97180-3

NO. 77007-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WENDELL LONG, an individual,

Appellant,

v.

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

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is Wendell Long ("Mr. Long"), Appellant in the Court of Appeals, and Plaintiff in the King County Superior Court.

II. CITATION TO COURT OF APPEALS

Mr. Long seeks review of *Wendell Long v. Snoqualmie Gaming Commission*, Case No. 77007-1-I, filed February 25, 2019 by Division I of the Court of Appeals. A copy is attached hereto as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Is an express waiver of sovereign immunity by the Snoqualmie Indian Tribe (the "Tribe") applicable to the Snoqualmie Gaming Commission (the "SGC") when the SGC's sovereign immunity is co-extensive with the Tribe's, and when the SGC is incapable of waiving its own sovereign immunity?

2. Did the trial court err when it denied jurisdictional discovery when Mr. Long asserted and presented evidence that the SGC is controlled by the Tribe?

IV. STATEMENT OF THE CASE

A. Factual Background

1. The Players: The Tribe, the Snoqualmie Gaming Commission, and Mr. Long.

The Tribe is a federally recognized Indian tribe governed by the Snoqualmie Tribal Council (the "Council") and the Snoqualmie Tribal

Constitution. CP 2. The SGC was established by the Council pursuant to the 2002 Snoqualmie Tribe Tribal Gaming Act ("STTGA"). *Id.* The STTGA 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 STTGA does not imbue the SGC with sovereign immunity separate from the Tribe, nor does it empower the SGC to waive sovereign immunity on its own behalf. CP 500.

Mr. Long is an enrolled member of the Choctaw Tribe of Oklahoma. CP 501, 622. He possesses over 30 years of gaming experience, 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.

2. The Context: History of Council Control of the SGC.

Despite the nominal statutory independence of the SGC, the Council intervened in the SGC's actions and decisions on multiple occasions in the recent past. This culminated in 2014 when the Council appointed itself to replace the SGC Commissioners. CP 500, 618-20. 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 simultaneously serve as SGC Commissioners. *Id.* SGC employees were routinely informed of licensing actions that the Council desired to occur, and complied accordingly. *Id.* Through these actions, the Council effectively appointed itself as the SGC.

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

By October 2015, the relationship between the Tribe and Mr. Long 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.* *See Tribe v. Long*, King County Cause No. 15-2-31112-3 SEA. 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 counterclaimed. *Id.*

Shortly after the Tribe initiated the lawsuit, the SGC initiated a licensing action against Mr. Long by summarily suspending his Snoqualmie gaming license. *Id.* The legality of the suspension was contested by Mr. Long in Snoqualmie Tribal Court. CP 502. The SGC's administrative action was based on the same allegations as the Tribe's

lawsuit, namely, claims regarding an unauthorized bonus and disclosure of purportedly "confidential information." CP 501, 623. Consequently, throughout 2015 and 2016, Mr. Long simultaneously defended two actions alleging the same claims and stemming from the same underlying set of facts: 1) the SGC's administrative action seeking revocation of Mr. Long's gaming license; and 2) the Tribe's lawsuit in King County Superior Court involving claims arising from Mr. Long's service as CEO.

4. Mr. Long Seeks Relief From the SGC Administrative Action in the Snoqualmie Tribal Court.

In February 2016, Mr. Long sought an injunction from the Snoqualmie Tribal Court to halt the SGC administrative action. CP 502. The Snoqualmie Tribal Court ultimately denied Mr. Long's requested injunction. CP 531. Recognizing the appearance of collusion by the Tribe and the SGC, however, the Snoqualmie Tribal Court expressed 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 [sic] 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. CP 532.

5. Mr. Long is Granted Partial Summary Judgment in *Tribe v. Long*.

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. *Id.*

6. The Snoqualmie Tribal Court Overturns SGC Action as Arbitrary and Capricious.

In the SGC licensing action, meanwhile, the Snoqualmie Tribal Court ruled that the SGC's license revocation 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, a decision which was, in turn, re-appealed. CP 283, 276.

7. Mediation in *Tribe v. Long*.

On January 4, 2017, the Tribe and Mr. Long engaged in mandatory mediation that resulted in a settlement agreement. *Id.* The parties agreed to a "complete general release and discharge of any and all claims" held by the Tribe "or entities or agencies":

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

CP 553-54 (emphasis added).

In addition to specifying that the broad release was on behalf of the "Tribe" and its "entities or agencies," the Settlement Agreement included an express waiver of sovereign immunity for resolution of any and all disputes arising under the Settlement Agreement. CP 554.

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.

As indicated here, the waiver was on behalf of the "Tribe," is unlimited, and "expressly and unequivocally" made. *Id.* (emphasis added).

B. Procedural Background – *Long v. Snoqualmie Gaming Commission*

1. The Superior Court Stays Discovery and Grants SGC's Motion to Dismiss.

The Settlement Agreement was presented to the SGC for purposes of dismissing the administrative licensing action. CP 533. The SGC

refused. *Id.* Consequently, Mr. Long brought the below action on January 26, 2017 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 controlling relationship between the Council and the SGC. CP 402, 413.

The SGC brought a Motion to Dismiss based on sovereign immunity. CP 103. Soon thereafter, the SGC filed a Motion for Protective Order to stay discovery pending resolution of the Motion to Dismiss. The trial court granted the Motion for Protective Order on March 10, 2017. CP 493. Consequently, no discovery was ever conducted.

On April 17, 2017, the trial court granted the SGC's Motion to Dismiss. CP 753. 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 that alternatively, if the SGC was a party to the Settlement Agreement, then the Settlement Agreement released Mr. Long's gaming license claim. *Id*. Mr. Long appealed.

