


1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
Filed 9/14/2020 10:14 AM

2 **JEREMIAH SIPP a/k/a SAGE**
3 **RADER, and HELLA RADER,**



Mark Reynolds

4 Plaintiffs-Appellants,

5 **v.**

No. A-1-CA-36924
Santa Fe County
D-101-CV-2016-01615

6
7 **BUFFALO THUNDER, INC.; BUFFALO**
8 **THUNDER DEVELOPMENT AUTHORITY;**
9 **PUEBLO OF POJOAQUE; PUEBLO OF**
10 **POJOAQUE GAMING COMMISSION; and**
11 **POJOAQUE GAMING, INC.,**

12 Defendants-Appellees,

13 **and**

14 **RAYMON MARTINEZ,**

15 Plaintiff-Respondent,

16 **v.**

No. A-1-CA-38636
Bernalillo County
D-202-CV-2017-09114

17
18
19 **SANTA ANA STAR CASINO and**
20 **PUEBLO OF SANTA ANA TRIBAL**
21 **ENTERPRISES,**

22 Defendants-Petitioners.

23 _____ /
24 **ORDER CERTIFYING TO THE**
25 **NEW MEXICO SUPREME COURT**

26 **THIS MATTER** comes before the Court on the Court's own motion, after
27 reviewing the pleadings and briefing of the parties and the records on appeal.

1 For purposes of these appeals, the facts in these cases are not in dispute.

2 The New Mexico Supreme Court has appellate jurisdiction to consider a
3 matter appealed to but undecided by this Court if this Court certifies that the matter
4 involves: (1) a significant question of law under the state or federal constitutions; or
5 (2) “an issue of substantial public interest that should be determined by the supreme
6 court.” NMSA 1978, § 34-5-14(C) (1972). These appeals raise significant questions
7 of constitutional law and an issue of substantial public interest.

8 Both cases raise the same question of tribal sovereign immunity: whether the
9 Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (2018), permits
10 tribes and states to contract in Tribal-State Class III Gaming Compacts to shift
11 jurisdiction over certain matters to state courts.

12 **Background**

13 “It has long been recognized that Indian tribes have the same common-law
14 immunity from suit as other sovereigns.” *R & R Deli, Inc. v. Santa Ana Star Casino*,
15 2006-NMCA-020, ¶ 10, 139 N.M. 85, 128 P.3d 513. IGRA provides, “Any Indian
16 tribe having jurisdiction over the Indian lands upon which a class III gaming activity
17 is being conducted, or is to be conducted, shall request the State in which such lands
18 are located to enter into negotiations for the purpose of entering into a Tribal-State
19 compact governing the conduct of gaming activities.” 25 U.S.C. § 2710(d)(3)(A).
20 Such compacts may include provisions relating to--

1 (C) (i) the application of the criminal and civil laws and regulations
2 of the Indian tribe or the State that are *directly related to, and*
3 *necessary for, the licensing and regulation of such activity;*

4 (ii) the allocation of *criminal and civil jurisdiction between the*
5 *State and the Indian tribe* necessary for the enforcement of such
6 laws and regulations[.]

7 25 U.S.C. § 2710(d)(3)(C)(i)-(ii) (emphases added). “Therefore, under IGRA, a
8 tribal-state gaming compact may apply state laws that are ‘directly related to, and
9 necessary for, the licensing and regulation’ of Class III gaming, and may then
10 allocate criminal and civil jurisdiction to the state when it is ‘necessary for the
11 enforcement’ of those laws.” *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, ¶ 12,
12 141 N.M. 269, 154 P.3d 644 (footnote omitted).

13 In Section 8(A) of each of the gaming compacts at issue, the Pueblos agreed
14 to a limited waiver of their defense of sovereign immunity for claims by “visitors”
15 who suffer “bodily injury or property damage proximately caused by the conduct of
16 the Gaming Enterprise.” The section further provides, “For purposes of this Section,
17 any such claim may be brought in state district court, including claims arising on
18 tribal land, *unless it is finally determined by a state or federal court that IGRA does*
19 *not permit the shifting of jurisdiction over visitors’ personal injury suits to state*
20 *court.*” Thus, the Pueblos and the State “agreed to jurisdiction shifting ‘unless’ a
21 court determines that ‘IGRA does not permit’ it.” *Id.* ¶ 16.

