. Long's gaming license.

On January 26, 2017, Mr. Long brought the below action in King County Superior Court against the SGC to enforce the unambiguous terms of the Settlement Agreement entered into with the Tribe and, by necessary extension, the SGC. *See Long v. Snoqualmie Gaming Commission*, King County Case No. 17-2—01853-8 SEA. The Complaint was accompanied

by discovery requests exploring the relationship between the SGC, an administrative agency of the Tribe, and the Tribal Council ("Council"), the Tribe's elected leadership.

The SGC, in turn, brought a Motion to Dismiss based on the doctrine of sovereign immunity. Soon thereafter, the SGC filed a Motion for Protective Order to stay the discovery submitted by Mr. Long pending resolution of the sovereign immunity-based Motion to Dismiss. The trial court granted the SGC's Motion for Protective Order on March 10, 2017. Consequently, no discovery was conducted in this case prior to consideration of the SGC's Motion to Dismiss on April 14, 2017.

On April 17, 2017, the trial court granted the SGC's Motion to Dismiss. The trial court's reasoning was almost entirely unexplained, with the court noting only that it was based on "the briefing and argument presented" and articulating an alternative ground that, if the SGC was a party to the Settlement Agreement, then the Settlement Agreement released Mr. Long's gaming license claim. A Motion for Reconsideration was denied on May 18, 2017.

This appeal examines whether the trial court erred by granting the SGC's Motion to Dismiss and denying Mr. Long's related Motion for Reconsideration. This question, examined *de novo*, demonstrates that the trial court committed reversible error for three reasons: (1) If based on CR

12(b)(1), dismissal was inappropriate because the terms of the waiver of sovereign immunity apply to the Tribe and, as a result, to the SGC, thereby releasing any and all claims held by the SGC against Mr. Long; (2) If based on CR 12(b)(6), the plain and unambiguous terms of the Settlement Agreement and the facts alleged at the trial court are sufficient to state a claim; and (3) If the Settlement Agreement applies to the SGC, as analyzed by the trial court in its alternative basis for ruling, then the terms of the Settlement Agreement apply in a bilateral fashion, and may not be interpreted and applied solely against Mr. Long. Further reinforcing the above errors is the fact that discovery on these potentially dispositive subjects was entirely foreclosed prior to ruling, in violation of Washington case law.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the March 10, 2017 Order Granting Defendant's Motion for Protective Order.

2. The trial court erred in entering the April 17, 2017 Order and Judgement Granting Defendant's Motion to Dismiss and Dismissing the Case.

3. The trial court erred in entering the May 18, 2017 Order Denying Plaintiff's Motion for Reconsideration on Defendant Snoqualmie Gaming Commission's Motion to Dismiss.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a settlement agreement entered into by a Native American tribe, that is governed by Washington law and contains an unlimited waiver of sovereign immunity, apply to a tribal administrative agency that is not a separately incorporated entity from the tribe? (Assignments of Error 2, 3).

2. Does a settlement agreement by a Native American tribe, which, if not governed by Washington law, is governed by tribal law and contains an unlimited waiver of sovereign immunity, apply to a tribal administrative agency that is not a separately incorporated entity from the tribe? (Assignments of Error 2, 3).

3. Is it in error to enter the Order and Judgment Granting Defendant's Motion to Dismiss and Dismissing the Case, and to enter the Order Denying Plaintiff's Motion for Reconsideration on Defendant's Motion to Dismiss, without allowing for basic discovery on the underlying issues to occur? (Assignment of Error 1).

IV. STATEMENT OF THE CASE

This appeal is the culmination of a single set of underlying facts and allegations that were litigated in two separate forums. CP 4, 429. The parties, case facts, and procedural history are outlined below.

A. The Tribe, the SGC, and Mr. Long.

The Tribe comprises approximately 500 enrolled members and is governed by the Council and the Snoqualmie Tribal Constitution. CP 2. Pursuant to the Tribal Constitution, the Council is the governing body for the Tribe. *Id.*

The SGC was established by the Council pursuant to the Tribe's 2002 Gaming Act ("Gaming Act"). *Id.* The Gaming Act established the SGC as an "independent governmental subdivision of the Tribe" and "as a political subdivision of the Tribe, [the SGC] possesses all the rights, privileges, and immunities of the Tribe, including, without limitation sovereign immunity from suit absent express consent from the Tribal Council." CP 499. The Gaming Act does not imbue the SGC with sovereign immunity separate and apart from the Tribe, nor does it empower the SGC to waive sovereign immunity on its own behalf. CP 500.

The Council has intervened in SGC actions and decisions on multiple occasions. In early 2014, the Council appointed itself to replace the SGC Commissioners who were forced from office by the Council. CP 500, 618-20. As such, the Council itself functioned as the SGC for a period of time. *Id.* Practically, this entailed Council members being interviewed and fingerprinted by SGC personnel, with background check

results reported to the National Indian Gaming Commission. *Id.* Ultimately, Council members were issued gaming licenses to serve as SGC Commissioners. *Id.* Both before and after the Council appointed itself as the SGC, SGC employees were informed of licensing actions that the Council desired to occur, and complied accordingly. *Id.*

Mr. Long is an enrolled member of the Choctaw Tribe of Oklahoma. CP 501, 622. He possesses over 30 years of experience in gaming, including 10 years as CEO for various tribal gaming and resort operations. CP 622. In May 2015, Mr. Long was hired by the Tribe as CEO of the Snoqualmie Casino located in Snoqualmie, WA. CP 501.

