Docket no. KNL CV-13-6019099-S	:	CONNECTICUT SUPERIOR COURT
BRIAN LEWIS AND MICHELLE LEWIS, Plaintiffs,	:	J.D. NEW LONDON
v.	:	AT NEW LONDON
WILLIAM CLARKE, Defendant	:	SEPTEMBER 10, 2014

MEMORANDUM OF DECISION ON MOTION TO DISMISS (#104.00)

The plaintiffs, Brian Lewis and Michelle Lewis, initiated this suit by way of complaint filed on October 21, 2013, against William Clarke and the Mohegan Tribal Gaming Authority (MTGA). Two days later, on October 23, 2013, before the return date, the plaintiffs withdrew the action as to the MTGA. On November 19, 2013, William Clarke appeared by counsel. The next day, the plaintiffs filed an amended complaint in two counts, one each by Brian Lewis and Michelle Lewis against Clarke only ("the complaint").[1]

On December 31, 2013, Clarke moved to dismiss the complaint. Filed with the motion were an affidavit of Michael Hamilton, a copy of a police report on the subject accident, portions of the Mohegan Tribe of Indians Code and a copy of the Tribal State Compact between the Mohegan Tribe and State of Connecticut. The plaintiffs filed an objection to the motion to dismiss on January 6, 2014. Clarke filed a reply memorandum to the plaintiffs' objection on February 11, 2014, attaching a copy of the Mohegan Tribal Code §§ 4-52 and 4-53 and an Affidavit of Mary Lou Morrissette. On February 14, 2014, the plaintiffs filed a sur-reply. The motion was argued on February 28, 2014.[2] Also on that day, Clarke filed supplemental authorities discussed at oral argument but not included in the briefs. On February 25, 2014, the plaintiffs filed a response to Clarke's supplemental authorities.

---

[1]On February 21, 2014, the plaintiffs filed another request for leave to amend their complaint, which request was denied by this court on March 25, 2014, without prejudice to renewal after issuance of this decision on the defendant's motion to dismiss.

[2] The parties filed written waivers of the 120-day deadline for this decision, for which the court thanks them and their respective counsel.

Copies mailed to all counsel of record and the Reporter of Judicial Decisions on 9/11/14

FACTS

In deciding a jurisdictional question raised by a motion to dismiss, the court takes the facts to be those alleged, and necessarily implied, in the complaint, construing them in a manner most favorable to the pleader. *Lagassey v. State*, 268 Conn. 723, 736, 846 A.2d 831 (2004). Legal conclusions and opinions are not taken as true. See *Ellef v. Select Committee of Inquiry*, Superior Court, judicial district of Hartford, Docket No. CV-04-0832432-S (April 8, 2004). The interpretation of pleadings is always a question of law for the court. *Boone v. William W. Backus Hospital*, 272 Conn. 551, 559 n.1, 864 A.2d 1 (2005). Viewing the complaint in this light, the essential facts are as follows.

On October 22, 2011, the plaintiff Brian Lewis was operating a motor vehicle southbound on Interstate Route 95 in Norwalk, Connecticut. The plaintiff Michelle Lewis was his passenger. Clarke was driving a limousine behind the plaintiffs. Suddenly and without warning, Clarke drove the limousine into the rear of the plaintiffs' vehicle and propelled the plaintiffs' vehicle forward with such force that it came to rest partially on top of a jersey barrier on the left hand side of the highway. The collision and the plaintiffs' resulting injuries were caused by Clarke's negligence. At that time, Clarke was a Connecticut resident, had a Connecticut driver's license, and, according to the affidavit of Michael Hamilton, the MTGA's Director of Transportation, was driving a limousine owned by the MTGA and was employed by the MTGA to do so.[3] Specifically, Clarke was driving patrons of the Mohegan Sun Casino to their homes. The limousine was covered by an automobile insurance policy issued by Arch Insurance.

DISCUSSION

"[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 134, 918 A.2d 880 (2007). The party who is asking the court to exercise jurisdiction in his favor must be able to allege facts

---

[3] "[I]f the complaint is supplemented by *undisputed facts* established by affidavits submitted in support of the motion to dismiss [or] other types of undisputed evidence . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Conboy v. State*, 292 Conn. 642, 651-52, 974 A.2d 669 (2006).

demonstrating that he is a proper party to make that request. See *St. Paul Travelers Cos. v. Kuehl*, 299 Conn. 800, 808, 12 A.3d 852 (2011). The plaintiff, therefore, bears the burden of proving subject matter jurisdiction. *Fort Trumbull Conservancy, LLC v. New London*, 265 Conn. 423, 430 n.12, 829 A.2d 801 (2003). In determining whether a court has subject matter jurisdiction, every appropriate presumption favors finding such jurisdiction. *Keller v. Beckenstein*, 305 Conn. 523, 531, 46 A.3d 102, 107 (2012).