2. The Court of Appeals Decision.

On February 25, 2019, Division I of the Court of Appeals handed

down its published decision, which is attached as Exhibit A. Stating that "[SGC] has sovereign immunity and did not waive it," the Court of Appeals affirmed the Superior Court. Court of Appeals Decision, p.1. The Court of Appeals focused on the ostensibly independent functions of the SGC, and STTGA language providing the SGC with "sovereign immunity from suit absent express consent from the Tribal Council." *Id.* at 2, quoting STTGA 7.02. The Court of Appeals held that this language requires, *inter alia*, the SGC's "immunity [to] be analyzed separately from any waiver of immunity by the Tribe." Court of Appeals Decision, p.14.

V. ARGUMENT

Two primary questions are presented in this case. Both are informed by common sense. The first is whether a waiver of sovereign immunity by the "Tribe" applies to a governmental subentity of that same "Tribe," particularly where the subentity possesses coextensive sovereign immunity with the Tribe, and is unable to waive its own sovereign immunity. The second is whether Mr. Long's constitutional right to discovery in this matter may be blocked by untested and historically inaccurate claims of "independence" by that same subentity.

RAP 13.4(b) provides that a petition for review will be granted by the Washington Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution or the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Multiple bases are met here. As indicated further below, the decision of the Court of Appeals contravenes *Wright v. Colville Tribal Enterprise Corp.*, 159 Wn.2d 108, 147 P.3d 1275 (2006), creates an unworkable analytical approach to application of waivers of sovereign immunity to tribal governmental subentities, and results in a significant expansion of the doctrine of sovereign immunity. As such, accepting review provides a much-needed opportunity to clarify the analysis for applying waivers of sovereign immunity to tribal governmental subentities.

Additionally, accepting review promotes the substantial public interest in reinforcing certainty for businesses and individuals engaged in commercial transactions with tribes by ensuring that unequivocal waivers of sovereign immunity will be given full effect. This interest is especially pronounced in light of the thriving tribal gaming industry in Washington.[1]

[1] Tribal gaming in Washington generated $3.3 billion in revenue in 2018. *See* Washington State Gambling Commission, 2018 Net Gambling Receipts Report, https://www.wsgc.wa.gov/sites/default/files/public/reports-publications/net-receipts/FY%202018%20Net%20Comparison%20vF12-21.pdf (last accessed May 9, 2019). Additionally tribal Gaming employs more than 33,000 Washington taxpayers, and generated $1.2 billion in tax revenue in Washington in 2017. *See* Nathan Associates analysis; Alan Meister, *Casino City's Indian Gaming Industry Report*, 2017 Edition, Newton: Casino City Press (2017).

Finally, accepting review also vindicates Mr. Long's significant interests in rights of access to the courts and discovery when confronted with an imbalanced jurisdictional discovery burden. Indeed, Mr. Long's jurisdictional discovery quandary is far more egregious than the dissenters found necessitated remand in *Wright*, and meets the criteria for remand identified by Justices Madsen and Fairhurst in their *Wright* concurrence. *Id*., at 121-22. This Petition for Review should be granted.

A. This Court Should Decide Whether an Express and Unambiguous Waiver of Sovereign Immunity by a Tribe is Applicable to a Governmental Subentity of that Tribe.

The scope of tribal sovereign immunity is an issue of federal law. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*., 523 U.S. 751, 753, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). Under federal law, tribal sovereign immunity protects recognized tribes from suit absent explicit and "unequivocal" waiver or abrogation. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S. Ct. 1670, 56 L.Ed. 2d. 106 (1978).

In *Wright*, this Court recognized that sovereign immunity extends to "tribal agencies and instrumentalities acting as extensions of tribal government." *Wright*, 159 Wn.2d at 112, 147 P.3d 1275 (2006), s*ee also N. Sea Prods., Ltd. v. Clipper Seafoods Co.*, 92 Wn.2d 236, 240, 595 P.2d 938 (1979) (holding a tribal corporation and subsidiary were "subordinate divisions" of the tribe protected by sovereign immunity). Then, a deeply

divided Court in *Wright* found that sovereign immunity extended to tribal corporations that were separately incorporated under tribal law, and denied remand for further fact finding to ascertain facts related to the waiver of sovereign immunity. Here, Mr. Long's case addresses a related issue: application of a waiver of sovereign immunity to tribal governmental subentities. As a result, this case is related to *Wright*, and the Court should take the opportunity to clarify how a waiver of sovereign immunity by a tribe applies to governmental subentities of that tribe. The Court should do so for four reasons.

1. There Is Little Case Law on This Subject.

There is little case law addressing the relationship between a tribe and a tribal governmental subentity for purposes of waiving sovereign immunity. What little case law exists suggests that no distinction should be made between a tribe and its governmental subentities. In *Lewis v. Clarke*, for example, the U.S. Supreme Court observed that "an arm or instrumentality of the State generally enjoys the same immunity as the sovereign itself." *Lewis v. Clarke*, ___ U.S. ___, 137 S.Ct. 1285, 1290, 197 L.Ed. 631 (2017). In Washington, *Wright* provides substantial analysis, but, as noted above, *Wright* pertained to separately incorporated tribal corporate entities. That said, the *Wright* majority approvingly cited *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Authority*,

207 F.3d 21 (1st Cir. 2000) for the proposition that "[t]he protection of tribal sovereign immunity also protects tribal agencies and instrumentalities as extensions of tribal government." *Wright*, 159 Wn.2d at 112-13. *Ninigret* makes clear that it saw no distinction between a tribe and its governmental subentities for purposes of analyzing sovereign immunity:

> The 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.***

Ninigret Dev. Corp., 207 F.3d at 29 (internal citations omitted) (emphasis added). Yet, despite *Ninigret's* view that no distinction is necessary, and despite recognizing that the SGC's sovereign immunity is coextensive with the Tribe's, the Court of Appeals extensively distinguished the Tribe and SGC when interpreting the Settlement Agreement. Court of Appeals Decision, p.11-15. This is contrary to available case law.

