# SUPREME COURT

OF THE

# STATE OF CONNECTICUT

## S.C. 19464

**BRIAN LEWIS AND MICHELLE LEWIS**

**v.**

**WILLIAM CLARKE**

**REPLY BRIEF OF DEFENDANT-APPELLANT WITH ATTACHED APPENDIX**

*TO BE ARGUED BY:*

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FILED: AUGUST 21, 2015

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## REPLY ARGUMENT

Four points in the plaintiffs' brief require a response: (1) their failure to address the controlling United States Supreme Court precedent that immunizes tribes and tribal entities from suit for their commercial activities; (2) their unfounded attempt to limit tribal sovereign immunity to actions against "tribal officials . . . in their representative capacities"; (3) their conflation of tribal sovereign immunity with the immunity of state officials under the Eleventh Amendment, and reliance on inapposite state law immunity principles; and (4) their unconvincing assertion that *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013), is not an "outlier," even though only the Ninth Circuit (and the trial court) have applied the "remedy-sought" approach.

### *A. Clear and controlling United States Supreme Court precedent makes tribes and tribal entities immune from suit for their commercial activities.*

The plaintiffs' grudgingly acknowledge that Congress has exclusive control over the scope of tribal sovereign immunity, but assert that "Congress has restricted that grant of immunity to *only* matters involving tribal self-governance. Turner v. United States, 248 U.S. 354 (1919) (emphasis added)." (Pl. Br., 3). The Supreme Court's less-geriatric jurisprudence – which the plaintiffs ignore – belies their assertion.

Indian tribes are nations "that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Community*, ___ U.S. ___, 134 S.Ct. 2024, 2030 (2014). The "necessary corollary to Indian sovereignty and self-governance[,]" is "that tribes possess . . . the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* Tribal immunity is not a privilege granted by Congress, nor is it limited to certain "matters". See *id.* at 2031 ("[t]he baseline position, we have often held, is tribal immunity"). Tribes are immune from suit because they are "separate sovereigns pre-existing the Constitution[,]"

period – qualified "only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands." *Id.* (to abrogate tribal immunity, Congress "must 'unequivocally' express that purpose").

*Bay Mills* does not write on a blank slate: It merely reiterates that "we have time and again treated the doctrine of tribal immunity as settled law and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Id.* at 2030-31 (quotation marks omitted); see *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 758 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).[1] The plaintiffs' assertion that "[i]f the Defendant's argument is accepted by this Court, sovereign immunity would allow him to escape subject matter jurisdiction[,]" (Pl. Br., 2), ignores that "settled law". Tribal immunity is federal law and a state court may not exercise jurisdiction in conflict with it. See U.S. Const., Art. VI, cl. 2 (federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby"); *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 884-85 (1986). Tribal immunity would not allow the defendant to "escape" jurisdiction because the trial court never had jurisdiction from which to escape.

Furthermore, *Bay Mills* forecloses the plaintiffs' argument that "protect[ing] tribal self-government," "control[ling] internal relations[,]" and "promot[ing] those traditional powers . . . which relate to self-sufficiency and economic development[,]" (Pl. Br., 3), are the limits of

[1] *Bay Mills* knocks the air out of the plaintiffs' claim that "the Mohegan Tribe's immunity cannot be unilaterally extended beyond *that which Congress originally conveyed to it.*" (Pl. Br., 3) (emphasis added). Congress did not "convey" immunity to the Tribe; like any other sovereign, it is "inherent in [its] nature . . . not to be amenable to suit without consent." 134 S.Ct. at 2030 (quoting THE FEDERALIST NO. 81, P. 511 (B. WRIGHT ED. 1961) (A. HAMILTON)).

tribal sovereign immunity.[2] In truth, tribal immunity does not "make any exception for suits arising from a tribe's commercial activities, even when they take place off Indian lands." 134 S.Ct. at 2031. *Bay Mills* notes that the plaintiff in *Kiowa* had

> asked this Court to confine tribal immunity to suits involving conduct on reservations or to noncommercial activities. . . . We said no. We listed *Puyallup*, *Potawatomi*, and *USF & G*[3] as precedents applying immunity to a suit predicated on a tribe's commercial conduct – respectively, fishing, selling cigarettes, and leasing coal mines. . . . Too, we noted that *Puyallup* involved enterprise both on and off the Tribe's reservation. . . . Our precedents, we thus concluded, have not previously drawn the distinctions the plaintiff pressed in the case.

*Id.* (citations, brackets and quotation marks omitted).