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." (Internal quotation marks omitted.) *Kizis v. Morse Diesel International, Inc.*, 260 Conn. 46, 52, 794 A.2d 498 (2002). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). "'Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity bars suits for damages against a tribe.' *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996). 'However, such waiver may not be implied, but must be expressed unequivocally.' *McClendon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989)." *Kizis v. Morse Diesel International, Inc.*, supra, 53. The tribe must have consented to suit in the specific forum. Id., 53, citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).

THE PARTIES' CLAIMS

Clarke moves to dismiss the complaint on the ground that the court lacks subject matter jurisdiction because the MTGA is entitled to sovereign immunity, as an entity of the Mohegan Tribe of Indians of Connecticut ("Mohegan Tribe" or "the tribe"), and he is entitled to sovereign immunity as an employee of the MTGA acting within the scope of his employment at the time of the accident. Clarke argues that to deny the present motion would be to abrogate the MTGA's sovereign immunity, and that only the Congress of the United States has that power. Clarke argues that dismissal of this case would not leave the plaintiffs without recourse because they can sue him in the Mohegan Tribal Gaming Court.

The plaintiffs oppose Clarke's motion based on an emerging "remedy-sought" doctrine promulgated by the Ninth and Tenth Circuits of the United States Courts of Appeal. The essence

of the "remedy-sought" doctrine is that sovereign immunity does not extend to a tribal employee who is sued in his individual capacity when damages are sought from the employee, not from the tribe, and will in no legally cognizable way affect the tribe's ability to govern itself independently. The plaintiffs claim that, even treating the MTGA as the Mohegan Tribe, their suit against Clarke individually would not infringe on the tribe's sovereign immunity and therefore, immunity should not be extended to him. Essentially, the plaintiffs argue that the tribe's sovereign immunity is limited; that, in a civil context, tribal immunity prevents only claims and judgments for money against the tribe or the MTGA; and that there is no such claim here, nor any possibility of such a judgment. The plaintiffs urge the court to adopt the remedy-sought analysis applied in *Maxwell v. County of San Diego*, 697 F.3d 941 (9th Cir. 2012), and find that a tribal employee can be sued in his individual capacity so long as the remedy sought is against the employee individually.[4]

Clarke replies that, in our federal circuit – the United States Court of Appeals for the Second Circuit – and under Connecticut law, it is well settled that tribal employees are immune from suit when acting within the scope of their employment, even where a tribal employee is the sole defendant, and that it is unnecessary and inappropriate to examine whether the tribe is a real party in interest. See *Chayoon v. Sherlock*, 89 Conn. App. 821, 877 A.2d 4, cert. denied, 276 Conn. 913, 888 A.2d 83 (2005). Clarke argues that this court should heed the Tenth Circuit's caution, in *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1297 (10th Cir. 2008), that adoption of the remedy-sought analysis would be like wading into a swamp and reject that analysis. Finally, Clarke claims that, even if this court applies the "remedy-sought" analysis, he would still be immune from suit because the MTGA is the real party in interest by virtue of its commitment to indemnify and defend him, its employee.

In the plaintiffs' sur-reply, they argue that the facts of this case differ from those in *Chayoon v. Sherlock*, supra, 89 Conn. App. 821. The plaintiffs contend that tribal immunity is not attached to an individual employee sued in his individual capacity. They argue that *Chayoon*

---

[4]The plaintiffs have cited to the *Maxwell v. County of San Diego* opinion appearing at 697 F.3d 941 (9th Cir. 2012). That opinion, however, has been withdrawn by *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013). Accordingly, this court relies on the latter opinion.

is distinguishable because the court found, despite the plaintiff's claim, tribal employees were being sued, in part, in their roles as tribal representatives. See *Chayoon v. Sherlock*, supra, 89 Conn. App. 829 (saying defendant is being sued individually does not make it so). The plaintiffs distinguish *Bassett v. Mashantucket Pequot Museum & Research Center, Inc.*, 221 F. Supp. 2d 271, 277-78 (D. Conn. 2002), also cited by Clarke, because the complaint in *Bassett* alleged that the tribal employees were being sued "individually and as an authorized agent of the Tribe as well as in their capacities as officers, representatives and/or agents of the [tribal] corporation and/or association."

