UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUEBLO OF POJOAQUE and
BUFFALO THUNDER, INC.,

Plaintiffs,

vs. Cause No.: 1:20-CV-00166-JB-GBW

HONORABLE BRYAN BIEDSCHEID, individually
and in his official capacity as District Judge,
New Mexico First Judicial District Division
VI; and RUDY PENA,

Defendants.

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT (Doc 36-1)

Plaintiffs, Pueblo of Pojoaque and Buffalo Thunder, Inc. (hereafter collectively "Pojoaque", through undersigned counsel, Ripley B. Harwood, Esq. (Ripley B. Harwood, P.C.), reply as follows in support of their Motion for Summary Judgment:

I. THE RECORD BEFORE THIS COURT DOES NOT INCLUDE CLAIMS THAT PLAINTIFF WAS ENGAGED IN GAMING AT THE TIME OF HIS FALL

In tacit acknowledgement of the weakness of the admissible factual underpinning of the straightforward legal issue before this Court, Defendants seek to bolster their respective Responses by adding the contention that Mr. Pena was engaged in Class III gaming at the time of his injury. Doc. 43, p. 4; Doc. 41, p. 3 & Ex. 1. This was never alleged in Mr. Pena's Complaint. Doc. 36-1, Ex. A, ¶ 24. The affidavit supporting this contention (Doc. 41, Ex. 1), was not executed until July 21, 2021, and did not exist at the time Judge Biedscheid denied Pojoaque's Motion to Dismiss in the underlying state court litigation.

The only support for this contention extant at the time Judge Biedscheid denied Pojoaque's Motion to Dismiss was a reference in Mr. Pena's Response brief to his interrogatory answer no. 29. *See* attached Exhibit A at p. 2, bullet 4 and referenced answer to Interrogatory no. 29. A reading of that interrogatory answer however, shows that it fails to support the contention.

Mr. Pena also never verified or signed interrogatory answers. Pursuant to Fed.R.Civ.P. 33(b)(3) and parallel New Mexico Rule 1-033.C(1) NMRA, interrogatory answers must be answered under oath. Unverified interrogatories cannot be considered in connection with motions for summary judgment. *Schwartz v. Compagnie General Transatlantique,* 405 F.2d 270, 273 (2d Cir.1968); *Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp.,* 45 F.Supp.2d 1164, 1205 (D.Kan.1999) ("unverified interrogatory answers ... are not a valid basis for factual findings in response to a summary judgment motion"). There is accordingly no admissible evidentiary support in the record before this Court for the after-the-fact assertion by Defendants that Mr. Pena was engaged in Class III gaming activity at the time of his fall.

This Court should therefore review Pojoaque's Summary Judgment Motion based on the state district court's January 8, 2020 order. Doc. 36-1 at p. 7-8 & Ex. C. It should disregard the district court's unsolicited amended order filed March 18, 2020, after Pojoaque's Declaratory Judgment Complaint was filed and served on Judge Biedscheid. Doc. 36-1 at p. 8 & Ex. D. The sole issue properly before this Court based on the record of admissible evidence under consideration by the state district court at the time it denied Pojoaque's Motion to Dismiss is indistinguishable from the facts set forth in *Dalley*; *i.e.*, whether a casino floor slip-and-fall is an event for which Tenth Circuit law interpreting IGRA would authorize Pojoaque to waive sovereign immunity under the

Gaming Compact between it and the State of New Mexico. The law of this Circuit is dispositive of this issue. Respectfully on this record, Pojoaque is entitled to the summary judgment it requests.