2. The Court of Appeals Decision Contravenes *Wright*.

The Court of Appeals decision is in contravention of *Wright*. In *Wright*, one of the factors considered by the majority as to whether sovereign immunity applied to the tribal corporate entities was whether tribal law permitted the corporate entity to waive its own sovereign

immunity.[2] *Wright*, Wn.2d at 115. Here, although the Court of Appeals acknowledged that the SGC's and Tribe's sovereign immunity was coextensive (*See* Court of Appeals Decision, p.11-15), and although the Court of Appeals acknowledged that the Tribe's Constitution prohibits the SGC from waiving its own sovereign immunity (*Id*., at 9-10, n.30), it failed to properly consider and apply these factors in light of *Wright*.

Additionally, the *Wright* majority and concurrence were concerned about the financial implications of denying sovereign immunity to tribal governmental corporations. *Wright*, 159 Wn.2d at113 ("And tribal sovereign immunity also protects certain tribal business enterprises because 'an action against a tribal enterprise is, in essence, an action against the tribe itself.'"); *See also Id*., at 124 ("Any liability imposed on the corporations could still affect the tribe's finances.") (J. Madsen concurring). Here, however, application of the waiver of sovereign immunity found in the Settlement Agreement has no impact on the Tribe's finances, but merely permits Mr. Long to proceed in his lawsuit seeking dismissal of the SGC's licensing action. Again, the Court of Appeals failed to properly consider and apply *Wright*.

[2] Another factor was whether the tribe's law itself waived the sovereign immunity of the tribal corporations at issue. *Id.* In this case, however, the waiver of sovereign immunity is found in the Settlement Agreement, duly ratified by the Council.

3. The Court of Appeals Decision Is Unworkable.

The Court of Appeals' analytical framework is wholly unworkable. The Court of Appeals constructed an impractical, function and relation-based analysis that focuses on the SGC's self-proclaimed, self-serving, and historically inaccurate claims of "independence" from the Tribe to justify requiring more specificity in the Settlement Agreement's waiver of sovereign immunity to apply it to the SGC. *See* Court of Appeals Decision, p.11 ("The Commission's exclusive authority over gaming licenses and its relationship to the Tribe and the Washington State Gambling Commission show that any claimed waiver of its sovereign immunity must be analyzed independently of the Tribe's waiver.") Indeed, the Court of Appeals explicitly hinges the analysis on the perceived function of the SGC and relationship with outside entities: "A contrary view [that the Tribe's waiver of its own sovereign immunity waives the SGC's sovereign immunity] would frustrate the independence of the Commission contemplated by the STTGA and the compact between the State of Washington and the Tribe." Court of Appeals Decision, p.15.

This function and relation-based approach for applying a waiver of sovereign immunity to a tribal governmental subentity is unsupported by Washington case law. If the Court of Appeals' analysis is correct, any individual or entity negotiating a contractual waiver of sovereign

immunity with a tribe must prospectively analyze any and all tribal governmental subentities that may be implicated in the contract, and weigh their function and relationship with state or U.S. agencies to see if that subentity may be sufficiently "independent" to escape the ambit of an otherwise all-encompassing waiver. This task would be daunting. In addition to tribal gaming agencies, the Court of Appeals analysis could easily apply to tribal law enforcement agencies, courts, utilities, electoral commissions, and other tribal subentities with varying degrees of claimed independence and outside contacts. The alternative to the above task is specifically listing each and every tribal subentity in the waiver of sovereign immunity, even if, as here, the waiver is already on behalf of the entire tribe and its "entities or agencies." CP 553-54. That does not comport with case law governing waivers of sovereign immunity.

4. The Court of Appeals Decision Significantly Expands the Doctrine of Sovereign Immunity.

Finally, in addition to being unworkable, the Court of Appeals' decision also significantly expands the doctrine of sovereign immunity. This is sharply against the national trend exemplified by the U.S. Supreme Court in *Lewis*. It is well known that no "magic words" are necessary for a tribe to waive its sovereign immunity. *See Auto United Trades Org. v. State*, 175 Wn.2d 214, 226 (2012), 285 P.3d 52 (citing *Okla. Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct.

905, 112 L.2d 1112 (1991). Yet here, given the Court of Appeals' analysis, an effective waiver of sovereign immunity must incant the "magic words" of specifying each and every applicable tribal governmental subentity included in the waiver. That is a significant and unwarranted expansion of the doctrine of sovereign immunity.

B. Under *Wright*, the Trial Court and Court of Appeals Erred by Denying Jurisdictional Discovery.

To support the contention that the SGC was controlled by the Council, Mr. Long submitted narrowly targeted discovery requests seeking to explore the relationship between the Council and the SGC, and the Council's ability and history of binding the SGC. These discovery requests did not occur in a vacuum. They were supported by the Declaration of Bo Yath that confirmed the SGC was, in fact, wholly controlled by the Council. Unfortunately, these discovery requests were stayed. Consequently, the SGC's repeated assertions regarding independence have never 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) (emphasis added); *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 has been thwarted.