B. Commencement of the Lawsuit and Administrative Action Against Mr. Long.

By October 2015, the relationship between the Tribe and Mr. Long had soured, causing Mr. Long and the Tribe to separate. CP 501, 623. Approximately two months later, the Tribe filed a lawsuit in King County Superior Court alleging that Mr. Long breached fiduciary duties, stole, and was otherwise "unjustly enriched." *Id.* The lawsuit alleged that Mr. Long purportedly awarded an unauthorized bonus to himself and other employees, and disclosed "confidential information" to unauthorized third parties. *Id.* Mr. Long promptly filed counterclaims related to wage claims, among other causes of action. *Id.*

Shortly after the Tribe initiated the lawsuit against Mr. Long, the SGC initiated a licensing action against Mr. Long by summarily suspending his Snoqualmie gaming license. *Id.* The SGC commenced the summary license suspension after a copy of the Tribe's Complaint was provided to the SGC by the Tribe. CP 501. The legality of the summary suspension was strongly contested Mr. Long in Snoqualmie Tribal Court. CP 502. Notably, the SGC administrative action was based on the same allegations in the Tribe's lawsuit, namely, allegations regarding an unauthorized bonus and disclosure of purportedly "confidential information." CP 501, 623. There are no factual allegations at issue in the SGC's licensing action that were not also alleged in the Tribe's lawsuit. *Id.* The parties were represented by legal counsel in both the lawsuit and the SGC licensing action, and the parallel disputes were extensively litigated throughout 2016. CP 501-02.

C. March 2016 Hearing in Snoqualmie Tribal Court.

In February 2016, Mr. Long sought an injunction from the Snoqualmie Tribal Court to halt the SGC's summary suspension and unfolding administrative action against Mr. Long's gaming license. CP 502. At hearing on March 3, 2016, the Snoqualmie Tribal Court analyzed the threshold matter of whether Mr. Long's Employment Agreement with the Tribe contained the requisite waiver of sovereign immunity to apply to

the SGC necessary to grant the requested injunction. CP 530-31. The Employment Agreement contained an expressly "limited" waiver of sovereign immunity, did not reference agencies or sub-entities of the Tribe, and was governed by Tribal law. *Id.* The Employment Agreement's limited waiver read as follows:

> **11. Sovereign Immunity.** Except as expressly provided herein, nothing in this Agreement shall be deemed or construed as a waiver of limitation of the Tribe's inherent sovereign immunity from uncontested suit. The Tribe hereby grants a ***limited waiver of sovereign immunity*** to Employee for the express and limited purpose of adjudicating a dispute arising out of the terms of this Agreement in Snoqualmie Tribal Court. Any such claim must be filed within the Tribal Court within one hundred-twenty (120) days of the act or omission giving rise to the claim. This waiver does not extend to nor allow for any award of punitive or exemplary damages, or attorneys' fees against the Tribe.

CP 541 (emphasis added). At the hearing, both parties vigorously argued the meaning of this "limited" waiver of sovereign immunity by the Tribe. Counsel for the SGC argued that the waiver of the Tribe's sovereign immunity in the Employment Agreement could not apply to the SGC because it was an expressly "limited" waiver of sovereign immunity: "Now the whole point of a limited waiver of sovereign immunity is that, in an agreement, the Tribe, or the tribal entity that's involved, says, "***We're waiving our sovereign immunity to this entity, or to this set of assets.***""

CP 531 (emphasis added). Moreover, addressing the commonality of "limited" waivers of sovereign immunity, counsel for the SGC argued:

> And there are literally thousands of contracts and financing agreements and other agreements, with banks, with contractors, throughout the Pacific Northwest, that have limited waivers of sovereign immunity that spell out specifically the assets and entities to whom that waiver applies. ***And that's the whole point of the limitation.***

Id. (emphasis added).

Relying upon the "limited" nature of the waiver, the Snoqualmie Tribal Court denied the requested injunction. *Id.* Recognizing the appearance of collusion by the Tribe and the SGC, however, the Snoqualmie Tribal Court expressed its deep concern:

> But I will tell you that this doesn't smell right. It doesn't pass the smell test to me. It looks to me like this, like they're headhunting. It doesn't sound like SGC independently, outside of the Tribe, all of a sudden found out that, that a licensing issue. It looks to me like...I don't think I have to tell you what it looks like.

Id.

Shortly thereafter, the SGC revoked Mr. Long's gaming license, based upon a finding that Mr. Long inappropriately awarded himself and others a bonus and improperly passed on "confidential information" to outside third parties - the same allegations as those in the Tribe's lawsuit. CP 531-32. This decision was promptly appealed to Snoqualmie Tribal Court. CP 532.

D. Summary Judgment Awarded to Mr. Long in the Lawsuit, and the Snoqualmie Tribal Court Overturns SGC Action as Arbitrary and Capricious.

Both the lawsuit initiated by the Tribe and the administrative action initiated by the SGC were litigated throughout 2016. CP 532. In the King County Superior Court action, Judge Palmer Robinson awarded partial summary judgment in Mr. Long's favor on July 5, 2016 in the amount of $85,674.44, plus an additional undetermined amount in attorneys' fees and costs, totaling approximately $200,000.00.[1] *Id.*

In the SGC licensing action, meanwhile, the Snoqualmie Tribal Court ruled that the SGC's revocation of Mr. Long's license was "arbitrary and capricious" and remanded the matter to the SGC for either dismissal or renewed action. *Id.* The SGC subsequently re-revoked Mr. Long's gaming license, thereby necessitating another review by the Snoqualmie Tribal Court where, after being stayed for approximately six months, the SGC licensing action is currently undergoing a second appeal. *Id.*

E. Mediation

On January 4, 2017, after a year of litigation, the Tribe and Mr. Long engaged in mandatory mediation. *Id.* The parties, through counsel, ultimately negotiated the Settlement Agreement, with both parties

[1] Due to the unique nature of litigating against a sovereign, damages were awarded in recoupment, as analyzed in *Berrey v. Asarco Inc.*, 439 F.3d 636 (10th Cir. 2006). CP 532.