At oral argument, Clarke cited *Tonasket v. Sargent*, 510 Fed. Appx. 648 (9th Cir., 2013), and *Miller v. Wright*, 705 F.3d 919 (9th Cir., 2013), for the proposition that the remedy-focused analysis employed in *Maxwell* has been abandoned. The plaintiffs' dispute that proposition because *Tonasket* and *Miller* did not address the present issue: those decisions involved the execution of a cigarette tax upon a tribal reservation.

ANALYSIS

At the outset, there is no claim by the plaintiffs that the MTGA has waived sovereign immunity or that Clarke has waived his claim to sovereign immunity. Nor does this court perceive that it has any power to "abrogate sovereign immunity" or otherwise assume any power or right reserved to the tribe, let alone to the United States Congress. Rather, the issue presented is whether the MGTA's immunity protects its employee, Clarke, from being sued solely in his individual capacity for an alleged tort occurring off the tribal reservation injuring non-patrons of the MTGA. In other words, the issue is not whether the court has the power to abrogate sovereign immunity, but whether sovereign immunity is present at all. Under the facts of this case, the court concludes that the "remedy-sought" analysis should be applied and, because the remedy sought is not against the MTGA, Clarke is not immune from suit.

Tribal sovereign immunity is limited. "[T]ribal sovereignty is dependent upon, and subordinate to . . . the [f]ederal [g]overnment." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980). "The [tribal] sovereign's claim to immunity in the courts of a second sovereign . . . normally depends on the second sovereign's law. *Schooner Exchange v. McFadden*, 7 Cranch 116, 136 (1812)."

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., supra, 523 U.S. 760-61 (*Stevens, J.*, dissenting). Tribal immunity "exists only at the sufferance of Congress and *is subject to complete defeasance*." (Emphasis in original; internal quotation marks omitted.) *Rice v. Rehner*, 463 U.S. 713, 724, 103 S. Ct. 3291, 77 L. Ed. 2d 961 (1993). Congress has restricted tribal immunity to matters involving tribal self-governance. *Turner v. United States*, 248 U.S. 354, 358, 39 S. Ct. 109, 63 L. Ed. 291 (1919); *Strate v. A-1 Contractors*, 520 U.S. 438, 459, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997) (immunity has not been extended beyond protecting tribal self government or controlling internal relations); *Rice v. Rehner*, supra, 724 (immunity limited to actions promoting powers such as self-sufficiency and economic development traditionally reserved to the tribe).

In *Maxwell*, the key Ninth Circuit case applying the "remedy-sought" doctrine, a Viejas tribal fire department ambulance with two tribal employee paramedics was dispatched to the scene of a shooting at the plaintiffs' residence, which was not on the Viejas Indian Reservation. *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013). Following the death of the patient, the plaintiffs brought state law tort claims against the tribal paramedics, individually. Although the Viejas Fire Department was also a defendant, the Viejas Tribe was not a party to the suit.

Carefully considering the purposes of tribal sovereign immunity, the court in *Maxwell* applied a remedy focused analysis, seeking to identify the real party in interest. Id., 1087-1090. The *Maxwell* court determined that the tribal paramedics were not entitled to immunity because the remedy sought by the plaintiffs would operate only against them personally. Id., 1088. Underlying the test applied in *Maxwell* was the consideration that the court "must be sensitive to whether the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act." (Internal quotation marks omitted.) Id., 1088.

"Tribal sovereign immunity derives from the same common law immunity principles that shape state and federal sovereign immunity. See *Santa Clara Pueblo v. Martinez*, [supra, 436 U.S. 58]; *Cook* [*v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008)]. Normally, a suit like this one – brought against individual officers in their individual capacities – does not

implicate sovereign immunity." *Maxwell v. County of San Diego*, supra, 708 F.3d 1088, citing *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1190 (9th Cir. 2003). The plaintiffs in this case seek money damages not from the sovereign Mohegan Tribe but from Clarke personally. See *Alden v. Maine*, 527 U.S. 706, 757, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) (states' immunity from private suit in their own courts distinguished from suits against states' employees). The essential nature and effect of the relief sought can mean that the sovereign is not the real, substantial party in interest. See *Maxwell v. County of San Diego*, supra, 1088, citing *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464, 65 S. Ct. 347, 89 L. Ed. 389 (1945).

