

COA No. 84628-1-1

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION I

RICHARD HOWSON,

Appellant,

v.

SIMILK, INC., d/b/a SWINOMISH GOLF LINKS, a
Washington Corporation,

Respondent.

APPELLANT'S OPENING BRIEF

BURI FUNSTON MUMFORD & FURLONG,
PLLC

By PHILIP J. BURI
WSBA #17637
1601 F Street
Bellingham, WA 98225
(360) 752-1500

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INTRODUCTION

[N]o matter how broadly conceived, sovereign immunity has never extended to a for-profit business owned by one sovereign but formed under the laws of a second sovereign when the laws of the incorporating second sovereign expressly allow the business to be sued. And it doesn't matter whether the sovereign owning the business is the federal government, a foreign sovereign, state—or tribe.

Somerlott v. Cherokee Nation Distributors, Inc., 686 F.3d 1144, 1154 (10th Cir. 2012) (Gorsuch, J., concurring).

This is a tort suit against a Washington corporation for personal injuries occurring on a Golf Course near Anacortes, Washington. Under normal circumstances, the Skagit Superior Court would have general jurisdiction over tort claims arising outside the Swinomish Reservation. But because the Swinomish Tribe in 2013 purchased Similk, Inc., the private corporation that owned the Golf Course, the Skagit Superior Court concluded the company was now immune from suit in State court.

Richard Howson, injured by the Golf Course's negligence, appeals. Washington courts have jurisdiction over Washington corporations committing torts in Washington State. Tribal ownership of a pre-existing corporation does not confer immunity, transforming the Golf Course into a federal enclave, exempt from State court jurisdiction and oversight. Mr. Howson respectfully requests this Court to reverse the trial court's dismissal and remand this case for trial.

I. ASSIGNMENTS OF ERROR.

The trial court erred as a matter of law by granting defendant Similk, Inc.'s motion to dismiss under CR 12(b)(1) (10/6/22 Order; CP 263). A copy of the trial court's Order for Dismissal is attached as Appendix A.

Issues pertaining to this assignment of error include:

A. "As a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country." Oklahoma v. Castro-Huerta, ___ U.S. ___, 142 S. Ct. 2486,

2493, 213 L. Ed. 2d 847 (2022). From its opening in 1928, Similk Beach Golf Course has operated in Skagit County under Washington statutes and regulations. Does the Skagit County Superior Court continue to maintain jurisdiction over hazardous conditions on the Golf Course?

B. “Since the 18th century, it has been a settled principle of international law that a foreign state holding real property outside its territory is treated just like a private individual.” Upper Skagit Indian Tribe v. Lundgren, ___ U.S. ___, 138 S. Ct. 1649, 1655, 200 L. Ed. 2d 931 (2018) (Roberts, CJ, concurring). The Swinomish Tribe purchased a Washington corporation that owned the Similk Beach Golf Course outside the Swinomish Reservation. May a tribal shareholder extinguish the jurisdiction of Washington courts over the corporation and its assets?

C. To decide whether Similk is an arm of the Swinomish Tribe, the Court balances “several factors including: (1) the method of creation of the economic

entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities.” White v. Univ. of California, 765 F.3d 1010, 1025 (9th Cir. 2014). Here, the Tribe purchased an existing private, for-profit Washington corporation to acquire the Golf Course. Did the Tribe’s acquisition transform Similk into an arm of the Tribe?

II. STATEMENT OF FACTS.

Because the trial court dismissed this case under 12(b)(1), the following facts come from Plaintiff Richard Howson’s complaint and are stated in his favor.

A. Similk’s Negligence And Mr. Howson’s Injuries.

On August 11, 2021, Mr. Howson played a round of golf at the Swinomish Golf Links near Anacortes, Washington. (Complaint ¶ 10; CP 2). He rented a golf cart

and used it as expected on the course. On the fairway to the 6th hole, Mr. Howson hit a tree stump in the grass and flew from the cart. (Complaint ¶ 13; CP 3). He landed awkwardly and fractured his lower back. (Complaint ¶ 13; CP 3).

Despite having the duty to maintain the public course, Respondent Similk, Inc., failed to either remove the 6-8 inch stump from the fairway or to mark it with a sign or spray paint. (Complaint ¶ 12; CP 3). Respondent's failure to exercise reasonable care was a direct and proximate cause of Mr. Howson's injuries. (Complaint ¶ 16; CP 4).

B. The History of Similk Beach Golf Course

On August 15, 2022, Mr. Howson sued Similk, Inc. for negligence. (Complaint; CP 1-6). Similk's sole shareholder, the Swinomish Indian Tribal Community, appeared and on September 9, 2022, moved to dismiss Mr. Howson's complaint under CR 12(b)(1). (Motion to

Dismiss; CP 7-82). It asserted that Similk was an arm of the Tribe and therefore immune to suit in State court.

On October 6, 2022, Skagit County Superior Court Judge Elizabeth Neidzwski agreed and dismissed Mr. Howson's complaint. (Order; CP 263-264). In her oral ruling, Judge Neidzwski focused on the history of Similk after the Tribe purchased it in 2013. (VRP 23) ("tribe purchased and immediately amended the articles of incorporation"). The trial court did not discuss the 85-year history of the Golf Course before then, and the uninterrupted application of Washington law.

In 1928, R.D. Turner opened a nine-hole public golf course as part of the Similk Beach Resort. (Motion to Dismiss at 12; CP 18) (citing Jack Darnton, Similk Beach Golf Course: Four generations gave it their best shot, GoAnacortes.com (December 3, 2014) (Attached as Appendix B). The current Golf Course dates to the mid-50s when the Turner family expanded it to 18 holes.

(Danton at 5; Appendix B at 5). From the 1950s through the 1980s, the Similk Beach Golf Club was a busy public facility, subject to Washington law and regulations. (Danton at 8; Appendix B at 8).