"walking away" from the dispute (without any exchange of funds) in return for a "complete general release and discharge of any and all claims" held by the Tribe "or entities or agencies" claiming by, through, or under the Tribe:

> 2. Effective upon execution of this Agreement, the Parties, on behalf of themselves, and all persons, spouses, entities or agencies claiming by, through or under them, and their heirs, successors, administrators, trustees and assigns, hereby knowingly and voluntarily unequivocally, irrevocably and absolutely grant and provide to the other Party to the full extent permitted by law, a full and complete general release and discharge of any and all claims, known and unknown, asserted and unasserted, that any Party may have against any other Party as of the date of execution of this Agreement, including but not limited to any and all claims, actions, causes of action, demands, rights, damages, costs, and expenses whatsoever which any Party may have had, may now have, may claim to have, or may hereafter have or claim to have at any time before the date of this Agreement including but not limited to all claims, known and unknown, relating to the subject matter of, or arising out of, the Litigation. The Parties each warrant and represent that they have not assigned or otherwise transferred any claim or cause of action released by this Agreement. The Parties further acknowledge and agree that these releases are full general releases. The Parties expressly waive and assume the risk of any and all claims for damages which exist as of this date, but which they do not know or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise, and which, if known, would materially affect his or its decision to enter into this Agreement.

CP 553-54 (emphasis added).

In addition to specifying that the broad release of claims was on behalf of the "Tribe" and its "entities or agencies," the Settlement Agreement included an express waiver of sovereign immunity for any and all disputes regarding the Settlement Agreement. CP 554. The waiver was on behalf of the "Tribe," unlimited, "expressly and unequivocally"

made, and provided that the Settlement Agreement would be interpreted, enforced, and construed pursuant to Washington law:

> 11. **This Agreement shall be construed, enforced, and interpreted in accordance with the substantive law of the State of Washington. Any dispute arising out of, or related to, this Agreement shall be brought in Washington State Superior Court, King County, and the Parties hereby irrevocably submit to the jurisdiction of the Court to resolve any dispute arising under this Agreement and waive any right to challenge the jurisdiction of said Court or to alter or change venue. The Tribe hereby expressly and unequivocally waives any and all claim(s) of sovereign immunity for purposes of either Party seeking relief in Washington State Superior Court, King County, as outlined in this paragraph, for purposes of resolving any dispute arising under this Agreement.**

Id. (emphasis added). Notably, the waiver of sovereign immunity in the Settlement Agreement was an unlimited waiver, not a "limited" waiver as that examined in the Employment Agreement by the Snoqualmie Tribal Court in March 2016. *Id.*; CP 541.

F. SGC Refuses to Honor the Settlement Agreement.

Following execution of the Settlement Agreement and stipulated dismissal of the lawsuit, the SGC refused to honor the Settlement Agreement. CP 533. Mr. Long thereby filed the underlying lawsuit seeking declaratory and injunctive relief against the SGC. CP 1-9. Additionally, Mr. Long submitted a series of discovery requests to the SGC seeking, without limitation, information on the Council's past history of binding the SGC and other indicia of the relationship between the Council and the SGC. CP 402-27. By motion of the SGC, the discovery was stayed pending the result of the Motion to Dismiss based upon

sovereign immunity under CR 12(b)(1) and a purported failure to state a claim under CR 12(b)(6). CP 99-102; 103-22.

G. Trial Court Grants SGC's Motion to Dismiss.

The parties submitted briefing on the SGC's Motion to Dismiss in March and April, 2017. Mr. Long asserted the following facts, among others, in support of his Response in Opposition to Defendant's Motion to Dismiss:

- The factual allegations examined in the lawsuit settled by the Tribe and the SGC's administrative action are one and the same;
- The SGC and the Tribe coordinated throughout both actions in litigation against Mr. Long;
- The SGC licensing action is currently on appeal and stayed before the Snoqualmie Tribal Court;
- The SGC declined to honor the Settlement Agreement and dismiss the SGC's administrative action against Mr. Long;
- The SGC maintains its cause of action, claim, or administrative decision in an action that is currently on appeal and stayed before the Snoqualmie Tribal Court; and
- Mr. Long's gaming license expired of its own accord in 2016, requiring no further action by the SGC other than the release/dismissal of the SGC licensing action.

CP 521.

Moreover, Mr. Long's Response brief included a declaration from a former employee of the SGC, Bo Yath. CP 618-20. Ms. Yath testified

that she was a six-year employee of the SGC, and that, despite the purported independence of the SGC, she was personally aware that the SGC carried out the express or implied direction of the Tribal Council on a variety of issues, including licensing and regulatory matters. CP 620. Specifically, she was personally informed on numerous occasions whether the Tribal Council desired a gaming license to be issued or not. *Id.*

On April 17, 2017, the trial court granted the SGC's Motion to Dismiss. CP 753. The trial court did not provide reasoning for the grounds, other than a handwritten notation that it was based on "the briefing and argument presented" and articulating an alternative ground that, if the SGC was a party to the January 4, 2017 Settlement Agreement, then the Settlement Agreement released Mr. Long's gaming license claim. *Id.* A Motion for Reconsideration was denied on May 18, 2017. CP 766-67. This appeal followed.

V. SUMMARY OF ARGUMENT

The trial court erred by dismissing the Appellant's lawsuit. Although unclear precisely what reasoning the trial court relied upon, it was error to dismiss pursuant either to CR 12(b)(1), CR 12(b)(6), or the alternative grounds offered by the trial court. If dismissed based on sovereign immunity under CR 12(b)(1), it was an error because the Settlement Agreement clearly and unambiguously waived the sovereign

immunity of "the Tribe" as part of a release of claims by "the Tribe" and "entities or agencies" claiming by or through the Tribe. CP 553-54. As such, the waiver of sovereign immunity necessarily encompasses the SGC, which is a component entity of the Tribe, not a separately incorporated entity. Applying Washington law, as required by the choice of law provision in the Settlement Agreement, results in a clear and unambiguous waiver of sovereign immunity by the Tribe, which necessarily includes the SGC. Moreover, even if Snoqualmie law were considered, the sovereign immunity waiver still applies to the SGC as it is express, broadly-written, unlimited, and not the "limited" waiver of sovereign immunity examined previously by the Snoqualmie Tribal Court. CP 541.