Several years before *Maxwell*, the Tenth Circuit stated, "[w]here a suit is brought against the agent or official of a sovereign, to determine whether sovereign immunity bars the suit, we ask whether the sovereign is the real, substantial party in interest. *Frazier v. Simmons*, 254 F.3d 1247, 1253 (10th Cir. 2001) . . . This turns on the relief sought by the plaintiffs. Id. . . . '[T]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.' *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101, 104 S. Ct. 900 79 L. Ed. 2d 67 (1984) . . . . Where, however, the plaintiffs' suit seeks money damages from the officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, sovereign immunity does not bar the suit so long as the relief is sought not from the [sovereign's] treasury but from the officer personally.' *Alden v. Maine*, [supra, 527 U.S. 757]." (Citations omitted; internal quotation marks omitted.) *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, supra, 546 F.3d 1296-97; see also *Nahno-Lopez v. Houser*, 627 F. Supp. 2d 1269, 1285 (W.D. Okla. 2009) (claims against individuals are not barred if damages are clearly not sought from the tribe). "The general bar against official-capacity claims . . . does not mean that tribal officials are immunized from individual-capacity suits *arising out of* actions they took in their official capacities . . . ." (Emphasis in original.) *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, supra, 1296. "Rather, it means that tribal officials are immunized from suits brought against them *because of* their official capacities – that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe." (Emphasis in original.) Id., 1296.

Clarke argues that, in *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, supra, 546 F.3d 1288, the Tenth Circuit likened the remedy-sought analysis to wading into a swamp. That argument is a mischaracterization. In fact, the Tenth Circuit stated: "[w]e need not wade into this swamp [of analyzing who is the real party in interest] . . . because a close reading of the plaintiffs' complaint makes clear that plaintiffs have failed to state a claim against the Individual Defendants in their individual capacities." Id., 1297. A close reading of the complaint in this case reveals that Clarke is only being sued in his individual capacity. The interpretation of pleadings is always a question of law for the court. *Boone v. William W. Backus Hospital*, supra, 272 Conn. 559.

Clarke argues that *Johns v. Voebel*, Superior Court, judicial district of New Haven, Docket No. CV-11-6017037-S (September 23, 2011), in which the complaint was dismissed on sovereign immunity grounds, is analogous to the present case. It is true that, in *Johns*, the plaintiff sued a driver employed by the MTGA who, off the tribal reservation, struck the plaintiff's vehicle. *Johns* is distinguishable from this case because the question of whether the tribal employee was being sued solely in his individual capacity was apparently neither raised nor considered by the court. The plaintiff in *Johns* conceded there was sovereign immunity: the issue was whether the tribal employee driver was acting outside the scope of his authority.

The defendant claims that *Bassett v. Mashantucket Pequot Museum & Research Center, Inc.*, supra, 221 F. Supp. 2d 271, and *Chayoon v. Sherlock,* supra, 89 Conn. App. 821, require a different analysis and dismissal of this case. While the plaintiffs' claims in both those cases were dismissed on sovereign immunity grounds, the defendants were tribal employees sued under theories of vicarious tribal liability. The complaint in *Chayoon* stated that the tribal employees were being sued individually as well as in their "professional capacities." *Chayoon v. Sherlock*, supra, 828. In *Bassett*, the District Court found that the defendants were being sued "in their official capacities as officers, representatives, and/or agents of the Tribe." *Bassett v. Mashantucket Pequot Museam and Research Center, Inc.*, supra, 276 n.9. In *Chayoon* and *Bassett*, both of which predate *Native American Distributing*, *Nahno-Lopez v. Houser*, supra, and *Maxwell*, tribal employees were sued in their official capacities. Because it was clear that at least part of the remedy sought was against a sovereign, it was unnecessary to analyze whether there

was *no* remedy sought against a sovereign. Compare *Maxwell v. San Diego*, supra, 708 F.3d 1088 (when a case is an official capacity suit, the remedy-sought analysis is not necessary), with *Cook v. Avi Casino Enterprises, Inc.*, supra, 548 F.3d 718 (sovereign immunity barred suit where real defendant in interest was the tribe).

