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COURT OF APPEALS

STATE OF NEW YORK

SUE/PERIOR CONCRETE & PAVING, INC.,

Respondent,

-against-

No. 196

LEWISTON GOLF COURSE CORPORATION,

Appellant.

20 Eagle Street
Albany, New York 12207
October 22, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE ABDUS-SALAAM

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 196. Counselor,
2 would you like any rebuttal time?

3 MR. GOODMAN: Two minutes, Your Honor,
4 thank you.

5 CHIEF JUDGE LIPPMAN: Two minutes, yes, go
6 ahead.

7 MR. GOODMAN: Yeah, may it please the
8 court, my name is Ed Goodman. I represent the
9 Lewiston Golf Course Corporation, an arm and
10 instrumentality of the Seneca Nation of Indians that
11 was impermissibly stripped of the federal right of
12 sovereign immunity that the Nation specifically
13 bestowed on that entity to restore - - -

14 JUDGE PIGOTT: Does that mean your argument
15 is that this case should have been tried in a
16 different court?

17 MR. GOODMAN: The - - - the - - - the case
18 should - - - should be tried in a court when a
19 sovereign decides which court that it wants to have
20 that case heard in. The sovereign right at issue
21 here is whether the - - - the - - - the Seneca Nation
22 chose to have this - - - this issue litigated in the
23 courts of the State of New York.

24 JUDGE GRAFFEO: Does that mean the
25 mechanic's lien is ineffective, it's void?

1 MR. GOODMAN: That's correct, Your Honor,
2 because - - -

3 JUDGE SMITH: It's - - - it's not void.
4 It's just that - - - that - - - it's just that the -
5 - - just that the lien - - - the - - - the lienholder
6 can never get a dime.

7 MR. GOODMAN: That's correct, because it
8 requires doing - - -

9 JUDGE GRAFFEO: Can't foreclose - - - can't
10 foreclose on the mechanic's lien?

11 MR. GOODMAN: You cannot foreclose on a
12 mechanic's lien because - - -

13 CHIEF JUDGE LIPPMAN: It's all governed by
14 federal law?

15 MR. GOODMAN: This is governed by federal
16 law. Fed - - - the sovereign - - - sovereign
17 immunity is a federal right, can't be diminished by
18 states.

19 JUDGE PIGOTT: So which court should you be
20 in?

21 MR. GOODMAN: Excuse me?

22 JUDGE PIGOTT: What court should you be in?

23 MR. GOODMAN: Well, the - - - whatever
24 court the Seneca Nation decides.

25 JUDGE PIGOTT: I want you to answer me.

1 negotiated a waiver, is that right?

2 MR. GOODMAN: They could have negotiated a
3 waiver.

4 JUDGE GRAFFEO: If they looked - - - if
5 they looked at the IDA agreement they wouldn't have
6 come to that conclusion. Because you clearly - - -

7 MR. GOODMAN: I think if you would look at
8 the IDA agreement you would see at - - - at - - -

9 JUDGE GRAFFEO: The IDA agreement clearly
10 indicates that you're going to be subject to
11 jurisdiction of the - - - of the state and federal
12 courts - - -

13 MR. GOODMAN: Because you're con - - -
14 yeah.

15 JUDGE GRAFFEO: And that you're not
16 connected, but you're an independent entity.

17 MR. GOODMAN: Well, LGCC in that - - - in
18 that document, Your Honor, is - - - is - - - is - - -
19 is waiving its immunity. The - - - the language in
20 the IDA agreements at 363 and 353 of the record, are
21 - - - is waiver language. So in that agreement, LGCC
22 consented to the jurisdiction of the federal courts -
23 - -

24 JUDGE PIGOTT: Why wouldn't you put that in
25 the contract with Sue/Perior then and say by the way,

1 want you to know, twelve million dollar contract, we
2 don't have to pay a nickel.

3 MR. GOODMAN: Because the - - - that's up
4 to the parties to negotiate that.

5 JUDGE PIGOTT: No, that's right. Well,
6 you're one of them and - - - and - - - and what
7 you're now saying is we fooled them. They thought
8 they were contracting with someone that was going to
9 pay. We're not - - -

10 MR. GOODMAN: Not -- - not necessarily.

11 JUDGE PIGOTT: Let me finish - - - we're
12 not going to pay because we're sovereign, and they
13 should have known that even though we're a sub of a
14 sub of a sub of the Seneca Nation of Indians.

15 MR. GOODMAN: That's correct. There's - -
16 - there's a number or reasons whether or not to
17 negotiate a waiver to sovereign immunity to ask for a
18 waiver of sovereign immunity. Again, in this case,
19 Sen - - - Sue/Perior - - -

20 JUDGE SMITH: But if - - - if - - - if - -
21 - in the extreme case, if you the - - - if your
22 answer, again, is I didn't because we're greedy,
23 sneaky people and we like to keep our money, you're
24 saying you've still got sovereign immunity?