If dismissed based upon failure to state a claim pursuant to CR 12(b)(6), the trial court erred because the plain terms of the Settlement Agreement apply to all claims arising out of the Settlement Agreement, including the licensing action currently on appeal before the Snoqualmie Tribal Court.

The trial court's alternative basis for dismissal, namely, that the Settlement Agreement released Mr. Long's claim against the SGC, is in error because it creates a harshly one-sided, unilateral, and incorrect interpretation of the Settlement Agreement that is plainly at odds with the

written language contained therein. Moreover, this is a reasoning that was not articulated by either party to the trial court.

While dismissal was inappropriate under either CR 12(b)(1) or CR 12(b)(6), it was rendered even more so due to dismissal occurring before Mr. Long was accorded the basic opportunity to engage in discovery necessary to establish his claim. Washington case law holds that, generally, non-moving parties should be afforded the opportunity to engage in discovery related to a jurisdictional issue. That did not occur here. Relatedly, if dismissed base upon CR 12(b)(6), Mr. Long was denied the opportunity to amend the Complaint, which should ordinarily be granted if a non-moving party can plausibly articulate facts necessary to state a claim.

Finally, the significant policy implications of the SGC's preferred interpretation of the Settlement Agreement should be considered. The SGC's interpretation of the enforceability of an unlimited waiver of sovereign immunity, compared to the distinctly "limited" waiver of sovereign immunity examined by the Snoqualmie Tribal Court, has significant consequences for entities and individuals engaged in business transactions with tribes and tribal entities. For all these reasons, the trial court should be reversed.

VI. ARGUMENT

A. Standard of Review.

Here, the SGC submitted evidence outside the pleadings in support of its Motion to Dismiss. CP 110. Consequently, review of the trial court's dismissal of an action under CR 12(b)(1) is *de novo*. *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn.App. 799, 808 (Div. 1 2013). Similarly, to the extent that the trial court relied on evidence submitted outside the pleadings when ruling on the CR 12(b)(6) motion, dismissal is reviewed as a grant of summary judgment. *Id.*

B. The Trial Court Erred By Dismissing Mr. Long's Action.

The trial court's reasoning in dismissing the underlying action is limited to "the briefing and argument presented" and an alternative basis that, if the SGC was a party to the January 4, 2017 Settlement Agreement, then the Settlement Agreement released Mr. Long's gaming license claim pending in Snoqualmie Tribal Court. CP 753. As the trial court's primary reasoning is unknown, the parties are at a distinct disadvantage in examining what basis the trial court relied upon for its ruling. Consequently, Mr. Long addresses each of the primary arguments asserted in the underlying proceeding, and then addresses the alternative basis offered by the trial court.

1. If the Trial Court Acted Pursuant to CR 12(b)(1), It Committed Reversible Error.

The primary argument addressed by both parties before the trial court was whether Mr. Long's lawsuit to enforce the Settlement Agreement was somehow foreclosed by sovereign immunity pursuant to CR 12(b)(1). Specifically, the SGC argued that the Settlement Agreement's waiver of sovereign immunity by "the Tribe" was insufficiently specific as to the SGC to comprise an operable waiver. CP 110-15. The SGC relied almost exclusively on the March 2016 ruling by the Snoqualmie Tribal Court addressing a distinctly different and expressly "limited" waiver of sovereign immunity, a distinction that the SGC employed to prevail at the Snoqualmie Tribal Court by utilizing the argument that such a "limited" waiver by the Tribe could not apply to the SGC. CP 113-15.

Mr. Long, by contrast, argued that the Settlement Agreement's choice of law provision required that it be interpreted pursuant to Washington law, and that the Settlement Agreement was clear and unambiguous. CP 508-15. Alternatively, even if the Settlement Agreement were interpreted in light of the Snoqualmie Tribal Court ruling, it was still sufficiently specific to encompass the SGC. CP 616-18.

a. Washington Law Regarding Sovereign Immunity.

Washington case law regarding sovereign immunity is well known. Tribal sovereign immunity extends to "tribal agencies and instrumentalities acting as extensions of tribal government." *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 112, 147 P.3d 1275 (2006). "Waiver of sovereign immunity can arise in only two ways: from a tribe's express waiver or through a congressional statute expressly abrogating sovereign immunity." *Foxworthy v. Puyallup Tribe of Indians Association*, 141 Wn.App. 221, 227 (2007) (citing *Santa Clara Pueblo*, 436 U.S. 49, 58 (1978)). Moreover, "no magic words are necessary to relinquish tribal sovereign immunity, [but] the intent to do so must be clear." *Auto United Trades Org. v. State*, 175 Wn.2d 214, 226 (2012) (citing *Okla. Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)). A Washington state court has "subject matter jurisdiction over breach-of-contract claims against tribes if the tribe consents to the civil jurisdiction of the state of Washington as permitted by federal law." *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn.App. 799, 815 (Div. 1 2013).

b. Washington Law Regarding Contract Interpretation.

Washington case law regarding contractual interpretation is equally well known. Washington follows the "objective manifestation

theory" of contract interpretation, under which the focus is on the reasonable meaning of the contract language to determine the parties' intent. *See Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503 (2005); 25 WASH. PRAC., CONTRACT LAW AND PRACTICE §2:1 (3d ed.) (citations omitted). "We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." *Id.*, at 504.

Moreover, contracts are interpreted as a whole, interpreting particular language in the context of other contract provisions. *See Weyerhaeuser Co v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 669-70 (2000). Additionally, "[w]hen interpreting a contract, [a court]...harmonize[s] clauses that seem to conflict. [The] goal is to interpret the agreement in a manner that gives effect to all of the contract's provisions." *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn.App. 841, 849 (2007). Indeed, Washington courts construe contracts so as not to render any provision superfluous. *See Fardig v. Reynolds*, 55 Wn.2d 540 (1960) (citing *Hollingsworth v. Robe Lumber Co.*, 182 Wash. 74, 79 (1935) ("In construing the contract, it is, of course, elementary that the intention of the parties thereto is to be gathered from the whole instrument, and each part, if possible, should be construed so that all of the parts thereof may have some effect.").