In October 1983, Earl and Betty Morgan formed Similk, Inc. to own and operate the Golf Course. (Cobb Dec. Exh. 1; Attached to Plaintiff's Response; CP 238). For the next 20 years, Similk, Inc., paid State and local taxes, filed annual renewals with the Secretary of State, and complied with Washington law and regulations.

By 2013, the Morgans' children decided it was time to sell. On August 13, 2013, the Swinomish Indian Senate voted to purchase Similk, Inc., for \$5,850,000.00. (SITC Res. No. 2013-08-146; Exh. 3 to Edwards Dec.; CP 171). The Resolution authorized a stock purchase rather than purchasing the corporate assets.

The Chairman or his designee is authorized to execute and deliver a Purchase and Sale Agreement with MorganTurner Properties, L.P.

for the land and tidelands and a Stock Purchase Agreement with Similk Inc. for purchase of all shares of stock when these agreements are completed...

(Res. No. 2013-08-146; CP 172).

On September 10, 2013, the Tribe purchased Similk, Inc., amending its Articles of Incorporation to include as a corporate purpose to “be operated at all times for the benefit of, and to carry out the purposes of, its Shareholder, Swinomish Indian Tribal Community, a tribal government organized under federal law.” (Articles of Amendment; CP 164).

The Tribe retained the corporation’s power “to do all things necessary and convenient to carry out its business and affairs as granted to corporations under the laws of the State of Washington.” (Articles of Amendment; CP 165).

Because Similk, Inc., remains a Washington corporation, granted the benefits and burdens of

Washington law, Richard Howson now appeals dismissal of his suit.

ARGUMENT

III. STANDARD OF REVIEW.

This Court reviews dismissal under CR 12(b)(1) de novo. Rabang v. Gilliland, 23 Wn. App. 2d 375, 380, 519 P.3d 234 (2022), review denied sub nom. Rabang v. Gilliland, 523 P.3d 1186 (2023) (“subject matter jurisdiction is a question of law reviewed de novo”).

IV. THE TRIAL COURT ERRED BY EXTENDING IMMUNITY TO SIMILK, INC.

Business entities that claim arm-of-the-tribe immunity have no inherent immunity of their own. Instead, they enjoy immunity only to the extent the immunity of the tribe, which does have inherent immunity, is extended to them... Arm-of the-tribe immunity must not become a doctrine of form over substance. The ultimate purpose of the inquiry is to determine whether the entity *acts* as an arm of the tribe so that its *activities* are properly deemed to be those of the tribe.

People v. Miami Nation Enterprises, 2 Cal. 5th 222, 250, 386 P.3d 357, 375, 211 Cal. Rptr. 3d 837, 858 (2016) (citations omitted).

Similk, Inc., is twice removed from the sovereign immunity of the Swinomish Tribe. First, it was, and remains, a private Washington corporation subject to Washington law and jurisdiction. Second, it owns a Golf Course outside the Reservation that continues to operate as a business with no direct effect on Swinomish Tribal self-governance.

A. A Pre-Existing Non-Tribal Corporation Cannot Become An Arm of the Tribe.

A Tribe cannot confer immunity on an existing corporation already subject to State court jurisdiction.

If a state law under which a tribe or a tribal entity forms a corporation or other business association clearly renders the corporation or business association subject to suit, the corporation or business association will lack sovereign immunity.

Restatement of the Law of American Indians § 54 (comment c). “When the sole facts are that an Indian tribe purchases all of the shares of an existing for-profit corporation and takes control over the operations of the corporation, tribal immunity is not conferred on the corporation.” McNally CPA's & Consultants, S.C. v. DJ Hosts, Inc., 277 Wis. 2d 801, 807, 692 N.W.2d 247, 250 (Wis. Ct. App. 2004). Here, the Swinomish Tribe absorbed an existing State-law entity, rather than create a tribal entity or purchase the assets separately.

At its creation in 1983, Similk, Inc., obtained independent legal status under Washington law, including the corporate right to sue and be sued.

(2) Unless its articles of incorporation provide otherwise, every corporation has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation, power:

(a) To sue and be sued, complain, and defend in its corporate name;

RCW 23B.03.020(2)(a). When it accepted these rights at formation, Similk, Inc., could not later extinguish its charter and qualify for tribal immunity. Restatement of the Law of American Indians § 54(1)(a) (immunity possible only if “state law under which the corporation or business association is formed does not render the entity subject to suit”).

By purchasing Similk, Inc., the Swinomish Tribe acquired both the corporation's privileges and its responsibilities under Washington corporate law.

As a legally distinct entity created, embodied, brought into being by law of a sovereign, a corporation is, at the same time, generally defined by and subject to the privileges and responsibilities provided by that sovereign's laws. A corporation isn't a natural person endowed with inalienable rights, but an artificial being that may exercise only those privileges the law confers upon it, either expressly, or as incidental to its very existence.

Somerlott v. Cherokee Nation Distributors, Inc., 686 F.3d 1144, 1155–56 (10th Cir. 2012) (Gorsuch, J., concurring).

The Tribe's purchase of Similk's stock shares did not selectively revise these privileges and responsibilities. They remain embedded in its incorporation. Then Judge Gorsuch described the consequences of State incorporation for an Oklahoma company with tribal owners, CND.

CND's claim to immunity is inconsistent with this foundational feature of corporate law. It chose to incorporate under Oklahoma's general limited liability company statute. And that statute expressly: (1) defines corporations created under its terms as "separate legal entit[ies]" with rights and responsibilities separate and distinct from those of their shareholders; and (2) specifies that the rights and responsibilities of corporations created under its terms include the duty to answer lawsuits in any court. 18 Okla. Stat. §§ 2003, 2004. These traits thus came part and parcel with CND's birth. They are part of its charter, entwined in its corporate DNA.

Somerlott, 686 F.3d at 1156.

Corporate immunity to State law directly contradicts this charter under State authority.