The Court "opted to defer to Congress about whether to abrogate tribal immunity for off-reservation commercial conduct[,]" *id.*, but Congress never took up the Court's invitation. See *Kiowa*, 523 U.S. at 758 (plaintiff "suggests instead that we confine [immunity] to reservations or to noncommercial activities. We decline to draw this distinction . . . as we defer to the role Congress may wish to exercise in this important judgment.") Though the plaintiffs would prefer it otherwise, the law is clear: A tribe is immune from suit for its commercial activities. *Bay Mills*, 134 S.Ct. at 2031; *Kiowa*, 523 U.S. at 758.

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[2] The plaintiffs and the trial court rely on *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and *Rice v. Rehner*, 463 U.S. 713 (1983). (Pl. Br., 3; App. Pt. 1, A23). Their reliance is misplaced. Neither case involved a suit against an Indian tribe, tribal entity, or tribal employee – as such, neither addressed tribal sovereign immunity from suit. *Strate* holds that a tribal court lacked jurisdiction over a lawsuit arising out of a car accident on what the Court determined to be non-Indian fee land because (1) the state of North Dakota, not the tribe, maintained the highway under a federal right-of-way, and (2) neither defendant was a member of the tribe. 520 U.S. at 442. *Rice* holds that a federally-licensed Indian trader who ran a general store on the Pala Reservation had to obtain a state liquor license. 463 U.S. at 715.

[3] *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991); *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).

It is clear, too, that tribal entities and their employees enjoy the same immunity as a tribe itself. See *Kizis v. Morse Diesel International, Inc.*, 260 Conn 42, 58-59 (2002) (employee of Tribe and employee of MTGA immune); *Davidson v. Mohegan Tribal Gaming Authority*, 97 Conn. App. 146, 150, *cert. denied*, 280 Conn. 941 (2006), *cert. denied*, 549 U.S. 1346 (2007) (MTGA protected by "tribe's sovereign immunity"); see also *Tassone v. Foxwoods Resort Casino*, 519 F. App'x 27 (2d Cir. 2013) (summary order) ("[t]ribal immunity also applies to entities, such as Foxwoods Resort Casino, that are arms, agencies or subdivisions of the tribe"); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 356-58 (2d Cir. 2000) (agency of tribe immune to same extent as tribe). The defendant discussed most of the reasons for this in his main brief, (Def. Br., 9 & n. 6), but one other bears emphasis: The Mohegan Tribe's intent to extend its sovereign immunity to the MTGA and its employees.

As the defendant pointed out in his main brief, the MTGA is a constitutional entity with governmental and proprietary powers. (Def. Br., 9); see Mohegan Const., Art. XIII, sec. 1; Mohegan Tribe, Code of Laws § 2-21; *Kizis*, 260 Conn. at 56. The Mohegan Tribal Code provides: "Nothing in this Article shall be construed as waiving the sovereign immunity of The Mohegan Tribe, The Mohegan Tribal Gaming Authority, or any Mohegan Tribal Entity or its or their agents, employees or officials." Mohegan Tribe, Code of Laws § 24-55.[4] This clear expression of intent and the constitutional origin of the MTGA makes it and its employees immune to the same extent as the Tribe.

[4] Article XIII empowers the MTGA "to grant a limited waiver of sovereign immunity as to Gaming matters, to contracts relating to Gaming, to the revenues of The Tribal Gaming Authority, to the assets within the control of The Tribal Gaming Authority, and as otherwise authorized by The Tribal Council, but shall have no such right as to other tribal revenues, assets or powers." Mohegan Const., Art. XIII, sec. 1. This limited waiver permitted the

*B. The employee of a tribal entity cannot act in an "individual" capacity if he acts within the scope and course of his employment.*

Perhaps aware that the United States Supreme Court consistently has rejected their constricted view of tribal immunity, the plaintiffs jiggle the handle on another back door: They claim that they may sue the driver of an MTGA limousine who struck their car while working for the MTGA, so long as they sue him not "in his representative or professional capacity as a tribal employee, but as an individual." (Pl. Br., 12). The very law on which the plaintiffs rely refutes their sophistry.

Tribal immunity "extends to tribal officials acting within the scope of their official authority[,]" *Burrell v. Armijo*, 603 F.3d 825, 832 (10th Cir. 2010), and to "employees of the [t]ribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority." *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir.), *cert. denied sub nom., Chayoon v. Reels*, 543 U.S. 966 (2004); accord *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008), *cert. denied*, 556 U.S. 1221 (2009). The plaintiffs pay lip service to this rule, but argue that a tribal employee does not act in a representative capacity – even when his allegedly tortious conduct took place in the scope and course of his employment – if a plaintiff chooses to sue him as an individual. (Pl. Br., 12).