II. PENA'S FALL DID NOT ARISE FROM PARTICIPATION IN GAMING

Even indulging for purposes of summary judgment analysis, the newly interjected contention that Pena was engaged with a slot machine when he was asked to move, his slip-and-fall still remains outside the scope of even the *dicta* discussion found in *Dalley* footnote 7. As candidly conceded in Judge Biedscheid's Response, to be a permissible subject of a gaming compact, an activity must actually involve the playing of the game. Doc. 43, p. 7. "[A]ctivities occurring in proximity to, but not inextricably intertwined with, the betting of chips, the folding of a hand, or such like…" [fall outside the purview of IGRA-authorized gaming compact subject matter and are "tangential"]. *Dalley*, 896 F.3d at 1207 & 1210.

Assuming *arguendo* that admissible evidence supported the contention, the facts taken most favorably to Mr. Pena would establish that he was playing a slot machine when employees/contractors asked him to move. He got up and attempted to comply with the directive, and fell. Doc. 41, Ex. 1. While such a scenario certainly implicates casino employees/contractors as proximately causing the occurrence, proximate cause is not the trigger.[1]

[1] Proximate cause language identical to that in Pojoaque's Gaming Compact was also contained in the Navajo Nation compact under consideration in *Dalley*. *Dalley*, fn. 2.

The two *Dalley* footnote 7 hypotheticals both involved a direct link between the gaming activity itself and the resulting harm.[2] Mr. Pena was not electrocuted by his chosen slot machine nor struck by an errant roulette ball while engaged in a spin of the wheel. His fall occurred when he stood and moved away from the slot machine. Doc. 41, p. 1-2 & Ex. 1. His fall did not actually involve playing his slot machine. It was not 'inextricably intertwined' with playing a slot machine. It occurred merely in proximity to a slot machine he had been playing. It was as tangential to the activity of gaming even within the context of *Dalley's* footnote 7 examples as it would have been had it occurred in a distant restroom. Individuals not participating in Class III gaming activities when they are allegedly harmed are not engaged in activities that are directly related to, and necessary for, the licensing and regulation of gaming. Doc. 43, p. 7; *Dalley*, 896 F.3d at 1207-08. That is true whether the fall occurs in a bathroom as in *Dalley*, or anywhere else on gaming premises in Indian Country, inclusive of the location of Mr. Pena's fall.

Also worthy of recall in this context is the overall backdrop from which IGRA emerged. Mr. Pena and Judge Biedscheid both urge this Court to engage in review of IGRA's legislative history, a task which both *Dalley* and *Nash* eschewed: "[t]he statutory language and the structure of the IGRA are clear, and so resort to the legislative history of the statute is unnecessary." *Nash*, 972 F.Supp.2d 1265. Courts should not resort to legislative history when the statutory language is unambiguous and to do so is improper." *Dalley*, 896 F.3d at 1211 & 1216 (citations to supporting authority omitted).

[2] Footnote 7 must also be kept in context: not only is it *dicta* but the Court repeatedly emphasizes that its two hypotheticals merely raise 'arguable' or 'colorable' claims that 'might' be viewed as being directly linked to gaming. The footnote is emblematic of the hazards of extracurricular musings.

Instead both *Dalley* and *Nash* looked to the unambiguous structure of IGRA and both concluded that if Congress had intended "to permit tribes to allocate jurisdiction [over tort claims], it could have crafted language to effectuate that purpose, but it did not do so." *Dalley* at 1211. *Nash* was even more explicit:

> Congress could have worded subparagraph (ii) in a way that obviously or necessarily included a shifting of jurisdiction over such claims as the one in the underlying state court litigation, as a permissible topic for negotiations of compacts. It did not do so. Even allowing that there are many issues to be resolved in negotiating compacts, the IGRA takes a narrow view of what jurisdiction shifting may occur, and the language it employs is restrictive rather than expansive.

Nash, 972 F.Supp.2d at 1265.

So while this Court should decline the Defendants' invitation to peruse IGRA's legislative history, it should analyze this unambiguous statute against the broader framework of Indian Law and policy within which the statute is embedded. The takeaway from that overview is reflected in the *Nash* Court's conclusion that IGRA's jurisdiction-shifting provision is narrow and that the language employed is restrictive, not expansive.