Clarke also relies upon *Kizis v. Morse Diesel International, Inc.*, supra, but *Kizis* was an action resulting from a fall at the Mohegan Sun Casino, not off the reservation. *Kizis v. Morse Diesel International, Inc.*, supra, 260 Conn. 48-49. Accordingly, *Kizis* is readily distinguishable from the present case. Noting that "[t]he tribe has not consented to state jurisdiction over private actions involving matters that occurred *on tribal land* . . ." the court held that "in this instance, the statutes and compacts cited previously, which have been recognized by both the federal government and the state of Connecticut through compliance with the procedures set forth in the gaming act and the Indian Civil Rights Act, explicitly place the present type of tort action in the jurisdiction of the tribe's Gaming Disputes Court." (Emphasis added; footnote omitted.) Id., 57-58. The facts of *Kizis* make it unilluminating to the present case, in which Clarke is alleged to have driven a limousine on non-tribal land into the vehicle of the plaintiffs, who were not invitees of the tribal casino.

The following Superior Court cases are, contrary to the defendant's claim, not inconsistent with the remedy-sought analysis because their facts and claims are distinguishable. In *Durante v. Mohegan Tribal Gaming Authority*, Superior Court, Complex Litigation Docket, judicial district of Hartford, Docket No. X04-HHD-CV-11-6022130-S (March 30, 2012), the plaintiff was killed in an automobile accident by a drunk driver who had been served alcohol at the Mohegan Sun Casino and brought suit against the MGTA, the chief executive officer of the MGTA, the chairman of the Mohegan Tribal Counsel, and the permittee of a night club at the tribal casino. Likewise, in *Ross v. Spaziante*, Superior Court, judicial district of New London, Docket No. CV-10-6003909-S (November 1, 2011), the plaintiffs filed suit against the MTGA, the permittee of a tribal casino bar, and others following an automobile accident involving a patron of the bar. Unlike in *Durante* and *Ross*, the MTGA is not a party to this suit and the claims here are not brought against high-ranking tribal officials, as in *Durante*, or based on Dram Shop Act liability of a tribal casino bar, as in *Ross*. In *Vanstaen-Holland v. LaVigne*, Superior

Court, judicial district of New London, Docket No. CV-08-5007659-S (February 26, 2009) (47 Conn. L. Rptr. 306), the plaintiffs sued the permittee, the owner, and an employee of an establishment at the Mohegan Sun Casino for reckless service of alcohol to a patron. Again, in *Vanstaen-Holland*, the MTGA was a defendant. *Vanstaen-Holland* does not hold that every tribal employee, as distinguished from officers, is entitled to immunity from personal lawsuits wherever and whenever he or she is working for the tribe.

In the other Superior Court cases cited by Clarke in support of his motion, *McAllister v. Valentino*, Superior Court, judicial district of Fairfield, Docket No. CV-11-5029414-S (April 10, 2012), and *International Motor Cars v. Sullivan*, Superior Court, judicial district of New Britain, Docket No. CV-05-4005168-S (June 20, 2006) (41 Conn. L. Rptr. 559), it was held that sovereign immunity operated to bar suits against Connecticut state marshals, based on several factors including finding no allegations that the respective marshals were being sued in their individual capacities and that the sovereign – the state – was therefore the real party in interest. While *McAllister* and *International Motor Cars* involved claims of state, not tribal, sovereign immunity, those decisions essentially applied the remedy-sought analysis, without that label.

Turning in another direction for illumination, federal employees may be sued individually for money damages even though the actions giving rise to the claim were done while they were acting within the duties of their employment. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). This court is unpersuaded that Clarke's claim to immunity is stronger than that of federal employees. "We see no reason to give tribal officers broader sovereign immunity protections than state or federal officers given that tribal sovereign immunity is coextensive with other common law immunity principles. See *Santa Clara Pueblo*, [supra, 436 U.S. 58] . . . ." *Maxwell v. County of San Diego*, supra, 708 F.3d 1089. Mohegan tribal employees are not "absolutely immune from suit" in Connecticut courts. *Wallet v. Anderson*, 198 F.R.D. 20 (D. Conn. 2000).