25 MR. GOODMAN: That's correct. The equity -

1 - - equity considerations, Your Honor, don't play
2 into sovereign immunity. Sovereign immunity is a - -
3 - a larger policy consideration that these were
4 rights without a remedy or equitable consideration.

5 JUDGE GRAFFEO: Although, in - - - in the
6 Ransom case and some of our other case - - - and some
7 of the other court cases, there are a list of factors
8 that can be examined. Where did this record show
9 where the profit from this golf course goes?

10 MR. GOODMAN: The record shows - - -

11 JUDGE GRAFFEO: Because the other two
12 entities indicate that there's some degree of profit
13 that goes to the Seneca Nation. I couldn't find
14 where - - - in the record where there's anything that
15 indicates that the profit from the golf course is
16 going to the tribe.

17 MR. GOODMAN: Well - - - well, two points
18 in response to your question. One is the - - - one
19 of the things that this court needs to do is clarify
20 what it did in the Ransom case, because if - - -

21 JUDGE READ: Do we have to overrule it?

22 JUDGE GRAFFEO: Can you answer my question
23 where in the record we - - - it indicates where the
24 profit for the golf course goes?

25 MR. GOODMAN: Yes, in - - - in the record,

1 the - - - the charter of the - - - of the Lewiston
2 Golf Course Corporation shows that it's a wholly
3 owned entity of the Seneca Niagara Falls Gaming
4 Corporation. There's no shareholder certificates,
5 there's no - - - there's no - - - no stockholder
6 certificates and no shareholders.

7 JUDGE SMITH: So your - - - so I think your
8 answer to Judge Graffeo then is it's the subsidiaries
9 money, but, in effect, it's the parents' money?

10 MR. GOODMAN: The parents', yeah, correct.

11 CHIEF JUDGE LIPPMAN: In practical terms,
12 did you care whether you made a profit? Do you care
13 on that golf course?

14 MR. GOODMAN: We don't care if we make a
15 profit. The - - - the golf course is a - - -

16 CHIEF JUDGE LIPPMAN: Is it just really a
17 auxiliary to the - - - to the casino?

18 MR. GOODMAN: It's an amenity to the
19 casino, Your Honor, like, you know - - -

20 JUDGE READ: What - - - what about - - -

21 CHIEF JUDGE LIPPMAN: It's an amenity?

22 MR. GOODMAN: It's an amenity. It's - - -
23 you want to keep patrons near the casino so that they
24 - - - they continue to gamble at the casino. That's
25 why you have restaurants; that's why you have the

1 shops.

2 JUDGE SMITH: And can you go back to the
3 question whether - - - whether Ransom is still good
4 law in light of Kiowa and that other case I can't
5 remember the name of?

6 MR. GOODMAN: Bay Mills, Your Honor.

7 JUDGE SMITH: Yeah.

8 MR. GOODMAN: Certain parts of the - - -
9 the - - - the - - - certain of the factors that are
10 set out in Ransom are no longer good law,
11 particularly, how the court would look at the
12 purposes factor, because under - - - under - - - at
13 least under the way courts - - - the Fourth
14 Department and other courts have looked at the Ransom
15 purposes factor, they've made a distinction between
16 commercial activities of tribes and quote/unquote
17 "governmental purpose." And under the Bay Mills
18 analysis, which was also in - - - in Kiowa, the - - -
19 the court has recognized - - - Supreme Court has
20 recognized that commercial activities are so tied to
21 governmental activities of Indian tribes,
22 specifically because tribes have no other means of
23 raising revenue.

24 JUDGE SMITH: Doesn't - - - doesn't - - - I
25 mean I - - - I - - - I understand what you're saying

1 that the - - - the - - - the distinction between
2 commercial - - - any distinction between commercial
3 and noncommercial is out of the window. But does it
4 make a difference that those cases, Kiowa and Bay
5 Mills, involved the tribe itself and not a - - - not
6 an arm of the tribe?

7 MR. GOODMAN: We submit that it doesn't,
8 Your Honor, because that simply privilege and form.

9 JUDGE SMITH: Why - - - why can't we make
10 that distinction? Why can't we say the Supreme Court
11 has never extended - - - the Supreme Court has never
12 said a word, I guess, or more than - - - might have -
13 - - maybe a couple of words about sovereign immunity
14 as applied to entities that are affiliates with - - -
15 of the tribe but are not the tribe.

16 MR. GOODMAN: But they are - - - these
17 entities are the means by which the tribe is
18 generating the revenue.

19 JUDGE PIGOTT: But that's why - - - that's
20 why all corporations are created. I mean this - - -
21 this - - - this corporation - - - the Seneca Nation
22 doesn't have title to this property. The - - - the
23 golf course generates its own revenue. Under - - -
24 under its charter, a suit against the LGCC will not
25 impact the tribe's fiscal resources. And under its

1 charter, the LGCC does not have the power to bind or
2 obligate the Senec - - - the Seneca Nation funds.