Finally, to assist in determining the meaning of contract language, Washington courts apply the "context rule" adopted in *Berg v. Hudesman*, 115 Wn.2d 657, at 667 (1990). This rule permits consideration of extrinsic evidence "'to determine the meaning of specific words and terms used' and not to 'show an intention independent of the instrument' or 'to vary, contradict, or modify the written word.'" *Hearst*, at 503 (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-96 (1999)).

c. The Settlement Agreement Is Interpreted Pursuant to Washington Law, and Contains a Valid Waiver of Sovereign Immunity That Applies to the SGC.

To the extent, if any, the trial court relied upon the March 2016 analysis by the Snoqualmie Tribal Court, it erred for three reasons: 1) The choice of law provision contained in the Settlement Agreement specifically provides for application of Washington law; 2) Even if Snoqualmie law were considered in interpreting the Settlement Agreement, the waiver of sovereign immunity examined by the Snoqualmie Tribal Court in March 2016 is completely inapposite to the waiver at issue here; and 3) Even if Snoqualmie law were considered in interpreting the Settlement Agreement, the sovereign immunity of the Tribe and the SGC are coextensive, and the SGC is not empowered to waive its own sovereign immunity.

The Settlement Agreement is clear in providing for application of Washington law. ("This Agreement shall be construed, enforced, and interpreted in accordance with the substantive law of the State of Washington."). Washington courts will enforce an express choice of law clause in a contract so long as applying it does not violate the fundamental public policy of the forum state. *Freestone Capital Partners, LP v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn.App. 643 (Div. 1 2010) (citing *McGill v. Hill*, 31 Wn.App. 542, 547 (1982)).

In response to the argument that the Settlement Agreement is governed by Washington law, the SGC contends that Washington law is the federal common law, which is the Tribe's law. CP 714 (citing *Auto. United Trades Org. v. State*, 175 Wash.2d 214, 226 (2012)). That is two bridges too far. The single case provided as authority by the Tribe for this proposition does not address the situation presented here where Mr. Long specifically bargained for, and received, a choice of law provision providing for application of *Washington* law in interpreting the terms of the Settlement Agreement. The SGC's circular reasoning, in an attempt to bring in the analysis by the Snoqualmie Tribal Court of a markedly different waiver of sovereign immunity, may not circumvent the express terms of the choice of law provision in the Settlement Agreement.

Consequently, any reliance by the trial court on the March 2016 Snoqualmie Tribal Court decision is an error.

Application of Washington law reveals that the provisions of the Settlement Agreement are clear and unambiguous. "When interpreting a document, the preferred interpretation gives meaning to all provisions and does not render some superfluous or meaningless." *Bogomolov v. Lake Villas Condo Assn. of Apartment Owners*, 131 Wn.App. 353, 361 (Div. 1, 2006). Here, the SGC's preferred interpretation of the Settlement Agreement as somehow excluding the SGC licensing action fails to interpret the Settlement Agreement as a whole, and fails to give effect to numerous provisions of the Settlement Agreement.

For example, if the Court were to adopt the interpretation urged by the SGC, namely, that the waiver of sovereign immunity in paragraph 11 of the Settlement Agreement somehow does not extend to the SGC, then it renders the release of claims by "entities or agencies" of the Tribe in paragraph 2 of the Settlement Agreement a nullity. If not covered by the Settlement Agreement, then the "entities or agencies" of the Tribe language serves no purpose, an impermissible result pursuant to basic Washington principles of contract interpretation.

Similarly, the SGC's interpretation renders inoperable the language releasing all claims "relating to the subject matter of, or arising out of, the

Litigation" in paragraph 2. If the parties intended to release only the legal claims asserted by the Tribe against Mr. Long, as well as Mr. Long's remaining counterclaims against the Tribe, then the "relating" or "arising out of" language is clearly unnecessary. Indeed, this language is only necessary if it is meant to accomplish precisely what Mr. Long alleges: a complete release of the claims "relating to" or "arising out of" the operative facts, which includes the SGC's administrative action claim against Mr. Long's gaming license. This language demonstrates that the parties intended to release claims broader than those strictly asserted in the underlying lawsuit. Since the SGC's administrative action is rooted in the same facts and asserts the same allegations as the lawsuit initiated by the Tribe, it is undoubtedly "relating to the subject matter of, or arising out of, the Litigation." To argue otherwise, as the SGC does, simply ignores the plain language of the Settlement Agreement, and renders important provisions of the Settlement Agreement entirely superfluous.

d. Even If Interpreted Under Snoqualmie Law, the Settlement Agreement Still Contains a Valid Waiver of Sovereign Immunity That Applies to the SGC.

Although the Settlement Agreement clearly requires application of Washington law under the choice of law provision, even if the Tribe's law were to apply, then the March 2016 Tribal Court decision only further

demonstrates why the waiver of sovereign immunity applies to the SGC. The SGC contended before the trial court that the Snoqualmie Tribal Court ruling conclusively established Snoqualmie law regarding the need for a waiver of sovereign immunity to specifically mention the SGC. CP 112-15. Not true. Instead, the most that can be said from the March 2016 Snoqualmie Tribal Court ruling was that the specific waiver of sovereign immunity contained in *that* agreement and examined at *that* hearing was insufficient to encompass the SGC. As argued at the trial court, however, the waiver of sovereign immunity examined at the March 2016 hearing was markedly different from the waiver of sovereign immunity examined here. Indeed, the following table presented to the trial court illustrates the stark differences presented between the waivers at issue:

	Waiver in Employment Agreement Examined in Mar. 2016	**Waiver in Settlement Agreement Currently At Issue**
Limitations in scope	"limited"	No restriction
Applicable law	Tribal	Washington
Time limitations	120 days	No limitation
Forum	Snoqualmie Tribal Court	Washington Superior Court
Availability of fees	Unavailable against the Tribe	No restriction

CP 517.