1. In *Wright*, This Court Split on the Question of Whether Additional Fact Finding Was Necessary.

In *Wright*, the dissent would have remanded the matter for jurisdictional discovery. *Wright*, 159 Wn.2d at 128. Meanwhile, the concurrence by Justices Madsen and Fairhurst also addressed the issue of jurisdictional discovery. Justice Madsen noted that a factual challenge is functionally similar to a summary judgment motion; thus, courts "***generally permit the nonmoving party to discover facts relevant to the jurisdictional issue***, particularly when the facts are peculiarly within the control of the moving party." *Id.* at 120 (emphasis added). As to whether a factual basis for sovereign immunity existed, the concurrence further noted that "in some cases fact-finding may be necessary to determine whether sovereign immunity applies." *Id.* at 121. As the *Wright* plaintiff

never challenged relevant facts relating to the tribal corporation's status, however, the record contained undisputed facts, and thus "remand for fact-finding is unnecessary." *Id.*

Here, unlike the plaintiff in *Wright*, Mr. Long consistently challenged the SGC's claimed independence, pertinent organizational structure, and interactions between the SGC and the Council. Moreover, the trial court prepared no findings of fact to inform appellate review. Finally, there are contested facts, and the SGC has been permitted to unilaterally advance a preferred version. Then, the Court of Appeals adopted wholesale the SGC's claims of "independence," supported exclusively by citations to tribal law that the Council itself repeatedly flouts, or by claims unable to be disproved absent discovery.

Indeed, the Court of Appeals illustrates the problem with lack of jurisdictional discovery when it simply repeats as verities SGC assertions that are not subject to verification absent discovery. By way of example, the SGC's Motion to Dismiss was supported by the Second Declaration of Edmund Clay Goodman in Support of Defendant's Motion to Dismiss Case. CP 125-128. Among other claims, this Declaration asserted that the SGC's counsel was unaware of the Settlement Agreement at issue until informed of it by counsel for Mr. Long. The assertions are repeated by the Court of Appeals. Court of Appeals Decision, p.5, 16. It may be that the

SGC's counsel was unaware, but far more important is whether the SGC Commissioners or staff were aware. Neither can be known for certain, however, because discovery on the interactions between the SGC and the Council has been thwarted. It was partly to explore and counter this assertion (and others) that Mr. Long secured the declaration of Ms. Yath, and submitted discovery requests.

Mr. Long's case is far more egregious than the dissenters found necessitated remand in *Wright*. Moreover, it meets the criteria for remand identified by Justices Madsen and Fairhurst in their *Wright* concurrence. *Id*., at 121-22. As such, review should be granted. *See* RAP 13.4(b)(1).

2. Federal Courts Are in Accord That Fact-Finding Jurisdictional Discovery Is Appropriate.

Notably, federal cases provide numerous examples where a plaintiff asserting subject matter jurisdiction was permitted the opportunity to conduct discovery. For example, the Ninth Circuit states, "discovery should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (*quoting Butcher's Union Local No. 498 v. SDC Inv., Inc*., 788 F.2d 535, 540 (9th Cir. 1986)); *see also United States ex rel. Cain v. Salish Kootenai College, Inc*. 862 F.3d 939 (9th Cir. 2017) (the district court shall allow 'appropriate discovery' if jurisdictional questions

exist). Furthermore, "It is well settled under Second Circuit law that, even where plaintiff has not made a prima facie showing of personal jurisdiction, a court may still order discovery, in its discretion, when it concludes that the plaintiff may be able to establish jurisdiction if given the opportunity to develop a full factual record." *Leon v. Shmukler*, 992 F.Supp.2d 179, 194 (E.D.N.Y. 2014).

Similarly, a plaintiff seeking jurisdictional discovery need not "first make a prima facie showing that jurisdiction actually exists.' " *Does v. Trump*, 328 F.Supp.3d 1185 (W.D. Wash. 2018) (*quoting NuboNau, Inc. v. NB Labs, Ltd*., No. 10-cv-2631-LAB-BGS, 2011 WL 5237566, at *3 (S.D. Cal. Oct. 31, 2011)). "Such a showing is necessary to survive a motion to dismiss, and '[i]t would ... be counter intuitive to require a plaintiff, prior to conducting discovery, to meet the same burden…to defeat a motion to dismiss.' " *NuboNau, Inc*., 2011 WL 5237566, at *3. This case presents an opportunity to settle whether plaintiffs must make the "counter intuitive" showing that jurisdiction exists being afforded the opportunity to engage in even limited jurisdictional discovery.

VI. CONCLUSION

This case satisfies numerous factors outlined under RAP 13.4(b), and Mr. Long's lengthy gaming career hangs in the balance. As such, review should be granted.

RESPECTFULLY SUBMITTED this 9th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury, that under the laws of the State of Washington, on May 9, 2019, I caused a true and correct copy of the foregoing document to be delivered via the court efiling system to:

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DATED this 9th day of May, 2019, at Seattle, Washington.

Sandra V. Brown, Legal Assistant

NO. 77007-1

COURT OF APPEALS, DIVISION I
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APPENDIX A

TO

PETITION FOR REVIEW

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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WENDELL LONG, an individual, Appellant, v. SNOQUALMIE GAMING COMMISSION, a political subdivision of the Snoqualmie Indian Tribe, Respondent.	)	No. 77007-1-I DIVISION ONE PUBLISHED OPINION FILED: February 25, 2019

LEACH, J. — Wendell Long appeals the superior court's dismissal of his lawsuit against the Snoqualmie Gaming Commission (Commission) for lack of jurisdiction due to the Commission's sovereign immunity and Long's failure to state a claim. Because the Commission has sovereign immunity and did not waive it, we affirm.

FACTS

The Snoqualmie Indian Tribe (Tribe) is a federally recognized sovereign Indian tribe. The Indian Gaming Regulatory Act requires that tribes enter into gaming compacts with states to authorize class III (casino-style) gaming on tribal lands.[1] The Tribe entered into a gaming compact with Washington State.[2] It

[1] 25 U.S.C. § 2710(d)(1)(C).