3 MR. GOODMAN: Right, and - - - and tribes
4 have the - - - should have and retain the right to
5 use the corporate form and subsidiary forms - - -

6 JUDGE PIGOTT: But I - - - what I'm giving
7 you is four reasons why you're - - - you're not the
8 Seneca Nation of Indians. You're - - - you're free
9 and independent. You own the land, you generate the
10 funds, your charter says you - - - that - - - that
11 they can't tap the Seneca Nation funds if they were
12 successful.

13 MR. GOODMAN: Our charter - - -

14 JUDGE PIGOTT: So you're all by yourself.

15 MR. GOODMAN: Our charter also says that
16 the Seneca Nation retains extensive controls over the
17 activities, administrative and financial activities,
18 of the LGCC and that its board is subject to
19 appointment and removal by the Seneca Nation of
20 Indians. That the - - - the board is comprised of
21 Senec - - -

22 JUDGE GRAFFEO: You can - - - you can have
23 it both ways? You can claim for some purposes you're
24 independent and for other purposes you're an arm of
25 the tribe?

1 MR. GOODMAN: That's correct, because
2 that's - - - that's the tool that - - - that the
3 tribes, under federal law, have the right available
4 to them. Again, you know, focusing on what - - -
5 what the court said in - - - in Bay Mills is that - -
6 - and this is particularly in Justice Sotomayor's
7 concurrence, that it's necessary for tribes to be
8 able to do commercial activities, because they have
9 no other means of raising revenue to provide services
10 to their members.

11 JUDGE PIGOTT: But doesn't that come with a
12 - - - with a - - - with the alternative that you're
13 going to pay your bills? That - - - that - - - you
14 know, that if - - - if you - - - if you contract with
15 somebody, you're going to honor your contract, and if
16 you don't there ought to be a remedy?

17 MR. GOODMAN: That - - - that's correct.
18 It does come with that, and there are mechanisms that
19 - - -

20 JUDGE PIGOTT: Doesn't that get us to back
21 to Ransom where - - - where we had the nine - - - the
22 nine things, and - - - and I just gave you four which
23 say that you're not the Seneca Nation of Indians, and
24 they ought to be able to pursue you.

25 MR. GOODMAN: Well, I would submit that the

1 four factors that you identified still show that the
2 - - - the - - - this LGCC is an arm of the Seneca
3 Nation of Indians.

4 JUDGE PIGOTT: Well, there's five that are
5 in your favor. I just gave you the four that are
6 not.

7 MR. GOODMAN: Right, right. I - - - but I
8 - - - I believe those four are in our favor. I would
9 just characterize them differently, Your Honor.

10 JUDGE GRAFFEO: So if - - - so if - - - if
11 - - - if someone is seriously injured on this golf
12 course through the fault of an employee of the - - -

13 MR. GOODMAN: Right.

14 JUDGE GRAFFEO: - - - management company
15 here, there's no lawsuit because they can claim
16 sovereign immunity?

17 MR. GOODMAN: Well, they - - - the - - -
18 this - - - the - - - the golf course carries
19 liability insurance, so the suit would be against the
20 insurer. And it's - - - well, this is - - -

21 JUDGE SMITH: What about - - - what about -
22 - -

23 JUDGE GRAFFEO: My - - - my - - - my
24 question is the - - - the assets of this entity,
25 you're going to claim it's sovereign immunity, you

1 don't recognize the responsibility?

2 MR. GOODMAN: We wouldn't necessary claim
3 it, because sovereign immunity's something that can
4 be waived, even on a - - - a case-by-case basis. And
5 if there's an egregious fact situation that would
6 redound negatively to the Nation and to its entities,
7 they would consider waiving sovereign immunity in
8 that instance, and that's - - -

9 JUDGE SMITH: Well, why do you get
10 liability insurance?

11 MR. GOODMAN: We get liability insurance in
12 order to protect people who come onto the grounds of
13 - - - of that entity to - - -

14 JUDGE SMITH: Even - - - even though if you
15 had no insurance you'd be immune from suit?

16 MR. GOODMAN: That's correct, because the
17 idea is the - - - the tribe wants to be and needs to
18 be a responsible actor in the market because - - -

19 JUDGE SMITH: Well, wouldn't - - - wouldn't
20 a responsible actor pay this contractor?

21 MR. GOODMAN: Well, Your Honor, we dispute
22 that we owe this contractor anything, and we - - - we
23 actually are - - -