For more than sixty years, Congress has embraced the bedrock axiom that "absent clear congressional authorization, state courts lack jurisdiction to hear cases against Native Americans arising from conduct in Indian Country." *Dalley* at 1204, citing *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). For this overarching reason, the *Dalley* Court observed that "Congress has 'authorized' the tribes and states to make such jurisdiction-altering agreements 'in only a few specific instances'…" *Dalley* at 1205 (citations to referenced authorities omitted).

IGRA is one of those few instances. It is an exception because regulation of

gaming is important. But gaming regulation is important not because Congress was afraid slip-and-fall plaintiffs might not receive a fair shake in Indian Country, but because of fears of the infiltration of organized crime into these enterprises. 25 U.S.C. §2702(2); see *Pueblo of Santa Ana v. Kelly,* 932 F.Supp. 1284, 1292 (D. N.M. 1996) (central purpose is to protect against the infiltration of organized crime into high-stakes gaming).

It is against this backdrop that IGRA should be analyzed. Defendants' claim that Congress envisioned the circumstances of Mr. Pena's fall as being "directly related to, and necessary for, the licensing and regulation of [Class III gaming]" (25 U.S.C. § 2710(d)(3)(C)(i)), simply finds no support in the broader IGRA context. *Dalley* analyzed a similar if not identical claim by rigorous, thorough, and restrictive analysis of subparts (i), (ii), & (vii) of this relevant IGRA provision. Unsurprisingly, it concluded that "Appellee's… arguments come up short." *Dalley* at 1211-16.

The lesson from the kind of studious IGRA review which *Dalley* exemplifies, is that there is no basis in the language of IGRA to believe that Congress intended to exalt torts occurring on casino premises over those occurring anywhere else in Indian Country, much less to accord them jurisdiction-altering status that is antithetical to century-old precedent. It was a stretch for the *Dalley* Court even in *dicta* to concoct tort hypotheticals that could 'colorably' be said to arise from the playing of Class III games. For reasons already discussed, Mr. Pena's fall did not arise out of his engagement with a slot machine. More importantly however, the notion that Congress could have intended waiver for torts even arising directly out of the playing of Class III games is a stretch that finds no support in the language of the statute itself nor in case law identifying its enforcement power as having to do with "the power to shut down

crooked blackjack tables." *Dalley* at 1208, citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S.782, 792, 134 S.Ct. 2024, 2033, 188 L.Ed.2d 1071 (2014). There is simply a disconnect between the language and purpose of this unambiguous statute and the Defendants' attempts to shoehorn into it unexpressed, unstated, and implied waivers of sovereign immunity. This Court should apply *Dalley* and *Nash*, reject those arguments, grant Pojoaque summary judgment, and declare that the First Judicial District Court lacks subject matter jurisdiction over Mr. Pena's personal injury lawsuit.

III. TORT LAW IS NOT DIRECTLY RELATED TO OR NECESSARY FOR THE REGULATION OF CLASS III GAMING

Both Defendants also persist in seeking to persuade the Court that it should 'interpret' IGRA "as permitting jurisdictional agreements regarding tort claims arising out of gaming activity, as a means of regulating dangers arising from those activities." Doc. 43, p. 8; *see* Doc. 41, p. 11. However, "[w]hen the terms of the statute are clear and unambiguous, that language is controlling absent rare and exceptional circumstances…". *Wilson v. Stocker*, 819 F.2d 943, 948 (10th Cir.1987). If "construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." *United States v. Missouri Pacific Railroad Co*., 278 U.S. 269, 278, 49 S.Ct. 133, 73 L.Ed. 322 (1929). In construing [unambiguous] statutes, the Court is " 'not [to] inquire what the legislature meant; [rather, the Court] ... ask[s] only what the statute means." ' *Chickasaw Nation v. Dep't of Interior*, 161 F. Supp. 3d 1094, 1099 (W.D. Okla. 2015), citing