[2] Tribal-State Compact for Class III Gaming Between the Snoqualmie Indian Tribe and the State of Washington (2002 & amend. 2008).

obligated the Tribe to establish an independent "Tribal Gaming Agency" to regulate the gaming activities on tribal land.[3] To satisfy this obligation the Tribe adopted the Snoqualmie Tribe Tribal Gaming Act, which established the Commission.[4] The STTGA declares the Commission "independent of the Tribal Council in all matters within the Commission's purview."[5] It also provides the Commission with "sovereign immunity from suit absent express consent from the Tribal Council."[6]

The compact gives the Commission the "primary responsibility for the on-site regulation, control and security of the Gaming Operation authorized by [the] Compact" and for its enforcement on Snoqualmie tribal lands.[7] The Commission must report "incident and investigation reports and final dispositions to the State Gaming Agency."[8] The Commission has concurrent jurisdiction with the State Gaming Agency to investigate compact violations and to bring administrative charges against individuals or business entities licensed under the compact for violation of tribal and state law.[9]

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[3] Tribal-State Compact § VI(B).

[4] Snoqualmie Tribe Tribal Gaming Act § 7.01, (2015) (STTGA), http://www.snoqualmietribe.us/sites/default/files/gaming_act.pdf.

[5] STTGA § 7.04.

[6] STTGA § 7.02.

[7] Tribal-State Compact § VI(B).

[8] Tribal-State Compact § VI(F).

[9] Tribal-State Compact § VI(F).

The Commission has the exclusive authority to issue, suspend, and revoke gaming licenses for the Snoqualmie Casino's employees, vendors, and contractors.[10]

On March 27, 2015, the Tribe hired Long as the chief executive officer of the Snoqualmie Casino.[11] The Tribe and Long signed a written agreement stating the terms of Long's employment. In this contract, Long warranted "that there [were] no impediments to his . . . being licensed by the Snoqualmie Gaming Commission for gaming purposes" and "to maintain [his] gaming license in good standing." Long applied to the Commission for this license and received it in May 2015.

The contract addressed the Tribe's sovereign immunity:

> Except as expressly provided herein, nothing in this Agreement shall be deemed or construed as a waiver or limitation of the Tribe's inherent sovereign immunity from unconsented 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 the Snoqualmie Tribal Court. Any such claim must be filed with 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.

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[10] STTGA § 7.03, §§ 9-11.

[11] The Tribe is a federally recognized "Indian Entity." Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915, 4918 (Jan. 17, 2017).

In October 2015, the Tribe fired Long. In December 2015, the Tribe sued Long in King County Superior Court for breach of fiduciary duty, conversion, and unjust enrichment. Long answered and counterclaimed.

On January 22, 2016, before the expiration of Long's gaming license, the Commission voted to suspend it pending a revocation hearing. Long sued the Commission in tribal court to enjoin the revocation of his license. The Commission asked the tribal court to dismiss this lawsuit for lack of subject matter jurisdiction. It did.

After an administrative hearing, the Commission revoked Long's license. Long appealed this revocation to the Snoqualmie Tribal Court. In August 2016, the tribal court found that the Commission's decision was arbitrary and capricious and remanded the case for further proceedings.[12] In September 2016, the Commission, on remand, affirmed its earlier decision and issued a final decision revoking Long's license. In response, Long filed a new complaint against the Commission in tribal court.[13]

In January 2017, a settlement agreement ended the litigation in superior court between Long and the Tribe started by the Tribe. The only parties to the

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[12] The court indicated that the Commission's written decision revoking Long's license failed to sufficiently link the findings to the dishonesty and lack of integrity the Commission claimed violated the gaming act.

[13] The Commission states in its brief that on November 13, 2017, the tribal court denied Long's motion for summary judgment, granted the Commission's motion for summary judgment, and affirmed the Commission's final decision to revoke Long's license. Our record does not contain this tribal court decision.

settlement agreement are Long and the Tribe. The agreement does not mention the Commission. The agreement describes a single lawsuit, the one started by the Tribe. The agreement makes no reference to either the proceedings between Long and the Commission or Long's gaming license. The Commission and its counsel did not know about the settlement until January 11, 2017.

The settlement agreement states that Long and the Tribe waive all claims against each other incurred before the agreement, including but not limited to those upon which the suit was based.[14] The agreement includes a limited waiver of sovereign immunity: "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."

After the settlement, Long asked the Commission to rescind the revocation of his gaming license. It refused. In January 2017, he sued the

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[14] Paragraph 5 states,

> The Parties agree that the agreements herein are made entirely for the purpose of a compromise and settlement of a litigated dispute. Neither the consideration set forth herein, nor the compromise and settlement of said dispute, nor anything contained herein shall be construed to be an admission by any Party of liability to any other Party or to any other person or entity, nor shall it be construed to create any rights or interests in third persons or entities. The Parties agree and acknowledge that the fact of this settlement may not be used by any Party to prove or establish liability in any other action or proceeding of any kind whatsoever.

Commission in superior court, contending that the Commission violated the terms of the settlement agreement by refusing to rescind the revocation of his gaming license. Long submitted a number of discovery requests to the Commission.

The Commission asked the superior court to dismiss the lawsuit for lack of subject matter jurisdiction due to its sovereign immunity and to stay discovery pending resolution of its dismissal request. The superior court granted the Commission's request to stay discovery. Later, the superior court dismissed Long's lawsuit. It included the following statement in its order: "[T]he Court notes that if the Commission is deemed a party to the [s]ettlement as Plaintiff asserts and his license was revoked prior to the [s]ettlement, Plaintiff appears to have released his 'claim' for license reinstatement by virtue of the [s]ettlement agreement." The superior court denied Long's motion for reconsideration. Long appeals.