24 JUDGE SMITH: Yeah, but you're not about to
25 have a court decide that question.

1 MR. GOODMAN: That's correct, not - - - at
2 least not the courts of the State of New York. So -
3 - -

4 CHIEF JUDGE LIPPMAN: Okay, counsel,
5 anything else?

6 MR. GOODMAN: Your Honor, no, I'd - - - I'd
7 just like to - - -

8 CHIEF JUDGE LIPPMAN: Okay, thanks.

9 MR. GOODMAN: Thank you.

10 JUDGE GRAFFEO: Should you have put waiver
11 language into this contract?

12 MR. PHOTIADIS: I'll answer that. We had
13 no reason to, and - - -

14 CHIEF JUDGE LIPPMAN: You weren't on notice
15 - - -

16 MR. PHOTIADIS: We - - - we - - -

17 CHIEF JUDGE LIPPMAN: - - - that they - - -
18 that they considered themselves a part of the Seneca
19 Nation?

20 MR. PHOTIADIS: Absolutely - - - absolutely
21 not, and - - -

22 CHIEF JUDGE LIPPMAN: None whatsoever?

23 MR. PHOTIADIS: I - - -

24 CHIEF JUDGE LIPPMAN: What about the
25 contract?

1 MR. PHOTIADIS: I - - - the - - - the
2 contract was drawn by the Lewiston Golf Course
3 Corporation's counsel. It made no mention of
4 invoking any sovereignty. It did not provide any
5 notice that they were ever going to claim to be a
6 sovereign entity.

7 JUDGE SMITH: You - - - you knew they were
8 owned by the Senecas, didn't you?

9 MR. PHOTIADIS: We knew that they were
10 owned by a subsidiary of the Senecas. And let me
11 comment on that exact point, because it's also
12 responding to a question that earlier raised. We
13 were not on public notice, and no one was on public
14 notice of any claim by the Seneca Nation that it had
15 a charter that was going to assert sovereign
16 immunity. The reply brief goes on to say the world
17 was on public notice because of these provisions in
18 the charter. That is factually not true. The
19 charter was not public. It was not filed with their
20 "Doing Business" certificate filed in New York State
21 in July of '07. We signed the contract in August of
22 '07. We undertook to start the construction.

23 JUDGE SMITH: If you - - - if they have
24 sovereign - - -

25 MR. PHOTIADIS: And it became public - - -

1 I'm sorry - - -

2 JUDGE SMITH: Go ahead.

3 MR. PHOTIADIS: - - - only in December of
4 198 - - - 19 - - - December of 2008, when it was
5 attached as an exhibit.

6 CHIEF JUDGE LIPPMAN: Yeah, but you knew
7 who you were dealing with, though?

8 MR. PHOTIADIS: We had done previous
9 business with the Senecas, and every one of those
10 previous businesses had been with the Seneca
11 Construction Management Corporation. They and their
12 counsel drew all those contracts.

13 JUDGE SMITH: Assume - - - assume you had
14 no notice at all.

15 MR. PHOTIADIS: What? What?

16 JUDGE SMITH: Assume you had no notice. If
17 they've got sovereign immunity, it doesn't matter.

18 MR. PHOTIADIS: That is true, but it's not
19 true that we should have known to ask.

20 JUDGE SMITH: Okay, but that's - - - but
21 that's between you and - - - and - - - yeah, and - -
22 - and the boss who gets mad at you for not knowing.
23 You can't sue them, no matter how outrageous their
24 position is, unless they are - - - unless they lack
25 sovereign immunity.

1 MR. PHOTIADIS: They lack sovereign
2 immunity. I was responding to the question why
3 didn't we ask. We didn't ask because previous
4 contracts we had with the - - -

5 CHIEF JUDGE LIPPMAN: What is the beef?

6 JUDGE SMITH: No matter how excellent your
7 reasons are it doesn't help.

8 MR. PHOTIADIS: But they all - - - I'm
9 sorry?

10 JUDGE SMITH: No matter how excellent your
11 reason for not asking is you don't win this case
12 unless you can show us they don't have sovereign
13 immunity.

14 MR. PHOTIADIS: And - - - and we think
15 we've done that.

16 CHIEF JUDGE LIPPMAN: But what's the beef
17 here? That because they're a sub sub that's what - -
18 - you recognize at certain levels they're arms of the
19 tribe, but - - - but - - -

20 MR. PHOTIADIS: Well this - - -

21 CHIEF JUDGE LIPPMAN: - - - but this entity
22 is not?

23 MR. PHOTIADIS: Well, I would start first
24 with corporations, as a general rule, are established
25 independent of their stockholders and owners. It is

1 true that there has been a variety of - - - of
2 federal and some state courts, including this court,
3 which have looked at sub-agencies of a tribe and by
4 looking at various factors, have determined that they
5 serve governmental purposes. And if there's enough
6 financial interconnectedness and variety of other the
7 factors - - -

8 CHIEF JUDGE LIPPMAN: Well, they control
9 this entire entity, right? They appoint everybody
10 that - - -

11 MR. PHOTIADIS: Only - - - only indirectly,
12 and the jurisprudence - - - the - - - the dominant
13 jurisprudence, not just from this court in Ransom,
14 but of the various other federal and state courts
15 that have considered the question how do you best
16 determine what is an arm of the tribe, look at when
17 you're deal - - - dealing with subsidiary entities,
18 whether the subsidiary entity is conducting quote "a
19 mere business," or if it, in fact, is serving some
20 important governmental purposes, et cetera.