To support their ambitious assertion, the plaintiffs claim that while *Chayoon* and *Bassett v. Mashantucket Pequot Museum & Research Ctr., Inc.*, 221 F. Supp. 2d 271 (D. Conn. 2002), "involved suits where the tribal employees were *named* individually[,]" they really "were *sued* as representatives, in their official capacities, of the tribe." (Pl. Br., 10)

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establishment of the Mohegan Gaming Disputes Court as a forum for the adjudication of claims against the MTGA. See *Kizis*, 260 Conn at 58-59.

(emphasis added). In fact, *Chayoon* and *Bassett* make it clear that any suit against a tribal employee for actions in the scope and course of his employment is a suit against him in his representative capacity – no matter how a plaintiff chooses to draft his complaint.

Mr. Chayoon attempted the same end-run around tribal immunity as the plaintiffs, albeit by a longer road: He first sued the Mashantucket Pequot Tribal Nation and Foxwoods in federal court for claimed violations of Connecticut's Family Medical Leave Act, but the court dismissed his suit based on tribal immunity. *Chayoon v. Sherlock*, 89 Conn. App. 821, 823, *cert. denied*, 276 Conn. 913 (2005), *cert. denied*, 547 U.S. 1138 (2006); see Docket Sheet in 3:02-cv-0163 (AVC), available at https://ecf.ctd.uscourts.gov/cgi-bin/DktRpt.pl?631370492747471-L_1_0-1 (website last visited 8/17/15).

Chayoon then sued seventeen individual defendants and the "Foxwoods Management Team" in federal court for the same claimed violations. 89 Conn. App. at 823; see Docket Sheet in 3:02-cv-1358 (AVC), available at https://ecf.ctd.uscourts.gov/cgi-bin/DktRpt.pl?118541761201346-L_1_0-1 (website last visited 8/17/15). In his second suit, Chayoon did exactly what the plaintiffs have done: He named the defendants as individuals, even though all seventeen held "positions on the Mashantucket Pequot Tribal Council or are officers and/or employees of Mashantucket Pequot Gaming Enterprise," and his "complaint concerns actions taken in defendants' official or representative capacities and . . . does not allege they acted outside the scope of their authority." 355 F.3d at 143. The Second Circuit rejected Chayoon's attempt to "circumvent tribal immunity by merely naming officers and employees of the Tribe . . . ." *Id.*

Finally, Chayoon tried his luck in state court – and his pleading strategy again mirrored the plaintiffs': Chayoon named "eight individuals who are or formerly were

employed by the Mashantucket Pequot Gaming Enterprise at Foxwoods" as defendants, 89 Conn. App. at 822, n. 1, and alleged "that the individual defendants are being sued in their "personal" capacities as well as in their "professional" capacities . . . [and] that because the defendants violated the FMLA, they necessarily acted beyond the scope of their authority and in their individual capacities." *Id.* at 829. The Appellate Court rejected Chayoon's "argu[ment] that the defendants are not immune from suit because they . . . were being sued individually," *id.* at 825, and pointed out that his complaint:

> patently demonstrates that in terminating the plaintiff's employment, *the defendants were acting as employees of Foxwoods within the scope of their authority.* It is insufficient for the plaintiff merely to allege that the defendants violated federal law or tribal policy in order to state a claim that they acted beyond the scope of their authority. . . . Such an interpretation *would eliminate tribal immunity from damages actions* because *a plaintiff must always allege a wrong* or a violation of law in order to state a claim for relief. In order to circumvent tribal immunity, the plaintiff must have alleged and proven, apart from whether the defendants acted in violation of federal law, that the defendants acted without any colorable claim of authority. . . . The plaintiff has made no proffer of such conduct here. The plaintiff merely has alleged that *he sued the defendants in their personal capacities* and that they acted outside of their authority.