The most significant difference between the two waivers of sovereign immunity at issue here is the fact that the waiver contained in the Employment Agreement – and ruled upon by the Snoqualmie Tribal Court – was an expressly "limited" waiver of sovereign immunity. CP 541. It was the very "limited" nature of this waiver that counsel for the SGC relied upon to successfully persuade the Snoqualmie Tribal Court that the waiver did not encompass the SGC: "Now the whole point of a limited waiver of sovereign immunity is that, in an agreement, the Tribe, or the tribal entity that's involved, says, "We're waiving our sovereign immunity to this entity, or to this set of assets." CP 51, 7.

By contrast, the waiver at issue in this appeal is not a "limited" waiver of sovereign immunity. Instead, it is unlimited, written to include the Tribe (without restriction), and the Settlement Agreement specifically releases claims by the Tribe and its "entities or agencies." Consequently, the very argument relied upon by the SGC before the Snoqualmie Tribal Court is fatal here. As the waiver is an unlimited waiver of sovereign immunity, it necessarily applies to the Tribe's agencies, including the SGC. Indeed, other than the March 2016 Snoqualmie Tribal Court ruling, the SGC fails to provide any authority – because none exists – that supports the notion that a waiver of sovereign immunity by a tribe must specifically identify each and every tribal sub-agency that it applies to.

While authority plainly exists to that effect for separately incorporated tribal entities (*see e.g. Wright*, 159 Wn.2d at 111-12), no such authority has been presented regarding tribal government agencies.

Finally, if Snoqualmie law is considered in examining the waiver of sovereign immunity, it only reconfirms that the waiver contained in the Settlement Agreement applies to the SGC. This is because the Tribe's law provides that the Tribe's and SGC's sovereign immunity is coextensive, demonstrating that, when the Council waived sovereign immunity for the "Tribe," it waived sovereign immunity for its governmental sub-entities. The coextensive nature of the Tribe's and SGC's sovereign immunity is illustrated by the Gaming Act. The Gaming Act provides that "as a political subdivision of the Tribe, [the SGC] possesses ***all of the rights, privileges, and immunities of the Tribe***, including, without limitation, sovereign immunity from suit absent express consent from the Tribal Council." CP 602-03 (emphasis added). Notably, the Gaming Act does not differentiate between the SGC and the Tribe for purposes of sovereign immunity. Nor does it require that any waiver of sovereign immunity specify the SGC by name to be effective. On the contrary, it clearly states that the SGC "possesses all of the rights, privileges, and immunities ***of the Tribe***..." *Id.* (emphasis added).

The coextensive nature of the Tribe's and SGC's sovereign immunity is reinforced by persuasive precedent from the federal courts and other tribal courts. In *Ninigret Dev. Corp. v. Narrangansett Indian Wetuomuck Hous. Authority*, 207 F.3d 21 (1st Cir. 2000), for example, the First Circuit addressed a situation where a tribal agency was sued under a waiver of the tribe's sovereign immunity. The First Circuit noted that "[t]he authority, as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity...Therefore, we shall not distinguish between the Tribe and the Authority in discussing concepts such as tribal immunity and tribal exhaustion." *Id.*, at 29. Similarly, in *Sebnem Pura v. Quinault Housing Authority*, Quinault Court of Appeals, Case No. CV 12-2-002, at 9 (2013) (available at http://www.quinaulttribalcourt.org/appeals.php (last visited Oct. 19, 2017), the Quinault Court of Appeals ruled that a "very limited and specific waiver of immunity" by the Quinault Indian Nation applied equally to the Quinault Housing Authority, a "delegate agency" of the Quinault Indian Nation under Quinault law.[2]

The coextensive nature of the SGC's and Tribe's sovereign immunity is further supported by the fact that only the Council may waive

[2] This authority was provided to the trial court at oral argument, with the admission that, while clearly on point, its persuasive authority may be considered in light of the fact that the author of the *Pura* decision is the same as the below-signed counsel for Mr. Long. Nevertheless, *Pura* was a unanimous decision of a three-judge panel and is noteworthy in that it addressed a "very limited" waiver, as compared to the unlimited waiver presented here. *Id.*, at 20.

sovereign immunity – not the SGC. As noted in §10.0 of the Snoqualmie Judiciary Act:

> The Snoqualmie Tribe, the Snoqualmie Tribal Council, and all Tribal agencies, committees, departments, entities or employees of any kind shall be immune from suit or omissions done during the performance of Tribal duties. ***Only Tribal Council has the authority to waive this sovereign immunity in accordance with Snoqualmie Tribal law.***

Decl. of H. Abell, Exh. H, at §10.0. Here, of course, it is the Council that waived the Tribe's sovereign immunity pursuant to the Settlement Agreement. Moreover, the language of §10.0 is important: by referring to "***this*** sovereign immunity," the Judiciary Act confirms that the sovereign immunity of the Tribe and the SGC is a single, coextensive legal protection – a protection that was entirely waived.

At the trial court, the SGC relied heavily on its status as an "independent governmental subdivision of the Tribe" under the Gaming Act. CP 112-113. As a legal matter, however, whatever the SGC's status as an "independent governmental subdivision of the Tribe" may mean, it does not mean that the SGC is independent of the Council for purposes of waiving sovereign immunity. As outlined above, the Snoqualmie Judiciary Act already clarifies that the SGC cannot waive its own sovereign immunity – only the Council may do so. Here, the Council has waived the sovereign immunity of the "Tribe" including, by definition, the

SGC. The SGC's status as an "independent governmental subdivision of the Tribe" does not alter that fact.

Since the SGC cannot independently waive sovereign immunity, the waiver of sovereign immunity by the "Tribe" in the Settlement Agreement applies to its component sub-entities, including the SGC. Indeed, the interpretation urged by the SGC, that a waiver of sovereign immunity must enumerate each and every tribal sub-entity that it applies to, is unsupported by any published decision identified by Plaintiff, and flies in the face of the "no magic words" requirement of *Auto United Trades Org.*, 175 Wn.2d at 226.