STANDARD OF REVIEW

We review the superior court's dismissal of a claim under CR 12(b)(1) or CR 12(b)(6) de novo.[15] Once a defendant requests dismissal under CR 12(b)(1) on the basis of sovereign immunity, the party asserting jurisdiction has the burden of proving the other party has no immunity or waived it.[16]

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[15] Wright v. Colville Tribal Enter. Corp., 159 Wn.2d 108, 111, 147 P.3d 1275 (2006); Outsource Servs. Mgmt. LLC v. Nooksack Bus. Corp., 172 Wn. App. 799, 807-08, 292 P.3d 147 (2013).

[16] Outsource Servs. Mgmt. LLC, 172 Wn. App. at 807.

We review a superior court's reconsideration decisions and orders to stay proceedings for abuse of discretion.[17] A court abuses its discretion when it bases its decision on untenable grounds or reasons.[18]

ANALYSIS

Long claims that the tribal council waived the Commission's sovereign immunity. He also claims the court should have granted his motion for reconsideration. Finally, he contends the court abused its discretion by staying discovery pending disposition of the Commission's dismissal request. Long fails to establish that the tribal council waived the Commission's immunity. Since the superior court properly dismissed the case, we decline to review his other assertions.

Lack of Jurisdiction Due to Sovereign Immunity

The parties agree that the Commission has sovereign immunity. But Long asserts that his settlement agreement with the Tribe waived the Commission's immunity for its licensing decisions. Long supports his position with two arguments. First, he claims any waiver of sovereign immunity by the Tribe waives that immunity for its agencies. Second, he asserts that the agreement's

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[17] King v. Olympic Pipeline Co., 104 Wn. App. 338, 348, 16 P.3d 45 (2000); Kohfeld v. United Pac. Ins. Co., 85 Wn. App. 34, 40, 931 P.2d. 911 (1997).

[18] Olympic Pipeline Co., 104 Wn. App. at 348.

waiver provision unambiguously includes the Commission. We find both arguments unpersuasive.

Federally recognized Indian tribes are "separate sovereigns pre-existing the Constitution."[19] These tribes have common law sovereign immunity as "a necessary corollary to Indian sovereignty and self-governance."[20] This immunity extends to a tribe's agencies and instrumentalities.[21] Washington courts must and do apply federal law to resolve whether tribal sovereign immunity applies.[22] So, contrary to Long's assertions, a settlement agreement provision requiring that it be interpreted in accordance with the substantive law of Washington State does not change the law this court applies to resolve the immunity issue.

Absent a tribe's express waiver of immunity or congressional abrogation, that tribe may not be sued in state or federal court.[23] In either event, any waiver

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[19] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).

[20] Three Affil. Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 890, 106 S. Ct. 2305, 90 L. Ed. 2d. 881 (1986); see also, Foxworthy v. Puyallup Tribe of Indians Ass'n, 141 Wn. App 221, 225-26, 169 P.3d 53 (2007); Wright, 159 Wn.2d at 112 (citing Santa Clara Pueblo, 436 U.S. at 59).

[21] Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 757-58, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973)); Wright, 159 Wn. 2d at 112.

[22] Auto. United Trades Org. v. State, 175 Wn.2d. 214, 226, 285 P.3d 52 (2012) (citing Kiowa Tribe of Okla., 523 U.S. at 754).

[23] Auto. United Trades Org., 175 Wn.2d at 226 (citing Kiowa Tribe of Okla., 523 U.S. at 754).

"must be unequivocally expressed" and cannot be implied.[24] A tribe can limit the extent of its waiver to a particular claim, a particular forum, or a particular party.[25]

The Commission suggests that federal common law requires a court to interpret any claimed immunity waiver "liberally in favor of the Tribe and restrictively against the claimant." We do not address this claim because Long's argument fails without application of this broad rule of construction.

The Tribe's constitution gives the tribal council the exclusive authority to waive sovereign immunity and requires that any waiver be express and unambiguous.[26] Consistent with its constitution, the Tribe's Judiciary Act states that "all Tribal agencies shall be immune from suit for any acts or omissions done during the performance of Tribal duties" and gives the tribal council exclusive authority to waive immunity for any of these bodies.[27]

The STTGA, which created the Commission, includes one "limited, irrevocable waiver of sovereign immunity" for disputes between patrons and casino staff.[28] The STTGA states that "nothing in [it] shall be construed as a waiver of the sovereign immunity of the Commission, Tribe, or any other governmental subdivision or economic enterprise of the Tribe."[29] Again,

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[24] Santa Clara Pueblo, 436 U.S. at 58 (internal quotation marks omitted).
[25] Auto. United Trades Org., 175 Wn.2d at 227.
[26] SNOQUALMIE TRIBE CONST. art. 1, § 3.
[27] Snoqualmie Tribe Judiciary Act § 10.
[28] STTGA § 12.06(B).
[29] STTGA § 15.

consistent with the tribe's constitution, it states that any waiver of immunity for the Commission is not effective unless approved by a resolution of the tribal council.[30]

The Commission has hearing regulations. They include "an express and limited waiver" of sovereign immunity for the sole purpose of an appeal of a final tribal gaming license revocation to the tribal court.[31] The regulations limit the waiver to this forum and authorize the tribal court to decide whether a final Commission decision revoking a tribal gaming license is "arbitrary and capricious, or contains an error of law."[32] The regulations condition this waiver on the tribal court conducting the appeal confidentially.[33] It does not "extend to any further appeal beyond the Tribal Court."[34] The regulations also limit the relief available in the tribal court to an affirmation or a remand to the Commission for further proceedings.[35] Finally, the regulations conclude with this statement: "The Commission explicitly does not waive its immunity from [among other things] suit from matters collateral to the appealed decision [or] matters arising from the same set of facts or controversy as the appealed decision."[36]

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[30] STTGA § 15.
[31] Snoqualmie Tribe Gaming Comm'n Hr'g Regs. § 2.10.
[32] Snoqualmie Tribe Gaming Comm'n Hr'g Regs. § 2.10(A)(6).
[33] Snoqualmie Tribe Gaming Comm'n Hr'g Regs. § 2.10(A)(5).
[34] Snoqualmie Tribe Gaming Comm'n Hr'g Regs. § 2.10(C).
[35] Snoqualmie Tribe Gaming Comm'n Hr'g Regs. § 2.10(D).
[36] Snoqualmie Tribe Gaming Comm'n Hr'g Regs. § 2.10(E).