St. Charles Investment Co. v. Commissioner of Internal Revenue, 232 F.3d 773, 776 (10th Cir.2000).[3]

In *Dalley* itself, the Court borrowed from *Bay Mills* to note that "we underscore that we have "no roving license, even in ordinary cases of statutory interpretation, to disregard clear language simply on the view that ... Congress 'must have intended' something broader." *Dalley* at fn. 6, citing *Bay Mills*, 134 S.Ct. at 2034. The Court went on to endorse the view that "[i]t is not our function 'to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have' intended." *Id*., citing *Wis. Cent. Ltd. v. United States*, ––– U.S. ––––, ––––, 138 S.Ct. 2067, 2073, 201 L.Ed.2d 490 (2018).

Dalley's review of IGRA was not only extraordinarily comprehensive but also microscopic. The Court scrutinized every potentially applicable subsection of § 2710(d)(3)(C) for evidence that IGRA contemplated jurisdiction-shifting for torts occurring on gaming premises, and could find none. The word "activity" appears no less than thirty-two times throughout *Dalley*. The Court looked specifically for evidence that Congress contemplated jurisdiction-shifting for 'activity' that included torts occurring on gaming premises. It found none and had to invent two hypotheticals in a footnote to illustrate potential exceptions to the general rule it announced. 'Activity' concluded the Court (again borrowing from *Bay Mills*), is "what goes on in a casino—[that is,] *each roll of the dice and spin of the wheel*." *Dalley* at 1210, citing *Bay Mills*, 134 S.Ct. at 2032 (*emphasis* in original). Unsurprsingly, the Court arrived at the logical conclusion from its plain but in-depth reading of IGRA, that only gaming activities

[3] See *Pueblo of Pojoaque et al. v. State of New Mexico, et al*., No. CIV 15-0625 JB/GBW, Doc. 149, p. 150 (IGRA's extraordinary preemptive power with respect to gaming on Indian lands is clear and manifest. IGRA's enactment "enshrines" a Congressional purpose to preserve Indian tribes' sovereign authority over gaming on Indian lands.)

themselves are directly related to the core purpose of IGRA of keeping Indian casinos free of corruption and criminal infiltration.[4] Other activities, such as the servicing of a slot machine (this case), or the mopping of a bathroom floor (*Dalley*) are as ancillary to the business of gaming as they are to the operation of any other type of business. Torts occurring in consequence are, again unsurprisingly, properly viewed as tangential.

A. *That the tort law is a form of regulation with salutary purposes does not mean that Congress incorporated it into IGRA*

The *Dalley* Court agreed, and no parties here dispute, that the tort law can fairly be viewed as a form of regulation with the salutary purposes of promoting the exercise or ordinary care and preventing the harms that result from negligence. *Dalley* at 1207. However, the argument that this is a basis for inferring Congress intended to allow jurisdiction-shifting does not follow. In fact, the argument cuts against these Defendants because the Court must presume that Congress understood the remedial purposes of the tort law when it enacted IGRA. As the Court said in *Dalley*, if Congress had wanted to permit tribes to allocate jurisdiction over tort claims to state courts, it could have crafted language to effectuate that objective, and it did not. *Dalley* at 1211.

Not only is such authorization absent from IGRA, one might well postulate that it is absent for a multiplicity of reasons: first, as already covered, the vindication of civil wrongs arising from tortious conduct at casinos is conceptually remote to the core purpose of IGRA. Second, torts occurring at casinos are indistinct from torts occurring elsewhere in Indian Country such that the happenstance of occurrence at a casino gives rise to no logical basis for displacing the long-standing rule that such occurrences

[4] State and federal interests both mesh and peak respecting *police powers* over Indian gaming: New Mexico has enacted laws that "strictly regulate "gaming in the state "to ensure honest and competitive gaming that is free from criminal and corruptive elements and influences." *Pueblo of Pojoaque et al. v. State of New Mexico, et al*., No. CIV 15-0625 JB/GBW, Doc. 149, p. 148, citing N.M.S.A. § 60-2E-2(A).