21 JUDGE PIGOTT: Well, the - - - the - - -
22 the - - - the charter of the LGCC says, "No activity
23 of the LGCC nor any indebtedness incurred by it shall
24 encumber, implicate, or in any way involve assets of
25 the Nation or another Nation-entity not assigned or

1 leased in writing to the LGCC, that the Nation shall
2 not be liable for any debts or obligations of the
3 LGCC, and the LGCC shall have no power to pledge or
4 encumber the assets of the Nation."

5 MR. PHOTIADIS: That's correct, those are
6 important factors. Not just that this - - - the
7 Appellate Division below recognized, but other
8 federal and state courts that have addressed this
9 issue, the issue being under what circumstances is an
10 arm of the tribe - - - I'm sorry, under what
11 circumstances is a sub-entity deemed to be an arm of
12 the tribe to be entitled to sovereign immunity.

13 JUDGE RIVERA: I think you were going to
14 make a distinction about commercial enterprises. Can
15 I - - -

16 MR. PHOTIADIS: You do.

17 JUDGE RIVERA: Can I just hear you on that,
18 because I thought a casino was a commercial
19 enterprise. So I guess I'm not understanding where
20 this distinction goes between a golf course and a
21 casino.

22 MR. PHOTIADIS: But they are more - - -
23 yes, Judge. Casinos are definitely commercial
24 enterprises, but they are much more than that. They
25 are regulated under a federal statute, IGRA, and they

1 are chartered and obligated, both by their charter
2 and by federal law, the IGRA statute, to use all of
3 their business and profits to support tribal
4 functions.

5 JUDGE RIVERA: So if they have some - - -

6 MR. PHOTIADIS: That is not the case.

7 JUDGE RIVERA: So if they have another
8 business that is used in exactly the way you just
9 described a casino would be used, they - - -

10 MR. PHOTIADIS: A casino - - -

11 JUDGE RIVERA: - - - they - - - they - - -
12 they cannot evoke sovereign immunity because it's not
13 a casino? Are you saying sovereign immunity, in
14 terms of commercial enterprise, is limited solely to
15 casinos?

16 MR. PHOTIADIS: No, I'm saying that a
17 casino is a commercial enterprise, but it is a
18 commercial enterprise plus.

19 JUDGE SMITH: Are you - - - are you
20 conceding - - -

21 MR. PHOTIADIS: The plus is - - -

22 JUDGE SMITH: Are you conceding that the
23 casino has sovereign immunity?

24 MR. PHOTIADIS: Yes.

25 CHIEF JUDGE LIPPMAN: Are you conceding

1 that this is an amenity to the casino? That this is
2 really just something to - - - to people who go to
3 the casino, stay at the hotel - - -

4 MR. PHOTIADIS: Well, it was - - -

5 CHIEF JUDGE LIPPMAN: - - - they went them
6 to be able to play golf nearby?

7 MR. PHOTIADIS: That was - - - that was one
8 purpose, but as - - -

9 CHIEF JUDGE LIPPMAN: Isn't that the main
10 purpose of the golf course, or you dispute that?

11 MR. PHOTIADIS: I dispute that that's the
12 main purpose and the benefit - - -

13 CHIEF JUDGE LIPPMAN: What is the main
14 purpose?

15 MR. PHOTIADIS: The main purpose of this
16 casino was to draw tourists to the Niagara Falls
17 region and - - -

18 CHIEF JUDGE LIPPMAN: No, no. No, no, the
19 main purpose of the golf course.

20 MR. PHOTIADIS: I misspoke. The main
21 purpose of the golf course was to establish a
22 championship golf course to draw tourists to the
23 Niagara region.

24 CHIEF JUDGE LIPPMAN: You don't think it's
25 - - - it's intended to feed the casino?

1 MR. PHOTIADIS: I'm sure it was intended to
2 - - - to help feed it.

3 JUDGE SMITH: Does - - - does - - -

4 MR. PHOTIADIS: But that is too indirect a
5 service - - -

6 JUDGE SMITH: Does LGCC - - -

7 MR. PHOTIADIS: - - - to cloak it with
8 sovereign immunity.

9 JUDGE SMITH: Does LGCC make money? Does
10 it - - - does it have an income?

11 MR. PHOTIADIS: It has its own separate
12 income. We have no knowledge and there's nothing in
13 the record about what - - - what its financial
14 circumstances are or are not.

15 JUDGE SMITH: Is it - - - is the golf
16 course on or off the reservation?

17 MR. PHOTIADIS: It's definitely off. It's
18 up in Lewiston at the - - -

19 JUDGE SMITH: The casino - - - what about
20 the casino itself?

21 MR. PHOTIADIS: The casino is in Niagara
22 Falls. It's about ten miles away. The tribes
23 themselves are, of course, headquartered in
24 Salamanca.

25 JUDGE SMITH: So the casino's on the

1 reservation and the - - - and the golf course is off?

2 MR. PHOTIADIS: The casino is not on the
3 reservation, either.

4 JUDGE SMITH: It's not.

5 MR. PHOTIADIS: But under the compact that
6 was made between the State of New York and - - - and
7 the Seneca Nation of Indians, they - - - there was a
8 - - - a property in downtown Niagara Falls, downtown
9 City of Niagara Falls, that was acquired and was - -
10 - they were - - - agreed to be able to conduct a
11 casino under the federal regulatory laws on that
12 property.