CND wishes to ignore them all the same, to disregard essential components of its charter, to overwrite its corporate DNA, to treat it as indistinct from its (ultimate and indirect) shareholder, and to deny others the ability to sue it. CND wants to exercise the privilege of incorporating, of coming into being, under Oklahoma law but without accepting the responsibilities attending that privilege.

Somerlott, 686 F.3d at 1156. Like CND, Similk asks this Court “to codify an entirely new and different corporate law..., one that picks and chooses the privileges [Similk] finds advantageous without the responsibilities it finds nettlesome.” Somerlott, 686 F.3d at 1156.

Mr. Howson has found no precedent for conferring tribal immunity onto an existing corporation created: (1) by non-tribal members with no tribal participation; (2) under State law; (3) for purely business activities unrelated to tribal governance; and (4) outside the boundaries of a reservation. Extending tribal immunity to pre-existing State for-profit corporations should give this Court pause. It would stretch tribal sovereign immunity far beyond existing

precedent and would profoundly alter enforcement of Washington law.

B. Washington Law Still Governs The Golf Course.

The second distinguishing factor is that Similk is not a tribal housing authority, economic development agency, or health care consortium. It owns a Golf Course. Despite its best attempts, the Swinomish Tribe cannot claim golf as an essential attribute of tribal self-government, self-sufficiency, and economic development.

The primary purpose of creating the golf course in Lewiston was to act as a regional economic engine and thereby serve the profit-making interests of the Seneca Nation's casino operations in the area. While this may result in more funds for government projects on the Seneca Nation's reservations and elsewhere that benefit members of the tribe, we agree with the Appellate Division that the purposes of Lewiston Golf were sufficiently different from tribal goals that they militate against Lewiston Golf's claim of sovereign immunity.

Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp., 24 N.Y.3d 538, 548, 25 N.E.3d 928, 934, 2 N.Y.S.3d 15, 21 (2014).

With increasing frequency, federal and state courts have rejected “arm of the Tribe” immunity for corporations performing standard business functions. As the United States Tax Court concluded with a tribal corporation named Uniband,

Uniband was established as a Delaware corporation in 1987 by TMBCI [Turtle Mountain Band of Chippewa Indians] and a third-party not affiliated with TMBCI, and for three years TMBCI held only 51% of Uniband. Thus, TMBCI did not establish Uniband by itself; at its inception Uniband was simply a business owned in part by TMBCI and was clearly a separate corporate entity created in part by the tribe. Uniband has not shown us how TMBCI's purchasing an additional 49% of Uniband transformed Uniband from a mere business holding into a tribal agency established by a tribal council pursuant to the tribe's powers of self-government.

Uniband, Inc. v. C.I.R., 140 T.C. 230, 253 (2013) (citations omitted). Accord, People v. Miami Nation Enterprises, 2

Cal. 5th 222, 246, 386 P.3d 357, 372, 211 Cal. Rptr. 3d 837, 855 (2016) (“solely for business purposes and without any declared objective of promoting the [tribe's] general tribal or economic development”); Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp., 24 N.Y.3d 538, 548, 25 N.E.3d 928, 934, 2 N.Y.S.3d 15, 21 (2014) (“United States Supreme Court has never held that corporations affiliated with an Indian tribe have sovereign immunity”).

Even the courts that find immunity distinguish the tribal corporations from “mere businesses”. Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185, 1188 (9th Cir. 1998) (“Modoc served as an arm of the sovereign tribes, acting as more than a mere business”); Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d 1040, 1043 (8th Cir. 2000) (“College serves as an arm of the tribe and not as a mere business”).

A 95-year-old public golf course, developed by non-tribal members outside the Reservation, does not merit the

same treatment as tribal colleges, housing authorities, and repatriation committees. White v. Univ. of California, 765 F.3d 1010, 1025 (9th Cir. 2014) (“Repatriation Committee, to recover remains and educate the public, is core to the notion of sovereignty”). It does not have the Congressional approval given to casinos on tribal reservations. 25 USC § 2702(1) (“promoting tribal economic development, self-sufficiency, and strong tribal governments”). It is “merely” a business and not subject to tribal immunity as an essential component of tribal self-governance.

C. The White Factors Weigh In Favor of Washington Jurisdiction.

The Ninth Circuit in White v. Univ. of California, 765 F.3d 1010 (9th Cir. 2014) established the test for deciding whether an entity is immune as a “arm of the tribe”:

We examine several factors including: “(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its

sovereign immunity; and (5) the financial relationship between the tribe and the entities.

White, 765 F.3d at 1025. Each of these factors weigh against extending sovereign immunity to Similk, Inc.

1. The Method of Creation.

The Swinomish Tribe had nothing to do with Similk's incorporation in 1983. Earl and Betty Morgan, non-tribal members, created Similk to own and manage the Similk Beach Golf Course. (Darnton at 9; Appendix at 9). For 20 years, Similk operated independently of the Swinomish Tribe and had no relation to Tribal government, management, or economic development. It was a private corporation under Washington law.

The fact that the Swinomish Tribe *purchased* rather than created Similk disqualifies it as an arm of the Tribe. Immunity is not a power that the Tribe can confer on non-tribal entities subject to Washington jurisdiction.

Restatement of Law of American Indians § 54(1)(a). As the California Supreme Court summarized,

In considering the method of creation of the economic entity courts have focused on the law under which the entity was formed. Formation under tribal law weighs in favor of immunity whereas formation under state law has been held to weigh against immunity or to constitute a waiver of immunity. The circumstances under which the entity's formation occurred, including whether the tribe initiated or simply absorbed an operational commercial enterprise, are also relevant.

People v. Miami Nation Enterprises, 2 Cal. 5th 222, 245–46, 386 P.3d 357, 372, 211 Cal. Rptr. 3d 837, 854 (2016) (citations omitted).

In her oral ruling, Judge Neidzowski found this factor unpersuasive, concluding “I don’t find that this is a controlling factor by any means, but I also find that it – all things being equal, it is fairly equal on both sides.” (VRP 23). The trial court erred by not giving sufficient weight – and protection – to Washington courts’ pre-existing jurisdiction. Amending Similk’s corporate charter after the

fact did not erase the corporation's foundational ability to sue and be sued in Superior Court.

