

SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

STATE *v.* MICHAEL T., SC 20230

Judicial District of New Haven at G.A. 23

Criminal; Prosecutorial Impropriety; Whether Prosecutor Committed Improprieties in Questioning of Victim by Assuming Facts Not in Evidence and During Closing and Rebuttal Arguments by Referring to Facts Not in Evidence, Vouching for Victim’s Credibility, and Appealing to Jurors’ Emotions; Whether Trial Court Properly Instructed Jury on Defendant’s Decision Not to Testify Per General Statutes § 54-84 (b). The defendant appeals directly to the Supreme Court under General Statutes § 51-199 (b) (3) from his conviction of six counts of sexual assault in the first degree and risk of injury to a minor in connection with the sexual assault of the minor victim. He claims on appeal that the trial prosecutor committed prosecutorial impropriety that deprived him of a fair trial by virtue of how she questioned the victim and conducted her closing and rebuttal arguments. The defendant argues with respect to the questioning of the victim that the prosecutor improperly assumed facts that were not in evidence by asking the victim about whether “the defendant put his private in her private,” where the victim had only indicated that “the defendant hurt her private with his private,” and by asking the victim about “blood [that] came out of her private,” where the victim had answered “his” when asked whether blood came out of her private or the defendant’s private. The defendant argues with respect to the prosecutor’s closing and rebuttal arguments that she improperly discussed facts not in evidence, vouched for the victim’s credibility, and appealed to the jurors’ emotions with her references to the difficulties of the jury’s experience over the course of the trial and her characterizations of the victim and the sexual assault. The defendant also claims on appeal that the trial court improperly instructed the jury under General Statutes § 54-84 (b) that the defendant did not testify and had a constitutional right not to testify and that the jury “must draw no unfavorable inference from the defendant’s failure to testify.” Section 54-84 (b) provides: “Unless the accused requests otherwise, the court shall instruct the jury that they may draw no unfavorable inferences from the accused’s failure to testify. In cases tried to the court, no unfavorable inferences shall be drawn by the court from the accused’s silence.” The defendant argues that the trial court improperly denied his request to substitute the words “elected

not to testify” in place of the words “failure to testify” in the jury instruction. He also argues, to the extent that § 54-84 (b) required the trial court to use the words “failure to testify” in the jury instruction, that § 54-84 (b) violated his right not to testify under the fifth amendment of the federal constitution.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

GREAT PLAINS LENDING, LLC et al. v. STATE OF CONNECTICUT,
DEPARTMENT OF BANKING et al., SC 20340

Judicial District of New Britain

Tribal Sovereign Immunity; Whether Trial Court Properly Remanded Matter for Evidentiary Hearing; Whether Trial Court Applied Proper Test to Determine If Plaintiffs Were “Arms of the Tribe”; Whether Plaintiff Tribal Chairman Was Entitled to Immunity from Administrative Orders and Civil Penalties. The plaintiffs Great Plains Lending, LLC and Clear Creek Lending are businesses owned and operated by the Otoe-Missouria Tribe of Indians (tribe) that made or offered loans to Connecticut residents over the Internet. The plaintiff John R. Shotton is the tribal chairman and a corporate officer of Great Plains. The defendant Connecticut Department of Banking (defendant) determined that the plaintiffs were conducting business without having a proper state license and in violation of state banking and usury laws. It issued administrative cease and desist orders and sought to impose monetary penalties on the plaintiffs. The plaintiffs filed a motion to dismiss with the defendant, arguing that they were entitled to tribal sovereign immunity from its orders and penalties. The defendant denied the motion on the ground that tribal sovereign immunity did not apply, and the plaintiffs filed an administrative appeal. The trial court remanded the matter to the defendant with direction to decide the plaintiffs’ immunity claims. On remand, the defendant concluded that the plaintiffs had not met their burden of establishing that they were “arms of the tribe” entitled to the sovereign immunity afforded to the tribe. The plaintiffs then filed this administrative appeal. The trial court considered that there are many state and federal multi-factor tests for determining whether a business entity is an “arm of the tribe” for immunity purposes and noted that the defendant applied the test set forth in *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 25 N.E. 3d 928 (N.Y. 2014). It also observed that the plaintiffs advocated for use of the test set

forth in *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F. 3d 1173 (10th Cir.). The trial court determined that the defendant committed legal error by applying the *Sue/Perior* test, which it characterized as improperly giving “primacy . . . to the financial relationship between the tribe and the commercial entities it has created.” The trial court also declined to accept the *Breakthrough* test as the standard and instead concluded that the proper test was set forth in *People ex rel. Owen v. Miami Nation Enterprises*, 386 P. 3d 357 (Cal. 2016), which is similar to the *Breakthrough* test but does not include that test’s consideration of whether granting “arm of the tribe” status furthers tribal sovereign immunity principles. The trial court stated that the *Miami Nation* test does include, however, the assessment of “functional considerations,” evidence of which was not present here. The trial court further concluded that “the viability of the [defendant’s] claims against [Shotton] rises and falls with the determination of whether Great Plains and Clear Creek are arms of the tribe.” The trial court accordingly ordered that the matter be remanded to the defendant for an evidentiary hearing in accordance with its decision. The plaintiffs appeal and the defendants, the department and its commissioner, cross appeal from the trial court’s judgment. Both sets of parties challenge the trial court’s determinations regarding the remand order, the proper test for ascertaining “arm of the tribe” status, and whether Shotton is entitled to immunity from the defendant’s administrative orders and civil penalties.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys’ Office for the convenience of the bar. They in no way indicate the Supreme Court’s view of the factual or legal aspects of the appeal.

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