13 JUDGE SMITH: So - - - so they - - - the -
14 - - in effect, the - - - the state agreed to treat it
15 as though it were reservation land for that purpose?

16 MR. PHOTIADIS: I don't know if it's
17 reservation land, but it's Indian land. It's
18 definitely never ever been part of a reservation.
19 But the - - - the subject property of the golf course
20 was acquired in fee simple on an open-market sale.

21 JUDGE SMITH: They're - - - they're - - -
22 they're ten miles apart. It seems funny to call a
23 golf course that's ten miles from a casino an amenity
24 to the casino.

25 MR. PHOTIADIS: That was language that the

1 charter used, Judge.

2 JUDGE SMITH: Okay, and in what sense - - -
3 I mean are the - - - are the people who play golf
4 mainly casino customers?

5 MR. PHOTIADIS: I doubt it. The - - - the
6 course - - - the golf course was constructed, as I
7 said, to be a championship-level golf course to try
8 to attract more tourists to the Niagara region, in
9 general.

10 JUDGE RIVERA: Could it have a dual - - -
11 could it have a dual purpose? Could it have - - -
12 could it draw people to the Niagara region - - -

13 MR. PHOTIADIS: That was the hope.

14 JUDGE RIVERA: - - - and also - - -

15 MR. PHOTIADIS: Yes.

16 JUDGE RIVERA: - - - and also bring people
17 to the casino?

18 MR. PHOTIADIS: Yes, Judge. I think that
19 was - - - that was one of the hopes expressed by the
20 Seneca Nation, but it - - -

21 JUDGE RIVERA: So they did think about
22 this?

23 MR. PHOTIADIS: It also said - - -

24 JUDGE RIVERA: It is - - - you agree it's
25 their intent?

1 MR. PHOTIADIS: It was - - - it - - - it -
2 - - they may have derived an indirect benefit from -
3 - - I mean, their casino operations and the - - - and
4 then, in turn, the Nation itself may have derived or
5 - - -

6 JUDGE RIVERA: So - - - so - - -

7 MR. PHOTIADIS: - - - perhaps hoped to
8 derive an indirect benefit from the golf course.

9 JUDGE RIVERA: So is that - - - is that
10 your dis - - -

11 MR. PHOTIADIS: But that's not sufficient.

12 JUDGE RIVERA: Is that your distinction
13 because both commercial enterprises are not part of
14 the Nation's property called, as we understand it, a
15 reservation property. That it's the - - - the casino
16 somehow goes directly to - - - to the - - - the
17 profiting from the casino enterprise goes directly to
18 the Nation but somehow, if there are any profits from
19 the golf course, they don't go to the Nation, even if
20 the point of the golf course is to increase the
21 profit revenue to the casino?

22 MR. PHOTIADIS: That - - - that's - - -
23 that's - - - that's substantially correct, but I
24 would take that a couple steps further because the
25 charter for the Golf Course Corporation does not

1 require any franchise taxes or fees to be paid,
2 period. There is no financial obligation, and there
3 are no strings tied to what the Golf Course
4 Corporation can or cannot do with any funds it
5 generates.

6 JUDGE ABDUS-SALAAM: So how - - - counsel?

7 MR. PHOTIADIS: And that is very, very
8 different from the Seneca Gaming Casinos, which is as
9 I said, are regulated by federal law.

10 JUDGE ABDUS-SALAAM: Counsel, does - - -
11 does it have to be a direct line from the prof - - -
12 if there are profits from the golf course that they
13 go directly into the Seneca Nation's coffers?

14 MR. PHOTIADIS: I'd say there would, at a
15 minimum, Judge, have to be a legal obligation to do
16 so. And in this case there is none.

17 JUDGE GRAFFEO: Is there any - - - is there
18 any decision in the federal courts or in other states
19 that have dealt with an issue similar to this?

20 MR. PHOTIADIS: The fact pattern - - -

21 JUDGE GRAFFEO: What - - - what would you
22 suggest to us is the closest case law?

23 MR. PHOTIADIS: There are a variety of
24 cases. The - - - the fact pattern here is extremely
25 unique.

1 JUDGE SMITH: What - - - what about - - -
2 what about that Colorado check-cashing case?

3 MR. PHOTIADIS: That case, Judge, disagreed
4 with Ransom.

5 JUDGE SMITH: I mean you - - - you think
6 it's wrong, but you - - - but you admit it's not that
7 different - - - distant - - - distant from our case?

8 MR. PHOTIADIS: Well, there certainly - - -
9 it's hard to see that there's a governmental purpose
10 to be served by a debt collection agency, which was
11 the case with Colorado.

12 JUDGE SMITH: Yeah, I mean, you - - -
13 basically, you say - - - you - - - you - - - if we -
14 - - if we go with you, we have to - - - and it's not
15 a shocking idea.