Weighed appropriately, Similk's method of creation strongly favors retaining State court jurisdiction. Its incorporation had nothing to do with the Swinomish Tribe or the purposes of sovereign immunity. Furthermore, the Tribe's amendment of the Articles of Incorporation did not, and could not, extinguish State court jurisdiction. If Tribal incorporation under State law weighs heavily against immunity, private incorporation under State law is an even more compelling reason to reject extending immunity after the fact.

2. Similk's Purpose is to Operate A Golf Course

For 20 years, Similk's sole purpose was to operate the Similk Beach Golf Course for profit. (Danton at 8; Appendix at 8) ("Similk Beach profited and continued to draw plenty of customers from Canada and the Seattle

area”). Like all Washington corporations, it protected its shareholder’s personal assets from liability.

When the Tribe purchased the company in 2013, Similk’s purpose remained the same: to own and operate the Golf Course. Its name changed to Swinomish Golf Links, and it had new shareholders. But the Golf Course remained as a source of revenue for Similk and its new shareholder, the Swinomish Tribe.

The trial court’s oral ruling noted the “broad benefits that the golf course has for the tribe, including economic benefit for members’ well-being, and the elected leaders’ use and furthering of governmental relationships.” (VRP 24). The purchase of any profit-making corporation will benefit the owner. But to weigh in favor of conferring immunity, the Tribe must show more than economic benefit. “Most notably, the purpose factor considers the extent to which the entity actually promotes tribal self-governance.” People v. Miami Nation Enterprises, 2 Cal.

5th 222, 245, 386 P.3d 357, 371, 211 Cal. Rptr. 3d 837, 854 (2016).

The Tribe's argument, accepted by the trial court, would confer immunity on any business a tribe purchases off the Reservation. For example, if the Tribe purchased a McDonald's franchise in Anacortes, it too would benefit the Tribe financially. But it would have no significant connection to tribal self-governance other than providing revenues. And this expanding immunity comes at the expense of State court jurisdiction.

3. The Managers Changed, But The Corporation Remained The Same

For 20 years, Earl Morgan and his family managed Similk and ran the Golf Course. After 2013, the managers changed, but the structure, ownership, and management of the Golf Course continued unchanged. Similk owns the property (not the Swinomish Tribe), Similk remains the entity in charge of the Golf Course (not the Swinomish

Tribe) and other than a change in managers, the Golf Course maintenance and operations continue as before. Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp., 24 N.Y.3d 538, 549, 25 N.E.3d 928, 934, 2 N.Y.S.3d 15, 21 (2014) (“Seneca Nation does not have legal title or ownership of the golf course being developed by Lewiston Golf”).

The only difference is that Similk’s shareholders changed. Like the Morgans, the Swinomish Tribe benefits from corporate protection of its assets from liability. Only Similk, not the Swinomish Tribe, must pay a judgment against the Golf Course. Sue/Perior Concrete & Paving, 24 N.Y.3d at 550, 25 N.E.3d at 935 (“the financial obligations were assumed by Lewiston Golf and any liability insurer, not by the Seneca Nation”).

The trial court found the change in personnel at the Course significant.

As for structure, ownership, and management, including amount of control the tribe has over the entities, again, the tribe is the sole shareholder and does control operations through the casino. The board is made up of tribal senators. Employees are members. It is overseen by the casino's CEO, who is appointed by the senate. So I do find that that factor weighs in favor of the tribe.

(VRP 24). Every tribally owned corporation will satisfy the tribal court's standard.

But as the Tenth Circuit concluded, structure, ownership and control requires more than the standard attributes of a business. Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1193 (10th Cir. 2010) (“Chief Financial Officer of the Authority, the General Manager of the Casino, and the Chief Financial Officer of the Casino are not tribal members”).

Here, the Tribe relies on the Declaration of Brock Hochsprung, a non-tribal member, as evidence of tribal control. And the Management Services Agreement attached to his Declaration clearly states that Similk is an

entity independent of the Swinomish Tribe, exercising its corporate powers under the laws of the State of Washington.

7. RELATIONSHIP OF THE PARTIES

The parties (Similk, Inc. and the Tribe) are acting as independent contractors and independent employers. Nothing herein contained shall create or be construed as creating a partnership, joint venture, joint employer or agency relationship between the parties and no party shall have the authority to bind the other in any respect. The Management Company (the Tribe) shall be solely responsible for all acts of its agents, employees, representatives, and subcontractors during the performance of this Agreement. Client (Similk, Inc.) will not provide fringe benefits, including health insurance benefits, or any other benefit, for the benefit of the Management Company (the Tribe) or its employees.

(Management Services Agreement at 6; Exh. 2 to Hochsprung Dec; CP 106); (Management Services Agreement ¶ 2.3 at 1; CP 101) (Similk's "Board of Directors expressly retains all authority granted to it pursuant to the

Articles of Incorporation, Bylaws, and laws and regulations of the State of Washington”).

The Swinomish Tribe does not own the Golf Course; Similk does. Under the Tribal Casino’s Management Agreement, Similk’s Board retains all authority to act under Washington law.

4. Tribal Intent.

When the Morgans incorporated Similk and owned it for 20 years, the Swinomish Tribe had no intent to confer immunity on the private corporation. Not surprisingly, after purchasing Similk, the Tribe alleges that it intended to begin sharing its sovereign immunity. The Court should view this intent carefully.

Had the Tribe intended to confer sovereign immunity, it would have purchased the property and Golf Course assets in the Tribe’s name. If the Swinomish Tribe were on title to the property, it would be immune from suit in State court. Michigan v. Bay Mills Indian Cmty., 572 U.S.

782, 795, 134 S. Ct. 2024, 2034, 188 L. Ed. 2d 1071 (2014) (“true enough, a State lacks the ability to sue a tribe for illegal gaming when that activity occurs off the reservation”).