Finally, whatever the SGC's status as an "independent" agency from the Council may be as a matter of law, the facts in this case demonstrate that it is anything but. As demonstrated by Ms. Yath's declaration, the SGC is, in effect, a rubber stamp for the Council. CP 618-20. Indeed, in the most striking example, the Council appointed itself as the SGC in 2014, in patent violation of Snoqualmie law. *Id.* Thus, for at least a certain period of time, the SGC and the Council comprised the exact same members. Moreover, Ms. Yath testified that she is "personally aware that the SGC carries out the direction of the Tribal Council on a variety of issues, including licensing and regulatory matters." CP 620. Consequently, to the extent that the SGC relies on its purported

independence from the Council, that is factually inaccurate, and must be presumed so for purposes of this review.

2. If the Trial Court Acted Pursuant to CR 12(b)(6), It Committed Reversible Error.

Although most of the briefing and oral argument before the trial court was devoted to the sovereign immunity issue under CR 12(b)(1), the SGC also argued that the lawsuit must be dismissed pursuant to CR 12(b)(6). CP 118.

Dismissals under CR 12(b)(6) are rare, granted sparingly, and with care. *See e.g. Bravo v. Dolsen Co.*, 125 Wn.2d 745, 750 (1996). As such, CR 12(b)(6) motions question only the legal sufficiency of a claim, with the factual allegations in the Complaint taken as true. *See Dana v. Boren*, 133 Wn.App. 307, 310 (2006). The trial court should only grant such a motion "in the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief." *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164 (2007). In other words, a CR 12(b)(6) motion should be granted "only if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Bravo*, 125 Wn.2d at 750. Courts hold that "any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's

claim." *Id.*, quoting *Halvorson v. Dahl*, 89 Wn.2d 673, 674 (1978). Finally, a plaintiff should be allowed to freely amend the complaint, in lieu of a dismissal, if it appears that by amending the complaint the plaintiff may be able to state a cause of action. CR 15(a); *Caruso v. Local Union No. 690 of Intern. Broth. Of Teamsters, Chauffers, Warehouseman and Helpers of America*, 100 Wash.2d 343 (1983)).

Here, the SGC's argument is that Mr. Long has not alleged that the SGC is pursuing a "claim" against him, and that the Settlement Agreement cannot be read to require the SGC to "undo" the revocation of Mr. Long's gaming license. CP 118-19.

By contrast, Mr. Long asserts that the Complaint plainly states that, when confronted with the Settlement Agreement, "the SGC refused to honor it." CP 519-20. In other words, the SGC maintains its licensing action against Mr. Long, an action which it could dismiss at any time, and an action which is currently on appeal before the Snoqualmie Tribal Court. Moreover, Mr. Long asserts that the SGC has expressly declined to voluntarily dismiss the administrative action. CP 520.

As for the argument that the decision to revoke Mr. Long's gaming license does not comprise a "claim" within the meaning of the Settlement Agreement, the SGC simply ignores the facts of the case and the rest of the language of the Settlement Agreement. The SGC asserted multiple

claims against Mr. Long, including the improper award of a bonus and impermissible transmission of supposedly "confidential information." CP 501, 623. The SGC appears to argue that, since the SGC adjudicated and then re-adjudicated these claims on remand, there are no longer any "claims" pending by the SGC against Mr. Long. Those "claims," however have been properly appealed (where Mr. Long already prevailed once) and remain on appeal before the Snoqualmie Tribal Court. As such, the SGC's revocation of Mr. Long's gaming license is not a final decision by the SGC and may be rescinded voluntarily or dismissed involuntarily by the judiciary. In short, merely because the SGC has acted on the allegations against Mr. Long, that does not make them any less subject to the terms of the Settlement Agreement.

This is especially true given the language of the Settlement Agreement. Far from being restricted to only "claims" of the parties, it also includes "any and all claims, known and unknown...including but not limited to ***any and all claims, actions, causes of action, demands, rights, damages, costs, and expenses whatsoever***...including but not limited to ***all claims, known and unknown, relating to the subject matter of, or arising out of, the Litigation.***" CP 520 (emphases added). Here, the SGC's administrative action against Mr. Long is undoubtedly a "claim," or an "action," or a "cause of action" against Mr. Long that is related to or

arises out of "the Litigation." Just because that "claim" or "action" or "cause of action" is currently on appeal does not make it any less subject to the Settlement Agreement. Moreover, as asserted previously, the factual allegations of the lawsuit and the administrative action are one and the same, rendering the "relating to the subject matter of, or arising out of, the Litigation" language all the more pertinent, especially since the recitals of the Settlement Agreement make clear that the purpose is to settle any and all disputes related out of the common factual history.

The SGC's argument before the trial court also appeared to contend that some sort of specific action was required to "undo" the licensing action against Mr. Long. That is incorrect. Mr. Long's gaming license expired of its own accord on May 10, 2016. CP 623-24. As such, release and dismissal of the SGC's administrative action against Mr. Long, merely results in his license having expired of its own accord. No further action is required – hence, no further action is specified in the Settlement Agreement.

C. The Trial Court's Alternative Basis Is In Error.

The clearest component of the trial court's otherwise cryptic order dismissing Mr. Long's lawsuit is its determination that, if the SGC were a party to the Settlement Agreement, since Mr. Long's license was revoked prior to the signing of the Settlement Agreement, then the terms of the

Settlement Agreement appear to release Mr. Long's pending appeal. CP 772. This reasoning overlooks, however, the otherwise plain language of the Settlement Agreement.