16 MR. PHOTIADIS: Dis - - - disagree with
17 Colorado, right.

18 JUDGE SMITH: We need to disagree with
19 Colorado's ruling.

20 MR. PHOTIADIS: But the Runyon case in
21 Alaska, the American - - - the - - - the case in
22 California - - - American Property Management case in
23 California, the Dixon case in Arizona, Gristede's
24 Foods, which is the Eastern District of New York, I
25 think those are close, even if you look at

1 Breakthrough Management, which is a Tenth Circuit
2 Case.

3 JUDGE GRAFFEO: Do we have to change Ransom
4 because - - - do we have to - - -

5 MR. PHOTIADIS: I think it would be a
6 mistake to change Ransom. You know - - -

7 CHIEF JUDGE LIPPMAN: Even in light of
8 federal cases like the Bay Mills case?

9 MR. PHOTIADIS: Yes, the Bay Mills case is
10 the - - - is, of course, the recent U.S. Supreme
11 Court Case that reaffirmed Kiowa. And the majority
12 in Bay Mills felt constrained due to stare decisis
13 and the fact that Congress has not overruled Kiowa,
14 which was decided more - - - more than twenty years
15 ago, or just about twenty years ago. To not revisit
16 its decision granting sovereign immunity to tribes,
17 without making a distinction as to whether the tribe
18 was con - - - engaging in commercialized activity - -
19 -

20 JUDGE SMITH: So you're really - - -

21 MR. PHOTIADIS: - - - on or off the
22 reservation.

23 JUDGE SMITH: You're really saying is they
24 were - - - they're constrained and we're constrained
25 by what's already been decided in Kiowa. But the - -

1 - the - - - you say they wouldn't go one inch beyond
2 it and we don't have to, either?

3 MR. PHOTIADIS: And this court is not so
4 constrained. Because - - -

5 CHIEF JUDGE LIPPMAN: Well, we're
6 constrained by federal law.

7 JUDGE SMITH: Well - - -

8 MR. PHOTIADIS: You're constrained by
9 federal law, but - - - but you're not constrained to
10 - - - you - - - you're not impelled by the Kiowa
11 decision to further extend the reach of sovereign
12 immunity - - -

13 JUDGE SMITH: You - - - you say we
14 shouldn't go an - - -

15 MR. PHOTIADIS: - - - to sub-tribal
16 entities and to depart from your Ransom analysis.

17 JUDGE SMITH: You - - - you say we
18 shouldn't go an inch farther than the Supreme Court
19 has already gone?

20 MR. PHOTIADIS: That - - - that's - - -
21 that's correct, and there is, as - - - as - - - as
22 the court panel already pointed out, there is no
23 Supreme Court precedent guiding this. The Ransom
24 court, by the way - - - decision, which has been
25 cited, and favorably, by the great majority of

1 federal and state courts over the past close-to
2 twenty years, it has become one of the seminal cases
3 in this field. We think it is a correct and good
4 statement of the law.

5 JUDGE RIVERA: Excuse me, what - - - what -
6 - - what - - - is there a way they could have set up
7 a commercial enterprise that would, in your - - -
8 from your perspective that would have been subject to
9 sovereign immunity? Or, again, is it locked into
10 only these casinos?

11 MR. PHOTIADIS: It probably would be
12 conceivable to set up a sub-corporation - - -

13 JUDGE RIVERA: Okay.

14 MR. PHOTIADIS: - - - engaging in a
15 commercial business activity.

16 JUDGE RIVERA: Well, what - - - okay.

17 MR. PHOTIADIS: But - - -

18 JUDGE RIVERA: Well, what's missing here
19 then?

20 MR. PHOTIADIS: What's missing here, the
21 primary factor, is - - -

22 JUDGE RIVERA: And why isn't this that
23 entity?

24 MR. PHOTIADIS: Because there is no
25 financial interdependence between the business and

1 activities of this entity and the tribe. It's not
2 intended to make any - - -

3 JUDGE GRAFFEO: Certainly if they engaged
4 in an activity on tribal reservation land?

5 MR. PHOTIADIS: Of course, of course.

6 JUDGE GRAFFEO: That's a given.

7 MR. PHOTIADIS: But this - - - this is - -
8 -

9 JUDGE RIVERA: But why is there no
10 interdependency?

11 MR. PHOTIADIS: The - - - there is no
12 financial interdependence at all and there is, at
13 best, an indirect service of a governmental purpose.
14 And to become an arm of the tribe and be able for a -
15 - - the Nation to take advantage of the limited
16 liability and other benefits that you get from doing
17 business in a corporate form, it's not enough to just
18 say we want to engage in a for-profit business and
19 then claim that they're sovereign immune.

20 And I'm not even getting into the fact that
21 the - - - there was public assistance rendered for
22 this. And by the way, the pilot agreement, according
23 to its terms, expires at the end of this calendar
24 year.

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 Thanks.