Furthermore, the Tribe could have placed the property and Golf Course assets into a tribal corporation, expressly immune from suits in State court but subject to claims in tribal court. Or, at minimum, it could have attempted to amend Similk’s Articles of Incorporation to remove its power to sue and be sued. But purchasing Similk’s stock did not transform it into an arm of the Tribe.

An Indian tribe's purchase of a corporation's stock does not normally confer tribal immunity on the corporation. We think it is self-evident that if a tribe purchases, for example, shares in Microsoft, Microsoft does not gain tribal immunity in any measure.

McNally CPA's & Consultants, S.C. v. DJ Hosts, Inc., 277 Wis. 2d 801, 806, 692 N.W.2d 247, 250 (Wis. Ct. App. 2004).

The choice to leave Similk as is had great advantages – not the least of which is corporate protection for the Tribe's assets. Claiming that the Tribe intended to immunize Similk once it completed the acquisition rings hollow.

5. The Financial Relationship Is A Typical One Between Business and Owner.

Finally, for 20 years the Swinomish Tribe had no financial interest in the Similk Beach Golf Course. After it purchased Similk, the Tribe has the same relationship to the corporation as the previous shareholders. Neither the Tribe nor the trial court identified anything that would distinguish the Tribe's ownership from the Morgan's. Both invested time and money in return for revenues.

I find that the golf course and the tribe are highly interconnected and integrated financially. There was a high purchase price, a major investment for the tribe. There is an annual capital contribution by the senate. There is this back-and-forth exchange of services and dollars between the casino and the tribe for the management services. So I do

find that there is a high level of integration and interconnectedness and also of tribal control over the golf course.

(VRP 24-25). Once again, the trial court's conclusion would apply to the Tribe's purchase of any for-profit business in any location.

If this is the law, and it is not, a tribe could purchase multiple franchise stores in multiple states and avoid any litigation for employment violations, contract disputes, or torts. It would be a financial windfall.

For this reason, both State and federal courts require tribally owned corporations off-reservation to have a strong nexus with self-governance and federal policies of sovereign immunity. Simply purchasing and operating an existing for-profit business is not enough. If it were, tribal immunity would carve large holes into State sovereignty, leaving State courts powerless to enforce applicable law.

V. MR. HOWSON HAS NO ALTERNATIVE TO SUPERIOR COURT.

In its last opinion on tribal immunity for off-reservation businesses, the United States Supreme Court left open the question raised in this case.

We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct. The argument that such cases would present a “special justification” for abandoning precedent is not before us.

Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 799, 134 S. Ct. 2024, 2036, 188 L. Ed. 2d 1071 (2014). The Court has allowed tort suits against tribal employees for their negligence outside the reservation. Lewis v. Clarke, 581 U.S. 155, 163–64, 137 S. Ct. 1285, 1291–92, 197 L. Ed. 2d 631 (2017).

Here, Richard Howson has no alternative to a tort suit in Superior Court. Under Swinomish Tribal Code 3-01.050,

the civil jurisdiction for Tribal Court extends only to the Reservation's borders.

The Court's subject matter jurisdiction shall be limited to civil matters that arise within the exterior boundaries of the Reservation or lands outside the boundaries of the Reservation held in trust by the United States for the Tribe or tribal members.

(STC 3-01.050; Exh. 1 to Plaintiff's Response; CP 234).

The consequence of the trial court's ruling is that any person in a dispute with the Swinomish Golf Links has no legal remedy. There is no court with jurisdiction. And unlike the State of Michigan in Bay Mills, private individuals do not have "the panoply of tools Michigan can use to enforce its law on its own lands." Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 796, 134 S. Ct. 2024, 2035, 188 L. Ed. 2d 1071 (2014).

CONCLUSION

The Swinomish Tribe, like any sovereign power, cannot confer immunity on private entity outside its borders

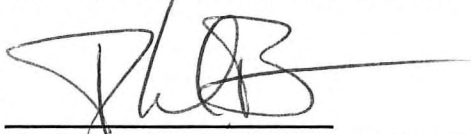
and subject to another government's laws. Here the Skagit County Superior Court erred as a matter of law by concluding that a Washington corporation, Similk, Inc., is immune from State court jurisdiction.

Appellant Richard Howson respectfully requests this Court to reverse the trial court's dismissal and remand this case for trial.

This document contains 5,024 words, excluding the parts exempted from the word count by RAP 18.17.

DATED this 30 day of March, 2023.

BURI FUNSTON MUMFORD & FURLONG, PLLC

By 

Philip J. Buri, WSBA #17637
1601 F. Street
Bellingham, WA 98225
360/752-1500

DECLARATION OF SERVICE

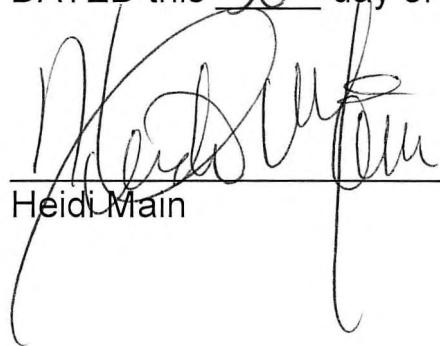
The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Appellant's

Opening Brief to:

Brian C. Gruber
Crystal Pardue
Ziontz Chestnut
2101 Fourth Ave., Ste. 1230
Seattle, WA 98121

Steve Robey
Robey Namba, P.S.
1414 F Street
Bellingham, WA 98225

DATED this 30TH day of March, 2023.



Heidi Main

Appendix A

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22-2-00639-29
ORDSM 12
Order of Dismissal
13238493



SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SKAGIT COUNTY

RICHARD C. HOWSON,
Plaintiff,

No. 22-2-00639-29

v.

SIMILK, INC. d/b/a SWINOMISH GOLF
LINKS,

~~(PROPOSED)~~ ORDER FOR
DISMISSAL

Defendant.

