Appeal No. 03-0421 **Cir. Ct. No. 01-CV-2906**

WISCONSIN COURT OF APPEALS
DISTRICT IV

DAIRYLAND GREYHOUND PARK, INC.,

PLAINTIFF-APPELLANT,

V.

JAMES E. DOYLE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WISCONSIN, AND MARC J. MAROTTA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE WISCONSIN DEPARTMENT OF ADMINISTRATION,

DEFENDANTS-RESPONDENTS.

FILED

June 2, 2003

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Deininger and Lundsten, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2001-02), this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination on a challenge to the Governor's authority to extend eleven Indian gaming compacts.

In 1988, the Indian Gaming Regulation Act, 25 U.S.C. §§ 2701 *et seq.* (IGRA), authorized "Class III" gaming activities on Indian lands, but only in states permitting Class III gaming "for any purpose by any person, organization,

or entity."[1] 25 U.S.C. § 2710(d)(1). In 1991, the United States District Court for the Western District of Wisconsin held that by permitting a State-run lottery and legal dog track betting, both Class III activities, Wisconsin law did, in fact, permit other Class III activities for IGRA purposes. ***Lac du Flambeau Band v. Wisconsin***, 770 F. Supp. 480, 486-87 (W.D. Wis. 1991). Pursuant to the legislative authorization provided by WIS. STAT. § 14.035 (1989-90), Governor Tommy Thompson negotiated gaming compacts in 1991 and 1992 with eleven Indian tribes, allowing them to open and operate casinos in Wisconsin offering certain Class III gaming activities.

In April 1993, WIS. CONST. art. IV, § 24(1) was amended to provide: "Except as provided in this section, the legislature may not authorize gambling in any form." On-track pari-mutuel betting remained a permitted activity. WIS. CONST. art. IV, § 24(5). However, WIS. CONST. art. IV, § 24(6)(c) was amended to clarify that the State lottery did not and could not include casino-type games. In 1998 and 1999, Governor Thompson negotiated five-year extensions of the gaming compacts.

In this lawsuit, Dairyland Greyhound Park seeks to enjoin Governor Doyle from renewing or extending any of the gaming compacts beyond their five-year terms. It contends that Wisconsin withdrew the necessary permission for Class III gaming activities by amending the constitution in 1993, such that the ***Lac du Flambeau*** decision no longer controls. The trial court disagreed and held that the amendments to article IV did not affect the gaming compacts or their

[1] "Class III" gaming activities include all forms of gambling other than social and traditional games with prizes of minimal value, bingo, and card games played without a bank. 25 U.S.C. §§ 2703(6), (7), and (8).

extension. Applying ***Lac du Flambeau***, the court ruled that permission for Class III gaming still flowed from the State's lottery and dog track betting. That holding is the subject of Dairyland's appeal.

Although the trial court reached the merits of Dairyland's claim, the Governor, as respondent, raises the threshold question whether state courts have jurisdiction to determine "scope of Indian gaming" issues under IGRA. In his view, Dairyland's claim is one that must be decided in the federal court as a matter of federal law. We note that the federal court recently refused to accept jurisdiction over a separate and essentially unrelated gambling compact case, which it remanded to the Wisconsin Supreme Court on May 29, 2003. *See* ***Panzer v. Doyle***, No. 03-C-211-S (W.D. Wis.). On the merits, the Governor contends that the 1993 constitutional amendment was not intended to affect the compacts, and does not, in fact, do so.

These issues involve fundamental questions of state court jurisdiction and the meaning of the 1993 amendment to the constitution. The resolution of these questions does not appear to involve the application of settled law but rather will involve significant interpretation of the state constitution in largely uncharted territory. Because these compacts, as currently negotiated, are in perpetuity with significant effects on the Indian tribes and state budget, this is a case of statewide importance. Therefore, we believe these matters of concern should be addressed by the Wisconsin Supreme Court.