A. Coextensive Immunity

Long correctly notes that the STTGA states that the Commission possesses "all of the rights, privileges, and immunities of the Tribe." He asserts that because the Tribe and the Commission have coextensive sovereign immunity, any waiver of that immunity by the Tribe also waives the Commission's immunity. Since the Tribe waived immunity for some purposes in its settlement agreement with Long, he contends that this waiver also waived the Commission's immunity. We disagree.

The Commission's exclusive authority over gaming licenses and its relationship to the Tribe and the Washington State Gambling Commission show that any claimed waiver of its sovereign immunity must be analyzed independently of the Tribe's waiver. The STTGA adopted by the Tribe, the Commission's regulations, and Long's employment contract all recognize the unique and independent status of the Commission.

The STTGA establishes the Commission: "**Establishment of the Commission.** The Tribe hereby establishes the Commission as an independent governmental subdivision of the Tribe."[37] The STTGA also describes the scope of the Commission's independence: "**Importance of Independence of Commission.** The Tribe recognizes the importance of an independent gaming

[37] STTGA § 7.01.

commission in maintaining a well-regulated Gaming Operation. The Commission shall be independent of the Tribal Council in all matters within the Commission's purview."[38]

Tribal council members are not eligible to serve on the Commission.[39] The primary management officials and key employees of the Tribe's gaming operation must have a gaming license issued by the Commission.[40] The Commission has exclusive authority to deny, suspend, and revoke any tribal gaming license.[41] The tribal council does not have any authority to review the Commission's gaming license decisions.[42]

The Commission has the power to adopt regulations implementing the STTGA and "generally to promulgate Regulations relating to gaming on the Tribe's Indian Lands."[43] While the Commission must provide notice of proposed regulations to the tribal council and consider its comments, the Council does not control the Commission's rule- making power.[44]

The Commission's regulations provide for a limited right of review by the tribal court and a corresponding express and limited waiver of immunity:

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[38] STTGA § 7.04.
[39] STTGA § 7.07(B)(1).
[40] STTGA § 11.04.
[41] STTGA § 7.08, .09.
[42] STTGA § 7.04.
[43] STTGA § 7.11(C).
[44] STTGA § 7.11(C)(1)(b), (c).

Section 2.10 Appeals

The Commission hereby authorizes an express and limited waiver of its immunity from suit for the sole purpose of an appeal to the Snoqualmie Tribal Court only from a final decision to revoke a tribal gaming license reached pursuant to these Regulations, which waiver is subject further to the limitations set out in this Section 2.10. This limited waiver of immunity for the purposes of allowing appeals of final revocation decisions to the Tribal Court shall be construed narrowly, and any appeal outside the scope of this Section 2.10 shall not be deemed to be within the scope of this limited waiver.

. . . .

(D) This limited waiver of sovereign immunity for purposes of appeal is further limited to decisions by the Tribal Court that would either affirm the Commission's or that remand to the Commission for further proceedings. There is no waiver of the Commission's immunity to any claims for any other kind of relief, including but not limited to damages, injunctive relief, attorney fees, or any other relief.

(E) The express, limited waiver of sovereign immunity shall only apply to the appeal at hand. The Commission explicitly does not waive its immunity from suit from matters collateral to the appealed decision, matters arising from the same set of facts or controversy as the appealed decision, or matters beyond the revocation of a gaming license.[45]

(Emphasis added.)

The employment contract between Long and the Tribe recognizes the Commission's independence. In this agreement, Long warrants "that there [were] no impediments to his . . . being licensed by the Snoqualmie Gaming Commission for gaming purposes" and "to maintain [his] gaming license in good standing." The Tribe makes no corresponding warranty that Long's license application will be approved by the Commission. Instead, the agreement

[45] Snoqualmie Tribe Gaming Comm'n Hr'g Regs. § 2.10.

requires that Long seek the license from the Commission, independent of his employment with the Tribe.

Long asserts that if this court affirms the superior court's conclusion that the STTGA establishes the Commission's independence, the record establishes that the Tribe in fact controls the Commission to such an extent that the Commission is not independent. He points to the declaration by Bopha Yath, a former agent of the Commission, who stated that the Tribe and the Commission do not always act independently for licensing purposes. We reject this assertion for two reasons.

First, "jurisdiction over a party asserting tribal sovereign immunity is a question of law."[46] Long cites no authority to support his contention that this court should consider Yath's declaration to resolve this legal issue. Second, Yath's declaration describes events that occurred before November 2014. The Tribe adopted the STTGA on January 22, 2015. Thus, Yath provides no information about the conduct of the Tribe and the Commission under the STTGA.

We conclude that the Commission's independent role in Indian land gaming regulation requires that its immunity be analyzed separately from any waiver of immunity by the Tribe. This means that the Tribe's waiver of its own

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[46] Wright, 159 Wn.2d at 111.

immunity, without more, does not waive the Commission's sovereign immunity in matters falling within its exclusive purview, like gaming license revocation. A contrary view would frustrate the independence of the Commission contemplated by the STTGA and the compact between the State of Washington and the Tribe. It would also ignore the carefully worded limited waivers found in the Commission's regulations.