This matter came before the Court on Defendant Similk, Inc. d/b/a Swinomish Golf Links' motion to dismiss under CR 12(b)(1). Similk, Inc. requests that the Court dismiss the complaint filed by Plaintiff Richard C. Howson, who seeks damages for injuries he allegedly sustained while playing golf at Swinomish Golf Links in August 2021. Similk, Inc.'s motion to dismiss is based on an argument that Similk, Inc. possesses sovereign immunity from suit in this Court because it is an arm of the Swinomish Indian Tribal Community, a federally recognized tribe.

The Court having considered the Motion to Dismiss, the response thereto and reply in support thereof, along with all supporting declarations and exhibits and the remainder of the record, the Court hereby FINDS and ORDERS:

~~(PROPOSED)~~ ORDER FOR DISMISSAL

1

ZIONTZ CHESTNUT
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121
TEL. (206) 448-1230; FAX (206) 448-1230

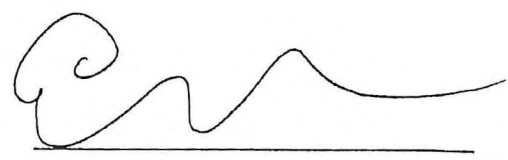
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1. Similk, Inc.'s Motion to Dismiss is GRANTED;
2. Plaintiff's complaint is dismissed.
3. Judgment in this action shall be entered by the Clerk and served on the parties.

IT IS SO ORDERED.

DATED this 6 day of October, 2022.

Judge: E. N. Dziewski



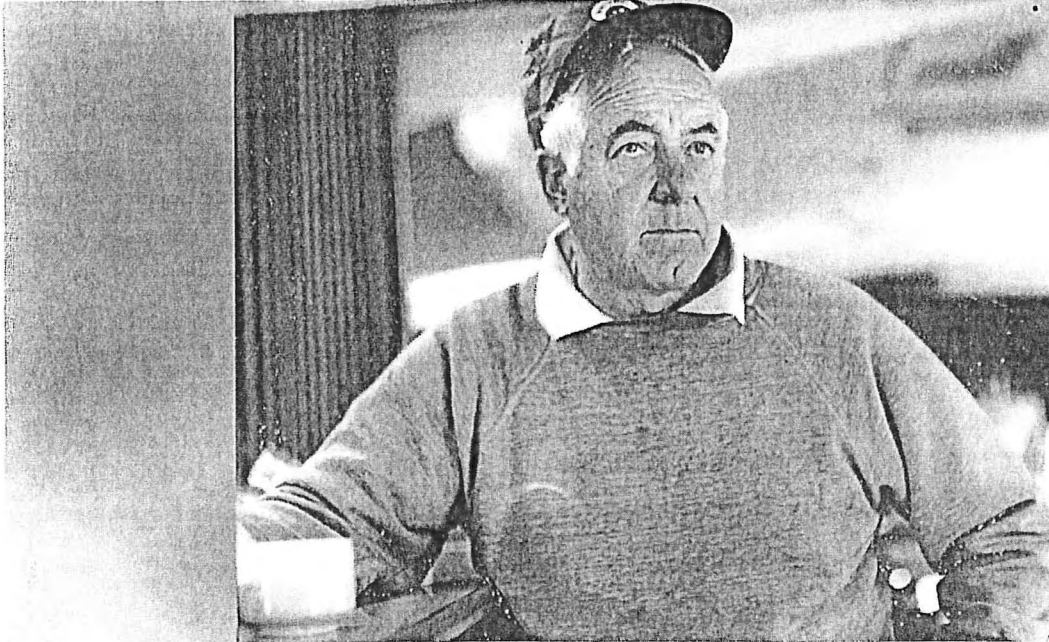
Appendix B

https://www.goskagit.com/anacortes/news/similk-beach-golf-course-four-generations-gave-it-their-best-shot/article_3eedff3a-eb44-5a5c-b474-c914468b3998.html

FEATURED

Similk Beach Golf Course: Four generations gave it their best shot

Jack Darnton
Dec 3, 2014



1 of



Earl Morgan, son-in-law of Similk Beach Golf Course founder R.D. Turner, was the hands-on head of the golf course for more than 40 years until he died in 1997. 'To me he was Similk Golf Course. It was that way for a lot of customers,' said Dick Freier, who was a mainstay at the course for decades until leaving this year. Courtesy Morgan Turner Family

You can drive past Similk Beach today and — unless you're old enough and have been here long enough — miss everything.

The lone building that sits between Satterlee Road and the log-strewn beach? It's boarded up now, but it was once a busy restaurant where people would sit down for a dinner of oysters that were harvested just yards away. That low-lying land on the other side of the street? That's where the original nine-hole Similk Beach Golf Course was.

So much is gone: the crowds, the restaurants, the horse stables, the bowling alley, the shuffleboard court, the oyster business — the 150-yard-long pier that jutted out into Similk Bay. This historic bit of Fidalgo Island shoreline was a recreation hub for all of Skagit County back in the day, a place to swim, golf, ride horses, picnic and party at the beach.

State parks didn't have much in the way of facilities in the 1930s and were in tough shape, and golf courses were scarce, especially public ones. Similk Beach was in its heyday then — the place where high schools held their class picnics and people flocked for the Fourth of July.

California — home to The Pike, a bathhouse resort at the beach with the most famous seaside amusement park and arcade on the West Coast.

L. D. Turner saw the possibilities here.

He didn't have a penny to his name, but he was determined to have a summer resort, said his daughter, Betty Morgan, who can see the beach where it all happened from her home on Christianson Road.

L. D. Turner hooked up with influential Mount Vernon banker C. J. Henderson, borrowed money (with partners he later bought out), acquired property and launched an enterprise that became the Morgan-Turner family's legacy.