1 Although IGRA “authorizes compacting parties to allocate jurisdiction
2 between the state and the tribe (jurisdiction shifting) that is ‘necessary for the
3 enforcement of such laws and regulation[,]’ . . . Congress did not define what it
4 meant by ‘regulating’ gaming activity and what might be ‘necessary for the
5 enforcement’ of such laws and regulations.” *Id.* ¶ 30. Following an examination of
6 the text and legislative history of IGRA, our Supreme Court explained that tort suits
7 are “related to gaming activity in helping ensure that gaming patrons are not exposed
8 to unwarranted dangers, something that inures to the benefit of the Tribes.” *Id.* ¶ 39.
9 Indeed, protection of “the personal safety of . . . outside visitors and consumers
10 would seem to be of mutual concern to both the state and the tribes,” and “[t]his
11 protection necessarily extends to personal injuries sustained by those patronizing the
12 casinos and providing assurances of an effective remedy.” *Id.* ¶ 40. Accordingly, our
13 Supreme Court held, “Congress could rationally conclude that tribes ought not be
14 foreclosed from negotiating such provisions perceived to be in their own interest,
15 and as ‘directly related to, and necessary for, the licensing and regulation’ of
16 gaming.” *Id.* Our Supreme Court was therefore satisfied that Congress envisioned
17 providing tribes and states with the choice of negotiating “a choice of forum along
18 with a choice of law to accommodate visitors’ personal injury lawsuits.” *Id.* ¶ 41.

19 Two federal courts have also examined this question. Most recently, in a case
20 where the plaintiff slipped and fell on a wet bathroom floor of the Navajo Northern

1 Edge Casino, the United States Court of Appeals for the Tenth Circuit held that the
2 term “class III gaming activity” is properly construed as the gambling taking place
3 in the casino. *Navajo Nation v. Dalley*, 896 F.3d 1196, 1202, 1207 (10th Cir. 2018)
4 (relying on the United States Supreme Court’s construction of the term “gaming
5 activity” in *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 792, 134 S.Ct. 2024,
6 188 L.Ed.2d 1071 (2014)). Contrary to our Supreme Court’s ruling in *Doe*, the Tenth
7 Circuit Court of Appeals then concluded:

8 [B]ecause tort law in the circumstances here does not directly relate to
9 the licensing and regulation of gambling itself, [§ 2710(d)(3)(C)(ii)]—
10 which depends upon [§ 2710(d)(3)(C)(i)] to define the scope of its
11 allocation of civil jurisdiction—does not authorize tribes to agree in
12 gaming compacts to shift (i.e., allocate) jurisdiction to state courts over
13 tort claims like those here.

14 *Dalley*, 896 F.3d at 1210 (footnote omitted).

15 Similarly, the United States District Court for the District of New Mexico held
16 that because “IGRA only authorizes states to acquire limited civil jurisdiction over
17 Indian casinos via the tribal-state compacting process for the purpose of *licensing*
18 *and regulating gaming activities*,” the state had no jurisdiction over personal injury
19 and wrongful death claims arising from a one-car accident that occurred after a
20 pueblo-owned casino over-served alcohol to its customers. *Pueblo of Santa Ana v.*
21 *Nash*, 972 F.Supp.2d 1254, 1257, 1267 (D.N.M. 2013) (emphasis added).

22 In the two appeals before us today, two district court judges reached opposite
23 conclusions on the question of whether tribal sovereign immunity barred the

1 respective suits: one district court granted the Pueblo's motion to dismiss, and the
2 other denied the Pueblo's motion to dismiss.