B. Broad Application of the Language of the Agreement

Long claims that the settlement agreement provision waiving sovereign immunity clearly and unambiguous waives the immunity of the Commission. We disagree.

A waiver of tribal sovereign immunity "must be unequivocally expressed."[47] Long claims that two settlement agreement provisions, when read together, unequivocally waive the Commission's immunity from suit over its gaming license decision for Long:

> 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 . . . .
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> . . . .

[47] Santa Clara Pueblo, 436 U.S. at 58; Wright, 159 Wn.2d at 115.

> 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.

We make several observations about the settlement agreement. First, the Commission is not a party to the agreement and did not know about it before the parties signed it. Second, the agreement makes no mention of the proceedings between the Commission and Long or any tribal court decision. Third, the agreement makes no mention of Long's gaming license. Fourth, the agreement does not describe any action to be taken or abstained from by the Commission.

We also note the Commission regulations addressing its sovereign immunity. They contain a limited waiver for the sole purpose of an appeal to tribal court to review a final gaming license revocation. They limit the relief available in the tribal court to an affirmation of the Commission's decision or a remand to the Commission for further proceedings.[48] They prohibit any appeal beyond tribal court. Finally, the regulations conclude with this statement: "The Commission explicitly does not waive its immunity from [among other things] suit

[48] Snoqualmie Tribe Gaming Comm'n Hr'g Regs. § 2.10(D).

from matters collateral to the appealed decision [or] matters arising from the same set of facts or controversy as the appealed decision."[49]

Given the clear limits of the regulation waiver (both in forum and relief), the Commission's independence in gaming license matters, the absence of any mention of the gaming license dispute in the settlement agreement, and the circumstance that the Commission is not a party to that agreement, the contract language relied on by Long cannot, as a matter of law, be described as an unequivocal waiver of the Commission's immunity.

Long suggests that had the Tribe wanted to exclude the Commission from the settlement agreement waiver it could have, asserting that because the agreement does not exclude the Commission, the waiver extends to it. This argument stands tribal immunity law on its head by ignoring Long's burden of showing subject matter jurisdiction.[50] Here, Long must show an express and unambiguous waiver of immunity. This means that the Commission does not have the burden of showing the absence of a waiver.

Long asserts that the context of the waiver clause in the agreement requires extending that waiver to all agencies of the Tribe. He correctly notes that paragraph 2 requires the parties to release one another and "all persons, spouses, entities or agencies claiming by, through or under them" from claims

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[49] Snoqualmie Tribe Gaming Comm'n Hr'g Regs. § 2.10(E).
[50] See Outsource Servs. Mgmt. LLC, 172 Wn. App. at 807.

arising prior to the agreement. He claims that this provision is superfluous unless it is interpreted to extend the immunity waiver to the Commission. But this provision has meaning if it is interpreted to extend the scope of the release to derivative entities without extending the scope of the waiver.

Finally, Long claims the agreement applies to the Commission because it contains an "unlimited waiver" in contrast to the "limited waiver" in his employment agreement. But the settlement agreement has limitations too. It is limited in time "as of the date of execution of th[e] Agreement." The waiver is limited to "dispute[s] arising under th[e] Agreement." The Commission had made a final decision in the dispute between the Commission and Long before the agreement was signed. Long points to no language in the agreement about his gaming license. He does not persuasively explain how any dispute about his revoked license arises under the settlement agreement. He certainly does not explain how his cobbled argument describes an unequivocal expression of waiver for the gaming license issue.

That the Commission based its decision on the same facts as the Tribe also does not matter. The Commission's regulations state clearly that the limited waiver for appeals of licensing decisions to the tribal court does not extend to

other "suit[s] from matters collateral to the appealed decision [or] matters arising from the same set of facts or controversy as the appealed decision."[51]

Since the tribal council did not unequivocally waive the Commission's sovereign immunity in the settlement agreement, the superior court properly dismissed Long's lawsuit for lack of subject matter jurisdiction.

Failure to State a Claim

Long asserts that the superior court also erroneously dismissed the suit for a failure to state a claim under CR 12(b)(6). Because the Tribe did not waive the Commission's sovereignty, we decline to review this issue.

Stay of Discovery

Long challenges the superior court's stay of discovery. A court has discretion to stay discovery pending a determination about immunity from suit.[52] The issue of immunity here can be determined on the basis of the law. So the superior court did not abuse its discretion by staying discovery.

Long also asserts he should be given the chance to amend his complaint to address the sovereign immunity claim in lieu of it being dismissed. He did not ask the trial court to let him amend. We decline to consider this request.

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[51] Snoqualmie Tribe Gaming Comm'n Hr'g Regs. § 2.10(E).

[52] Behrens v. Pelletier, 516 U.S. 299, 308, 116 S. Ct. 834, 133 L. Ed 2d 773 (1996) (indicating that qualified immunity protects one from the burdens of litigation, including pretrial actions, and therefore a court should stay discovery during determination regarding immunity).

Denial of Motion for Reconsideration

Long asserts that the superior court abused its discretion by not granting his motion for reconsideration. Long does not provide any argument in his brief to establish the grounds for reconsideration under CR 59. We need not address an issue that a party does not argue in its brief.[53] We decline to review this issue.

CONCLUSION

Long fails to demonstrate that the Commission waived its sovereign immunity. He thus fails to show that the superior court had subject matter jurisdiction over his claim. The superior court did not err when it dismissed the case. We affirm.

Leach, J.

WE CONCUR:

Andrus, J.

Ureda, J.

[53] Timson v. Pierce County Fire Dist. No. 15, 136 Wn .App. 376, 385, 149 P.3d 427 (2006) (citing State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004)).

WILLIAMS KASTNER

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