Four generations ran a demanding, year-round operation that changed with the times, yet stayed true to its roots and was always a family business. Hard-working family members kept things scaled to Skagit County and what they could manage, and the last piece, the public golf course, stayed profitable and personable to the end when the Swinomish Indian Tribal Community purchased it and adjacent property — historic tribal reservation lands — in September 2013.

The tribe plans to keep operating and improving the course, now the Swinomish Golf Links, and would like to bring back oyster production on the Similk Bay beds.

In 1928, the promotion of Similk as "Queen of the Beaches" was well underway.

Since starting the development we have never stopped work in our efforts to provide what we term are the necessities of life, so as to make living at a pleasure beach a pleasure," the Similk Bay Development Co. enthused in an advertisement in the March 22 edition of the Anacortes American, touting the new pier essential to boating, fishing and swimming and the development of "electric light, pressure water, good wide roads (and) sanitation."

Soon we will speed up our real program of play with golf, tennis, roque, etc., at which time Similk will become the real Queen of the Beaches, being serviceable, comfortable, pleasureable and beautiful enough to entertain any class of resident or visitor," the ad continued.

Four greens opened to play in 1928, and the course's original nine holes were completed soon after.

The nine-hole golf course turned out to be the "outstanding triumph of this resort," the American wrote on March, 6, 1930.

L.D. Turner branched out into the oyster business about this time, taking advantage of Similk Bay's productive tidelands and its rich mix of saltwater and fresh water from the Skagit River that gave the plump oysters he raised a distinctive taste.

That the beach was hard, not muddy, was no small thing. You could drive a tractor out on it to harvest oysters at low tide.

You didn't have to dredge," explains Tom Cleland, who married Turner's granddaughter, Beth Morgan.

The resort flourished as the family kept adding attractions.

rough café where Grace sold oysters and oyster dinners.

"We just never stopped," Betty Morgan said, remembering her father's drive to make the resort a success.

"It was push-push," said her daughter, Beth Morgan-Cleland, who had oysters as baby food and was mowing fairways when she was 14.

"He always had things cooking," she said of her grandfather, whom she remembers as rarely without a cigar and always in a three-piece suit and wearing a hat, even on the oyster beds.

"He was the kind of guy who made this country," Tom Cleland said. "He was a period piece."

The golf course people play today was built in the mid-50s. Similk Beach's fortunes as a resort had waned as the state parks were improved and people had other recreation choices. But the oyster business was still doing fine.

Turner Similk Bay Oysters were shipped to accounts along the rail line as far east as Chicago. The family delivered oysters daily to markets and cafés from Seattle to Bellingham. The women handled cooking demonstrations at grocery stores, frying up oysters dredged in cracker meal to push their product.

The kids, of course, worked too. In the '60s and '70s, the Morgan, Stevens and Trulson girls mixed thousands of handmade milkshakes at the golf course lunch counter.

Beth Morgan-Cleland remembers punching oyster shells at the beach with these same neighborhood girls. They'd make a hole in the shells, then string them on wire so they could be used to catch oyster spat at Dabob Bay along Hood Canal.

"It was 15 cents a string and hard work, Beth said. But everyone's kids worked then. Families were looked down on some, no matter what their status, if they didn't, Beth said.

Using oyster profits to expand the golf course to 18 holes seemed a perfect fit. The oyster business was busiest in the late fall, winter and early spring, then the golfing peaked and brought in more money when the weather warmed up.

It also meant the family would have to work harder than ever to keep everything running. There was no down time.

The 18-hole course is mostly to the north of the old one. Just three holes — 13, 14 and 15 — were part of original course, which is now overgrown. The greens that pop up at the Similk Beach Golf Course are built on oyster shells. The course is right at sea level or even below in spots, so it made sense — plus "they had to get rid of oyster shells," Tom Cleland said.

Jim Turner, R.D. Turner's son, headed the golf course project. He was a scratch golfer but had no training or experience in golf course construction. He knew he was building a community course, though, not a fancy, expensive country club layout.

"He was the mastermind and had it laid out," said Pat Mooney, now a port commissioner, who worked for the family in the oyster beds when he was 15 and helped Jim Turner with his survey work.

Mooney, one of hundreds of kids who worked for the family over the years, remembers Jim Turner plowing and discing ground to shape the course. Kids would follow and pick out rocks and sticks. Then Turner would make another pass and the kids would go back to work.

thought that would never end," Mooney said.

Tragedy struck the family on a moonlit night in 1953.

Jim Turner, 34, was bringing a big load of oysters down from the seed beds at Blaine to the fattening beds and packing plant at Similk Beach when the barge sank. He and Ron Mason, the only other man on board, drowned.

Earl Morgan, who would have a huge impact on the business for more than 40 years, had to take on an even larger role. With Jim Turner gone and R.D. Turner, who would die in 1957, not nearly as active as he once was, it was a big load.

"He (Earl) was a one-man show," Betty Morgan said of her late husband.

Earl Morgan was from St. Louis. He met Betty, thanks to R.D. Turner, while he was stationed at Naval Air Station Whidbey Island.

Earl Morgan and some Navy buddies showed up at the beach one afternoon. R. D. Turner "conned" him into picking some oysters for him, the family story goes. Then came an invitation to dinner from Grace and the news: "I have a daughter."

Earl Morgan grabbed hold of the oyster and golf businesses and kept things progressing. He somehow found time to be a Pacific Coast Oyster Growers Association director for many years and serve on the board of the Northwest Golf Course Superintendents Association — plus serve as Fire District 13 commissioner for many years.

Earl Morgan started backing off the oyster business in the late '70s. The beds, leased out in later years, were worked last in 2000 when the state Department of Health closed 80 acres of shellfish beds in the bay where Taylor Shellfish was raising oysters. Water samples from roadside ditches near the Similk Beach shoreline confirmed the presence of sewage from residences in the community.

No contamination was ever found out in the shellfish beds, Tom Cleland recalls.

Taylor stopped operating there, and the area wasn't deemed fit for oyster production until 2010 after more than 40 sewage systems were repaired or replaced. The family chose not to apply for permits.