*Id.* at 829-30 (emphasis added; internal citations and quotation marks omitted).[5]

*Bassett* reaches the same conclusion in response to a similar attempt to circumvent tribal immunity: The plaintiffs sued two employees of the Mashantucket Pequot Museum "individually and as an authorized agent of the Tribe, as well as in their capacities as officers, representatives, and/or agents" of the Museum. 221 F. Supp. 2d at 273. In spite

[5] The plaintiffs argue that the first defendant (the CEO of Foxwoods) "was named as a defendant not because of his individual conduct but rather because he was a high ranking tribal official. . . . In other words, the plaintiff was not suing [him] for his individual conduct, but rather, *because* he was an official of the Tribe." (Pl. Br., 10) (emphasis in original). The plaintiffs miss the point of both *Chayoon* decisions: The label that a plaintiff attaches to a tribal employee does not determine whether the employee acted in a representative capacity and thus is immune from suit. The determinative factor is whether the employee acted in the scope and course of his employment; if so, the employee automatically "represents" his tribal employer.

of the plaintiffs' conjunctive pleading, the District Court separately addressed their claims against the employees: "(1) in their individual capacities, (2) in their official capacities as officers, representatives, and/or agents of the Corporation and Association, and (3) in their official capacities as officers, representatives, and/or agents of the Tribe." *Id.* at 274.

The District Court agreed "that the doctrine of tribal immunity extends to the plaintiffs' copyright and state law damages claims against [the employees], even though the Second Amended complaint alleges that they are sued in their "individual capacities."" *Id.* at 279-80. Like *Chayoon*, the Court held that plaintiffs

> may not simply describe their claims against a tribal official as in his "individual capacity" in order to eliminate tribal immunity. As mentioned, that designation in suits against state officials affects Eleventh Amendment immunity, but does not reduce the protections afforded by absolute or qualified immunity to those state officials. Permitting such a description to affect tribal immunity would eviscerate its protections and ultimately subject Tribes to damages actions for every violation of state or federal law. The sounder approach is to examine the *actions* of the individual tribal defendants. Thus, the Court holds that a tribal official – even if sued in his "individual capacity" – is only "stripped" of tribal immunity when he acts "manifestly or palpably beyond his authority".

*Id.* at 280 (emphasis in original).[6]

The lesson of *Chayoon* and *Bassett* – that the label a party uses in his complaint does not determine its legal viability – is one familiar to this Court. See *BNY Western Trust v. Roman*, 295 Conn. 194, 210 (2010) ("in determining the nature of a pleading filed by a party, we are not bound by the label affixed to that pleading by the party"). It would set a dangerous precedent to permit the plaintiffs to plead around tribal immunity – after initially suing, but then withdrawing, their complaint as to the MTGA – by affixing a label to the

[6] The plaintiffs argue that "[o]ne simply cannot read the Bassett complaint and come to the conclusion that the defendants were being sued individually and not as representatives of the tribe itself." (Pl. Br., 11). The District Court did not agree; it read the complaint as alleging separate individual capacity claims, 221 F. Supp. 2d at 274, on which the *Bassett* plaintiffs relied as a supposed antidote to tribal immunity. *Id.* at 279-80.

defendant that contradicts their own allegations and the undisputed facts. The trial court found that the defendant was an MTGA employee who "was driving patrons of the Mohegan Sun Casino to their homes[,]" in "a limousine owned by the MTGA and was employed by the MTGA to do so." (App. Pt. 1, A19). Though the plaintiffs claim to have sued the defendant "as an individual[,]" (Pl. Br., 12), the context of his "actions," not the plaintiffs' pleading strategy, is the dispositive factor for tribal immunity.

*C.* Sullins v. Rodriguez *does not concern tribal sovereign immunity and the plaintiffs' other state law immunity cases also are inapposite.*

The plaintiffs contend that "[t]his Court's rationale in Sullins [*v. Rodriguez*, 281 Conn. 128 (2007)] was well placed[,]" and "ask[s] this Court to apply the same rationale." (Pl. Br., 17). Though the plaintiffs rely heavily on *Sullins* and its predecessors, (Pl. Br., 12-19), and the trial court did likewise, (App. Pt. 1, A27-29), this Court should not.[7]

First and foremost, "[t]ribal sovereign immunity is governed by federal law." *Beecher v. Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 134 (2007); see *Kiowa*, 523 U.S. at 754; *Auto. United Trades Org. v. State*, 285 P.3d 52, 57 (Wash. 2012) (en banc) ("[w]hether tribal sovereign immunity applies is a question of federal law"). If Connecticut law points to a different result than the clear and controlling federal precedent that requires dismissal of the plaintiffs' suit, Connecticut law must yield. See *Bay Mills*, 134 S.Ct. at 2031 ("tribal immunity is a matter of federal law and is not subject to diminution by the States"); *Kiowa*, 523 U.S. at 756 (same); *Three Affiliated Tribes*, 476 U.S. at 891 (same).