Connecticut law includes clear criteria for determining the party against whom relief is being sought. "[The Connecticut Supreme Court has] identified the following criteria for determining whether an action against an individual is, in effect, against the state and barred by the doctrine of sovereign immunity: (1) a state official has been sued; (2) the suit concerns some

manner in which that official represents the state; (3) the state is the real party in interest against whom relief is sought; and (4) the judgment, though nominally against the official, will operate to control the activities of the state or subject it to liability." (Internal quotation marks omitted.) *Gordon v. H.N.S. Management Co.*, 272 Conn. 81, 93-94, 861 A.2d 1160 (2004). "If the plaintiff's complaint reasonably may be construed to bring claims against the defendants in their individual capacities, then sovereign immunity would not bar those claims." *Miller v. Egan*, 265 Conn. 301, 307, 828 A.2d 549 (2003).

It is Clarke's position that, even if the "remedy-sought" analysis is applied here, the court may and should find that the MTGA is the real party in interest in this suit, so that Clarke should be protected by tribal sovereignty. Clarke asserts that, aside from the insurance policy covering the limosine,[5] the MTGA is obligated to defend and indemnify him pursuant to the Mohegan Tribal Code. Accordingly, just to defend Clarke, let alone pay any judgment against him, would adversely affect the MTGA's treasury. A voluntary undertaking cannot be used to extend sovereign immunity where it did not otherwise exist. See *Group Health, Inc. v. Blue Cross Association*, 625 F. Supp. 69, 76 (S.D.N.Y. 1985) (government may not, by indemnity

---

[5] The defendant argues that the fact that the MTGA had liability insurance on the limousine he was driving does not affect the MTGA's status as real party in interest because the MTGA has a self-insured retention and, even if it did not have that, any claim would affect the MTGA's loss history and cost of coverage. He also claims that, if a judgment were to be entered against him, it would affect the MTGA's administration and hiring abilities, *i.e.*, that allowing this suit to proceed would discourage prospective employees from accepting employment with the MTGA – apparently because they expect, if hired by the MTGA, to be treated differently when they are alleged to have been negligent drivers than if they were employed by a non-tribe employer. Assuming these effects are real, and not conjectural, the court for two reasons rejects the defendant's claim that they show harm to the MTGA's, or the tribe's, purse or independence. First, the court finds no basis in fact, law or logic on which to conclude that these effects are significant enough to be legally cognizable. Second, considering these claims with all the defendant's claims, let alone separately, they do not meet the four-prong test for finding the MTGA or the tribe the real party in interest in this case. The defendant has not been sued as a tribal official; there is no allegation that the defendant was representing the MTGA or the tribe at the time of the collision (even as employee); the MGTA is not, and cannot for the reasons here stated make itself, the party against whom relief is sought; and a judgment against the defendant will not operate to control the activities of the MTGA or subject it to liability. See *Gordon v. H.N.S. Management Co.*, supra, 272 Conn. 93-94.

manufacture immunity for its employees). The court finds that Clarke's claims that the MTGA is the real party in interest in this case – the third and fourth factors in *Gordon v. HNS Management Co.*, supra, 272 Conn. 93-94 – are not supported by the facts. This conclusion is strengthened by the long-standing principle that, in considering whether or not the court has subject matter jurisdiction, the plaintiff's allegations are construed in favor of finding jurisdiction where it is possible, in reason, to do so. *Stone v. Hawkins*, 56 Conn. 111, 115, 14 A. 297 (1888). To extend tribal sovereign immunity to Clarke in this case, where the effect of both the claim and any judgment on the tribal purse and self governance is self-inflicted – that is, the effect results from the MTGA's choices – is beyond the power of this court. Even if by tribal law the MTGA has to indemnify Clarke, that is a tribal choice. This court rejects Clarke's implicit claim that a sovereign may extend immunity to its employees by enacting a law assuming its employees' debts. See *Demery v. Kupperman*, 735 F.2d 1139, 1148 (9th Cir. 1984), cert. denied, 469 U.S. 1127, 105 S. Ct. 810, 83 L. Ed. 2d 803 (1985) (state may not extend sovereign immunity by legislation assuming employees' debts). To hold that the MTGA has the unilateral power to expand the boundaries of sovereign immunity based on tribal legislation, contract or other form of tribal indemnification of an employee, or of employees generally, is beyond the power of this court because to do so would not only be to change the law of sovereign immunity, but to do so with unknown public policy ramifications. The Mohegan Tribe, or the MTGA as its subsidiary, can elect to waive sovereign immunity, but cannot unilaterally elect to expand it.

CONCLUSION

This court finds no implication of tribal sovereign immunity such that Clarke, a tribal employee sued in his individual capacity, is immune from suit. Therefore, Clarke's motion to dismiss is denied.

Cole-Chu, J.