2 MR. PHOTIADIS: Thank you very much.

3 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

4 MR. GOODMAN: Just a couple of brief points
5 in rebuttal.

6 CHIEF JUDGE LIPPMAN: Sure.

7 MR. GOODMAN: First, the - - - the great
8 majority of cases, the overwhelming majority of cases
9 that have looked at entity immunity have found that
10 tribal corporate entities are immune from suit.
11 They're - - -

12 JUDGE PIGOTT: It varies from place to
13 place. I know when I was on the Appellate Division,
14 there was one where - - - I think it was one - - -
15 one of the power and gas companies wanted to provide
16 gas or electricity on the reservation and the - - -
17 and the chief wouldn't let them. And they - - - and
18 there in a dilemma because they said we got - - - you
19 know, we got requirements under our - - - our tariffs
20 to provide it to each and every resident of the State
21 of New York. And I think we said if the Indians say
22 you can't come on the reservations, you can't. And
23 they, you know, effectively prevented people from
24 getting basic power. But that's their - - - that's
25 their sovereign immunity.

1 MR. PHOTIADIS: That's - - - that - - -
2 that's their prerogative and the - - - the
3 overwhelming majority of cases have upheld that and
4 you - - -

5 JUDGE PIGOTT: But that's on the
6 reservation.

7 MR. PHOTIADIS: But Bay Mills and Kiowa
8 decisions made clear sovereign immunity is not
9 limited to the reservation, again, to that - - -
10 because that's because of the limited access to
11 revenue that - - - for tribes to fund their
12 governmental activities.

13 JUDGE ABDUS-SALAAM: And, counsel, how far
14 do we need to go, taking your example to its logical
15 extension, a sub-sub-sub-sub-sub-entity of LGG - - -
16 LGCC could be part of the Nation as long as there's
17 some commercial activity going on and some money is,
18 you know, ideally going to the - - - the tribe.

19 MR. GOODMAN: Yeah, I would submit that the
20 four factors that are present here that - - - that
21 everyone agrees on, the Fourth Department, Superior,
22 are sufficient under - - - under the Ransom test to
23 find entity immunity, and that's - - - it's created
24 under the Nation's laws and bestowed with the
25 Nation's immunity by - - - with the intent of the

1 Nations. It's - - - the board is appointed by and
2 can be removed by the Nation. The board is comprised
3 of only Seneca Nation members, and there's - - -

4 JUDGE SMITH: Not - - - not - - - but not
5 necessarily officials, though, just members?

6 MR. GOODMAN: Well, they are officials
7 because they are members of the - - - they're on the
8 SGC Board and under Nation's law they'd be deemed to
9 be officials of the Nation. And finally and most
10 importantly, the extensive controls that the Nation
11 has reserved to itself over the fiscal and
12 administrative activities of the LGCC, so no matter
13 how far down - - -

14 JUDGE PIGOTT: Well, the part that I read
15 to Mr. Photiadis says almost exactly the opposite,
16 that, "The Nation shall not be liable for debts or
17 obligations" of the - - - "of the LGCC, the Lewiston
18 Golf Course Corporation, and they shall have no power
19 to pledge or encumber the assets of the Nation. The
20 obligations of the LGCC shall not be a debt of the
21 Nation or any other Nation Chartered Gaming
22 Corporation. The company shall not have any power to
23 borrow or lend on behalf of the Nation or grant or
24 permit or purport to grant or permit any right, lien,
25 encumbrance, or interest in" or any - - - "any of the

1 assets of the Nation." That seems pretty all-
2 encompassing saying you're on your own.

3 MR. GOODMAN: Well, you're on - - - we're
4 on our own in that the assets that the Nation has - -
5 - has segregated and given to this entity are the
6 only assets of the Nation that are at risk. That's
7 the purpose of setting up a corporate entity. It
8 doesn't mean those assets aren't Nation assets.

9 JUDGE PIGOTT: No, but that's the Ransom -
10 - - then you get back to the Ransom factors, and
11 that's one of the factors that says it's - - - you
12 don't have the immunity, because you're - - - you're
13 not part of the Nation when it comes to the fiscals.

14 MR. GOODMAN: But - - - but if you note,
15 the only factor that Sue/Perior has pointed to now,
16 particularly in light of Bay Mills saying commercial
17 and governmental are - - - are the same, you can't
18 parse out what kind of purpose is involved, is
19 financial interdependence. And even - - - even if
20 we'd submit, which we don't, that there's no
21 financial interdependence, you can't establish a
22 threshold factor. That's clear under federal law.
23 So that - - - and that's the Breakthrough case and
24 other cases.

25 CHIEF JUDGE LIPPMAN: Okay, counselor.

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MR. GOODMAN: Okay, thank you.

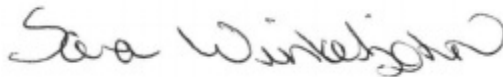
CHIEF JUDGE LIPPMAN: Thanks. Thank you
both.

(Court is adjourned)

C E R T I F I C A T I O N

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I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Lewiston Golf Course Corporation v. Sue/Perior Concrete & Paving, Inc., No. 196 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: October 27, 2014