Indeed, *Sullins* also kneels at a federal altar. See 281 Conn. at 133 ("federal sovereign immunity jurisprudence preempts analysis under state law"). The only aspect of

[7] In his main brief, the defendant asked this Court to "go no further" than the "bright-line rule" that federal precedent establishes, (Def. Br., 11-12), but discussed *Sullins* as an alternative argument because the trial court had relied on it. (Def. Br., 17-19).

*Sullins* that merits emulation is its conclusion "that federal law governs our inquiry . . . [so] we need not decide whether the result in this case would be different" under the four-part state law test. See 281 Conn. at 133, n. 8.

Second, *Sullins* concerns immunity from suit under 42 U.S.C. § 1983, not tribal immunity from an ordinary tort suit, and turns on § 1983's specific use of "person". See § 1983 (liability for "[e]very person" for depriving another of constitutional rights under color of law). *Sullins* allows a lawsuit against the former warden of Northern Correctional Institution in his individual capacity to proceed because:

> [S]tate officials sued for money damages in their official capacities are not "persons" within the meaning of § 1983 because the action against them is one against the office and, thus, no different from an action against the state itself. . . . State officials are, however, "persons" within the meaning of § 1983 and may be held personally liable when sued as individuals for actions taken in their official capacities and, thus, under color of law.

281 Conn. at 141 (citation omitted). No such statutory safe harbor exists in this case. The plaintiffs have brought an ordinary negligence action – not a claim that a state official deprived them of their constitutional rights under the color of state law.[8]

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[8] State law immunity principles do not govern this Court's inquiry. However, the plaintiffs' misleading discussion of *Sullins* – particularly the first prong – demands a reply. (Pl. Br., 12-17). The plaintiffs cite *Sullins*, *Spring v. Constantino*, 168 Conn. 563 (1975), and *Kelly v. Bridgeport*, 111 Conn. 667 (1930), for the proposition that "[s]imply being an employee of the sovereign does not satisfy the first prong of Sullins." (Pl. Br., 13). *Sullins*, of course, says no such thing, as it does not apply the state law test. The plaintiffs' claim really rests on the three-part test for public "office" in *Kelly*; but *Kelly* was not an immunity case, nor did it involve the test for being a public employee. The issue in *Kelly* was whether Bridgeport's "position of assistant director of public works . . . was a mere employment and not an "office" within the intendment of the charter provision forbidding the abolition by the common council of any existing office." 111 Conn. at 670. Unsurprisingly, *Kelly* is nowhere to be found in *Miller v. Eagan*, 265 Conn. 301 (2003), which is the decision *Sullins* quotes for the four-prong test. See 281 Conn. at 133, n. 8. *Spring* does discuss *Kelly*, but *Spring* held only that public defenders were not public employees because defending a client is not "a sovereign or governmental act[,]" as "the state cannot function both as prosecutor and defender[.]" *Id.* at 569. *Spring* does not venture beyond this unique facet of public

*D. This Court should not follow the Ninth Circuit into the "swamp" of the "remedy-sought" approach.*

Near the end of their brief, the plaintiffs assert that "[c]onsistent with the common law tradition which has shaped tribal immunity, and with *other jurisdictions* such as the Maxwell opinion, the practical approach in such cases is to first look at where the damages are being sought from." (Pl. Br., 23) (emphasis added). This ode to *Maxwell* would strike a less sour note if any "other jurisdiction" actually had followed its "remedy-sought" approach. In truth, the Ninth Circuit alone[9] indulges in the "remedy-sought" charade – the only other court to dip its toe in the water was grateful that it did not have to wade in further. See *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1297 (10th Cir. 2008).[10] Indeed, in a tribal immunity case a mere two years later, the Tenth Circuit did not

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defenders' work. The plaintiffs also claim, based on *Kelly*, that the defendant fails the second prong "because [he] is not an official of the Mohegan Tribe". (Pl. Br., 16). Their claim is hard to reconcile with the personal immunity of state employees for damage or injury caused in the scope and course their employment. See Conn. Gen. Stat. § 4-165.