The Settlement Agreement is a *bilateral* agreement, with terms designed to benefit both parties. Specifically, the Settlement Agreement provides that "the Parties" shall provide a "full and complete general release" of any and all claims against the other. This is a bilateral provision envisioning a mutual release of claims. As such, it makes no sense to fully enforce the provisions of the Settlement Agreement against only one party. How it could be construed to do so is entirely unclear, and the trial court provides no clarification. If, however, the trial court's order is read to the effect that there is no "claim" held by Mr. Long against the SGC, then it appears that the trial court adopted the SGC's CR 12(b)(6) reasoning. For the reasons described in the section above, that reasoning is in error.

D. Discovery Should Proceed And, If Necessary, Mr. Long Should Be Permitted to Amend His Complaint.

The trial court committed reversible error by dismissing Mr. Long's lawsuit under the facts and circumstances alleged, without according Mr. Long the basic opportunity to engage in discovery. Mr. Long asserts that sufficient facts have been provided to establish

jurisdiction and/or state a claim. If in doubt, however, when defending against a CR 12(b)(1) motion to dismiss, courts generally permit the non-moving party (in this case, Mr. Long) to discover facts relevant to jurisdiction, particularly when the facts are peculiarly within the control of the moving party. *See Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 119-21 (2006).

Here, Mr. Long submitted a series of discovery requests to the SGC that explored the relationship between the Council and the SGC, and the Council's ability and history of binding the SGC. These discovery requests were stayed, however, by motion of the SGC. Consequently, the multitudes of allegations by the SGC pertaining to jurisdiction have not been subject to scrutiny through the discovery process. According to the Washington Supreme Court, "the right of discovery authorized by the civil rules" is of constitutional dimension. *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991). Stated another way:

> The people have a right of access to courts; indeed, it is the bedrock foundation upon which rest all the people's rights and obligations. This right of access to courts includes the right of discovery authorized by the civil rules. As we have said before, 'it is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense.

Putman v. Wenatchee Valley Med. Ctr., P.S., 166 Wn.2d 974, 979, 216 P.3d 374 (2009); *see also Lowy v. PeaceHealth*, 174 Wn.2d 769, 776-77

(2012) (noting that the discovery rules effectuate the constitutional mandate through "a broad right of discovery" and "relatively narrow restrictions"). Here, that right of discovery has been entirely thwarted, and the trial court erred by preventing Mr. Long from engaging in discovery pertinent to the jurisdictional issue.

Relatedly, if the trial court dismissed based upon CR 12(b)(1), Mr. Long should have been permitted the opportunity to amend his Complaint in lieu of dismissal. CR 15(a); *Caruso v. Local Union No. 690 of Intern. Broth. Of Teamsters, Chauffers, Warehouseman and Helpers of America*, 100 Wash.2d 343 (1983)). If there is an identified pleading deficiency of some sort, it was not identified by the trial court.

E. Significant Policy Implications Arise from the SGC's Preferred Interpretation.

Finally, the SGC's preferred interpretation of the Settlement Agreement as excluding the SGC from an unlimited waiver of sovereign immunity by "the Tribe" results in significant real-world policy implications for businesses and entities conducting transactions with the Tribe, or any tribal-affiliated entity in Washington. As noted by counsel for the SGC himself:

> And there are ***literally thousands*** of contracts and financing agreements and other agreements, with banks, with contractors, throughout the Pacific Northwest, that have limited waivers of sovereign immunity that spell out specifically the assets and entities to whom that waiver applies. And that's the whole point of the limitation.

CP 531 (emphasis added). The SGC is correct. There are, in fact, thousands of contracts throughout the Pacific Northwest that have waivers of sovereign immunity akin to the one examined in March 2016 by the Snoqualmie Tribal Court, i.e. a "limited" waiver of sovereign immunity. As examined in *Pura*, some waivers are even restricted to being "very limited and specific waiver[s] of immunity." The fact that the waiver in the Settlement Agreement is expressly unlimited and without restriction is notable, and further demonstrates the intent of the parties to waive the claims before the SGC.

Just as there are literally thousands of contracts with limited waivers of sovereign immunity in the Pacific Northwest, however, there are a lesser number of contracts in the region where sovereign immunity is waived by the "tribe." If the SGC's preferred interpretation is adopted, it places every person and entity who has such a waiver of sovereign immunity with a tribe that fails to specifically articulate each and every sub-entity of the tribe it applies to, at risk of having no legal recourse. This is the case even if the entity in question is not separately

incorporated, as here, but is a tribal agency, or even an agency created by a tribe after execution of the applicable contract. Far from being the "diminution" of sovereign immunity warned of by the SGC (CP 714), this represents a dramatic and unwarranted expansion of the doctrine. To do so works a hardship, not only on Mr. Long, but on others in a comparable situation.

VII. CONCLUSION

The SGC is attempting to have it both ways. On one hand, it claims to be independent from the Council and contends that any action by the Tribe cannot possibly be binding on the SGC for purposes of sovereign immunity. On the other hand, the SGC only has sovereign immunity by virtue of being part and parcel of the Tribe. This is an untenable position when the Tribe has unambiguously waived its sovereign immunity, as here. It is especially untenable when the SGC has argued, unreservedly, that only the "limited" nature of the waiver of sovereign immunity examined in March 2016 before the Snoqualmie Tribal Court prevented that waiver from applying to the SGC. The unlimited waiver of sovereign immunity presented here further demonstrates the applicability to the SGC.

For all the reasons specified above, the Order Granting Defendant's Motion for Protective Order, Order and Judgement Granting

Defendant's Motion to Dismiss and Dismissing the Case, and the Order Denying Plaintiff's Motion for Reconsideration on Defendant Snoqualmie Gaming Commission's Motion to Dismiss, should be reversed.

RESPECTFULLY SUBMITTED this 23rd day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 23rd day of October, 2017, I caused a true and correct copy of the forgoing document, Appellant's Opening Brief to be delivered to the following counsel of record as indicated:

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October 23, 2017 - 3:35 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77007-1
Appellate Court Case Title:	Wendell Long, Appellant vs. Snoqualmie Gaming Commission, Respondent
Superior Court Case Number:	17-2-01853-8

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