3 In *Sipp v. Buffalo Thunder, Inc.*, A-1-CA-36924, the plaintiff sued the
4 defendants after Buffalo Thunder lowered "a large electric garage-type door" on the
5 plaintiff's head while he was delivering electric lights on behalf of his employer,
6 Dahl Electric. The Pueblo moved to dismiss the plaintiff's claim, asserting sovereign
7 immunity and arguing that (1) the Gaming Compact's provision of a limited waiver
8 of sovereign immunity ceased to operate in light of the federal district court's
9 decision in *Nash*, and (2) the limited waiver did not apply to the plaintiff. The district
10 court granted the Pueblo's motion to dismiss, ruling the plaintiff's claim did not fall
11 within the limited waiver of sovereign immunity found in Section 8(A) of the
12 Gaming Compact. The plaintiff appealed the dismissal to this Court.

13 In *Martinez v. Santa Ana Star Casino*, A-1-CA-38636, the plaintiff sued the
14 defendants after suffering injury from a slip-and-fall accident that occurred on casino
15 premises. The defendants moved to dismiss, asserting sovereign immunity and
16 contending the Gaming Compact's provision of a limited waiver of sovereign
17 immunity ceased to operate in light of the decisions in *Bay Mills* and *Dalley*. The
18 district court denied the plaintiff's motion to dismiss, ruling that the New Mexico
19 Supreme Court's decision in *Doe*, 2007-NMSC-008, controlled its ruling. The
20 defendants then filed a petition for writ of error with this Court, seeking review of

1 the district court’s ruling. *See generally Holguin v. Tsay Corp.*, 2009-NMCA-056,
2 ¶ 2, 146 N.M. 346, 210 P.3d 243 (explaining that the collateral order doctrine
3 permits interlocutory review of the denial of a motion to dismiss based on tribal
4 sovereign immunity).

5 **Significant Questions of Constitutional Law with Substantial Public Interest**

6 These cases present questions of constitutional law arising from the Pueblos’
7 sovereign immunity and the inability of states to diminish such immunity. *See*
8 *Hamaatsa, Inc. v. Pueblo of San Felipe*, 2017-NMSC-007, ¶¶ 19-21, 388 P.3d 977
9 (recognizing tribes’ status as “separate sovereigns pre-existing the Constitution” and
10 that one aspect of the sovereignty retained by tribes “is common-law immunity from
11 suit,” which “is protected from an individual state’s attempt to abridge or redefine
12 its scope”).

13 Relatedly, these cases present an issue of substantial public interest. The
14 Pueblos argue that because the Gaming Compacts’ shifting of jurisdiction to state
15 court remains in effect “*unless* it is finally determined by a state or federal court that
16 IGRA does not permit the shifting of jurisdiction over visitors’ personal injury suits
17 to state court,” the decisions in *Dalley* and *Nash* operate to preclude the shifting of
18 jurisdiction under the Gaming Compacts in the cases at bar. (Emphasis added.)
19 Resolution of this issue has the potential to impact future court decisions bearing
20 upon personal injury claims against tribes and their corporations in New Mexico.

1 This Court is faced with two competing lines of authority that bear upon the
2 question of whether the limited waiver of sovereign immunity within the gaming
3 compacts is effective and allows for state court jurisdiction in these cases: (1) the
4 binding nature of our Supreme Court’s decision in *Doe*, see *State v. Dopslaf*, 2015-
5 NMCA-098, ¶ 11, 356 P.3d 559 (explaining that “appeals in this Court are governed
6 by the decisions of the New Mexico Supreme Court—including decisions involving
7 federal law”); and (2) the two federal court cases holding that IGRA does not permit
8 the shifting of jurisdiction. See *Doe*, 2007-NMSC-008, ¶ 15 (recognizing that tribal-
9 state gaming compacts are contracts between the tribes and the State of New Mexico,
10 and that they are interpreted as contracts).

11 In our estimation, the issue presented in these appeals involves a significant
12 question of constitutional law and is of substantial public interest that should be
13 determined by the Supreme Court.

14 **IT IS THEREFORE ORDERED** that this case is certified to the Supreme
15 Court pursuant to Rule 12-606 and NMSA 1978, Section 34-5-14(C) (1972).

16 
17 **JULIE J. VARGAS, Judge**

18 
19 **MEGAN P. DUFFY, Judge**

20 
21 **SHAMMARA H. HENDERSON, Judge**