[9] Earlier this summer, the Ninth Circuit employed the "remedy-sought" approach a second time. See *Pistor v. Garcia*, 791 F.3d 1104, 1115 (9th Cir. 2015) (brackets and quotation marks omitted) (tribal defendants not immune "because they are being sued in their individual capacities, rather than in their official capacities, for actions taken in the course of their official duties; the gamblers seek[ ] money damages not from the tribal treasury but from the tribal defendants personally; and any remedy will not operate against the Tribe"). To date, no court outside of the Ninth Circuit – other than the trial court – has followed suit. *Pistor* notwithstanding, even the Ninth Circuit seems conflicted about whether suing a tribal employee as an individual deprives him of the protection of tribal immunity. See *Murgia v. Reed*, 338 F. App'x 614, 616 (9th Cir. 2009) (unpublished) (if tribal police officers "were acting for the tribe within the scope of their authority, they are immune from Plaintiff's suit regardless of whether the words "individual capacity" appear on the complaint").

[10] The plaintiffs mischaracterize the defendant's reliance on the Tenth Circuit's "wade into the swamp" comment as "arguing that this signaled a disapproval of the Maxwell holding." (Pl. Br., 6, n. 1). Obviously, the Tenth Circuit did not have a crystal ball, or a time machine, at its disposal – and so "could not have been referring to Maxwell specifically." *Id.* The source of the Tenth Circuit's caution, which the defendant asks this Court to heed, was the

mention *Maxwell*, or the "remedy-sought" approach, at all. See *Burrell*, *supra*, 603 F.3d at 832-36. Rather, like *Bassett*, *Burrell* explains that the "immunity question hinges on the breadth of the official power the official enjoys and not whether the official is charged with using that power tortuously or wrongfully." *Id.* at 832.

Though the plaintiffs laud "the careful analysis undertaken by Maxwell, which clearly cautioned against encroaching on a tribe's right to sovereign immunity[,]" (Pl. Br., 6), *Maxwell* really is a green light for litigants to plead around tribal immunity. This case is an apt example. Far from being "sensitive to whether the judgment sought would affect the treasury of the Tribe," *id.*, the trial court brushed aside the MTGA's statutory obligation to defend and indemnify the defendant – with money that, by law, otherwise would go into the tribal treasury – as a "tribal choice". (App. Pt. 1, A29). A judgment is likely to have a similar negative impact on the Tribe's "public administration" and governance, (Pl. Br. 6), by undermining the authority of the tribal courts and making it difficult to hire employees and obtain liability insurance. In short, the remedy-sought approach will not "*ensure* that tribal immunity is not infringed upon[,]" *id.* (emphasis in original), it will cut a gaping hole in the protection tribal immunity should offer to tribes, tribal entities and tribal employees.

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difficulty of determining the "real party in interest" in a suit nominally against a tribal employee in his individual capacity. 546 F.3d at 1296-97.

## CONCLUSION

For those reasons, and the reasons in the defendant's main brief, this Court should reverse the decision of the trial court and remand the case with direction to grant the defendant's motion to dismiss.

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# SUPREME COURT

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## S.C. 19464

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**v.**

**WILLIAM CLARKE**

## APPENDIX

U.S.C.A. Const. Art. VI

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

C.G.S.A. § 4-165

§ 4-165. Immunity of state officers and employees from personal liability

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

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

Mohegan Tribal Code, Sec. 24-55. - Sovereign Immunity.

Nothing in this Article shall be construed as waiving the sovereign immunity of The Mohegan Tribe, The Mohegan Tribal Gaming Authority, or any Mohegan Tribal Entity or its or their agents, employees or officials.

## CERTIFICATION PURSUANT TO PRACTICE BOOK §§ 62-7 & 67-2

I hereby certify, pursuant to Practice Book § 67-2, that (1) the electronically submitted reply brief has been delivered electronically on August 21, 2015, to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and (2) on August 21, 2015, a copy of the reply brief has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7:

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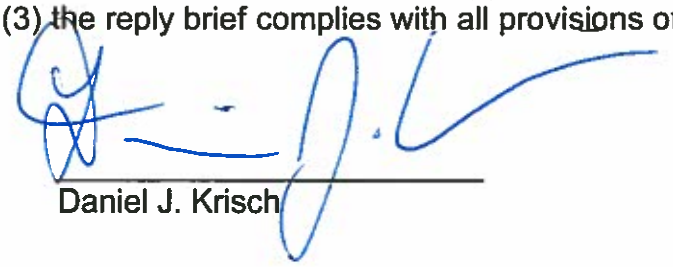
I further certify, pursuant to § 67-2, that: (1) the electronically submitted reply brief and the filed paper reply brief have been redacted or do not contain any names or other personal identifying information prohibited from disclosure by rule, statute, court order or case law; (2) the reply brief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



Daniel J. Krisch