The new golf course, a hit from the beginning, meant a new clubhouse. R.D. Turner, always frugal, found two surplus barracks buildings at Joint Air Naval Station in Seattle. They were barged here, glued together and set atop chunks of wood at the site of the current clubhouse, which replaced it in 2001.

Golf was a growing sport as the new course matured. Shell and Texaco came here in the 1950s, and the influx of refinery workers, many of whom played in leagues, gave the course a boost over the years. In the mid-1980s, the original baby boom helped create a demand for golf in the United States that was perhaps unparalleled in the game's history, according to the National Golf Foundation.

Similk Beach profited and continued to draw plenty of customers from Canada and the Seattle area, but it didn't overextend itself.

Things were not as hot-shot" as they were at some of the new courses, Beth Morgan-Cleland said. "We were pretty low-key around here."

"We always tried to be true to our price point," said Dick Freier, who was a mainstay at the course for decades until leaving this year. "We tried to give people the best value we could."

Freier's dad, Ray, was a teacher at Anacortes High School and golf coach.

rowing greens.

He shucked oysters for a bit for the family, but his blade work wasn't as smooth as his swing.

Earl found out I was more valuable at the golf end than I was at the oyster end," he recalled with a chuckle.

As Freier took on more responsibility, he could see the near round-the-clock work it took to keep the course viable, and the constant investment in equipment.

There was a time our equipment was as good or better than anybody's, and we had as much or more than anybody," Freier said.

Along with the day-to-day course upkeep, there were always drainage and irrigation projects and course improvements such as ponds and traps that needed doing — and all took money. Margins were tight.

Maintaining and cutting grass is not a real profitable operation," Freier said.

But it was what Earl Morgan lived.

His love was to be out on a piece of equipment maintaining that golf course," Freier said. "To me he was Similk Golf Course. It was that way for a lot of customers."

The golf boom that began in the mid-1980s brought more golfers to Similk — and more developers to Earl Morgan's office. The course and the open land surrounding it was ripe for development in their eyes, a hot property that could accommodate houses ringed by an expensive private golf course or country club layout.

A sale then would mean the end of the friendly, affordable public course that had supported the family and been a part of the community for nearly 70 years, and Earl Morgan turned them all down.

He didn't want to see the golf course become a housing development," Freier said. "That wasn't what the family wanted."

Beth Morgan-Cleland was teaching at Fidalgo Elementary School then — she had a 40-year career there — and Tom Cleland was the longtime owner of Anacortes Cyclery.

He sold the business in 1997, planning to retire.

Five days later, Earl Morgan died, and Tom Cleland had a family legacy to oversee.

Freier had been taking on more responsibility, and he had a big role when Tom Cleland went to work building the current clubhouse in 2001.

They tore the old clubhouse down on Oct. 1 and opened the new one on June 1, 2002.

We had a temporary trailer and made it work," Tom Cleland said. "We had a great group of people working out there."

The clubhouse really improved customers' morale, Freier said.

It was a nice place where they could enjoy a beer and a sandwich."

At the core, though, it was still a straightforward place in the family tradition.

For every deli sandwich we'd sell, we'd sell 10 hot dogs," Freier said.

asn't stopped. According to the National Golf Foundation, only 13 new golf courses opened in the U.S. in 2012 while 154 closed.

om Cleland, aware of the trends that were putting a financial squeeze on golf courses everywhere, chose to keep the course and operations pretty much the same after the new clubhouse opened, a conservative plan that worked and kept an institution in the black.

He kept things financially secure and supported a lot of people," Beth Morgan-Cleland said.

Family members had continued their involvement. Beth's sister Lori Yandle, her husband John and son James spent years at the course, and Christine Cleland, Beth and Tom's daughter, represented the fourth generation of the Morgan-Turner family to work there.

But circumstances pointed to a sale. The business was in a good spot, and remaining family members, who had their own plans, weren't inclined to take on the challenges and year-round grind operating a public golf course would bring.

The sale was a wrenching decision for the family, but one that would benefit it as a whole, Tom Cleland said. And selling to the Swinomish, who had long been interested in the land, seemed a good fit.

The tribe's intention, and ability, to keep the golf course moving ahead — and bring back oyster production — should mean Similk, "Queen of the beaches," will live on with a new owner proud of its own long history with the site.

"I wanted the golf course to continue and the oyster beds to be used," Tom Cleland said. "We took our best shot. Time will tell."

Family memories

Tom Cleland

As with most changes of significance, the selling of the family course had a bittersweet tone to it.

Over the years there have been a lot of ashes spread out around the course of golfing friends and buddies who at least wanted a partial spiritual presence at a place that was important to them. Then the summer before we sold, a once-in-85-year event occurred, a marriage on Similk Golf Course — that being our daughter Christine Grace marrying Travis McGrath on the No. 2 tee.

So the Turner/Morgan/Yandle/Cleland chapter at Similk Beach is now memory, but there is another chapter starting. Hopefully it will be a good read.

Christine Cleland

I just want to acknowledge the incredible community of golfers and friends who helped shape Similk. Some learned to play golf, others were there daily, and a few could no longer swing a club, but brought joy to the clubhouse with daily cups of coffee.

I had a remarkable window into our family history. As a kid, I picked range balls with George Howard, who himself picked range balls for my great-grandfather when he had been my age — "Always a candy bar for payment."

I was blessed to spend 14 summers working at the most fun and rewarding business. The stories that were told to me about the course, my grandpa, grandma, uncle Jim and others taught me the importance of relationships. That sincere sense of community is what means most to me when I reflect upon the end of an era and my place within it. Thank you.

BURI FUNSTON MUMFORD, PLLC

March 30, 2023 - 3:19 PM

Transmittal Information

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Appellate Court Case Title: Richard Howson, Appellant v. Similk Inc. d/b/a Swinomish Golf Links,
Respondent
Superior Court Case Number: 22-2-00639-3

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