are to be dealt with by Indians applying their laws in their courts.[5] Third and relatedly, as set forth in the brief-in-chief, the notion that only state tort law and process suffices to protect public health and safety in Indian Country merely because tortious conduct happens to occur on casino premises is nonsensical. It also represents a reversion to a paternalism that was emblematic of federal policy towards Indians in the nineteenth century, but which is anathema to modern law and policy encouraging self-determination, self-governance, autonomy, equality and independence. While legislative intent is irrelevant and improper to the analysis of Pojoaque's Motion, since both Defendants invite it, Pojoaque counters simply that it would not be an uneducated guess to conclude that Congress took all of the foregoing into account in deciding not to write tort law jurisdiction-shifting into IGRA.

CONCLUSION

Enduring precedent is the legacy of perspicacious jurists. Thus it seems fitting to conclude the briefing on this issue by paying tribute to the solitary jurist who accurately discerned the application and limitations of IGRA in the case which created all the consternation in the first place. In the long run of the law, it turns out to be the late,

[5] Defendants cite *Muhammad v. Commanche Nation Casino*, 2010 WL 4365568 (W.D. Okla. 2010) for the now-discredited speculation that Congress envisioned jurisdiction-shifting compact negotiations for casino torts when it enacted IGRA. Doc. 43, p. 9; Doc. 41, p. 11. Citation to an unpublished decision is disfavored. An unpublished decision may be cited if: (1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and (2) it would assist the court in its disposition. *Ontiveros v. Biotest Pharms. Corp.*, No. CV 12-729 LH/WPL, 2015 WL 13665373, at *2 (D.N.M. Mar. 25, 2015) citing 10th Cir. R. 36.3(B). *Muhammad* meets neither criteria. Judge Vasquez cited the case in her *Dalley* district court opinion that the Tenth Circuit reversed. In consequence, the case is now red flagged on Westlaw.

great Justice Minzner,[6] author of the *Santa Clara* dissent, and not the authors and adherents of the majority opinion, whose incisive views foreshadowed *Dalley's* holding and accurately captured IGRA's narrow scope:

> [A]llocating jurisdiction over visitors' personal injury claims would not seem to be "necessary for the enforcement of laws and regulations that are directly related to, and necessary for licensing and regulation of Class III gaming activities."
>
> Had Congress intended for such claims to be included, I think IGRA would have been explicit… . Even allowing for the fact that there were many issues to be resolved in negotiating compacts, IGRA seems to me to take a narrow view of what jurisdiction shifting, if any, was likely to occur. The phrase "directly related to and necessary for the licensing and regulation" of gaming activities seems restrictive rather than expansive.
>
> Because shifting jurisdiction over visitors' personal injury claims was not explicitly authorized by IGRA, … the tribes' exclusive jurisdiction over such claims must prevail.

Doe v. Santa Clara Pueblo, 2007-NMSC-008, ¶'s 53 & 56. Had Justice Minzner's wisdom of foresight prevailed all those years ago, this Court would not today be confronted with this recurrent and pestilential issue and a great deal of interim trouble and expense would have been avoided. Instead, personal injury fortune hunters continue to spear state district courts with *Santa Clara*, demanding adherence to *stare decisis* while knowing full well that the decision contravenes settled Tenth Circuit law in an area where federal law expressly preempts the field. *Pueblo of Pojoaque et al. v. State of New Mexico, et al.*, No. CIV 15-0625 JB/GBW, Doc. 149, p. 161.

This case presents this Court with the opportunity not only to declare it to be governed squarely by *Dalley*, but to rule (if Defendants' unsworn facts concerning being engaged in gaming are considered), that Congress simply did not contemplate

[6] Her legal acumen was perhaps only equaled or exceeded by her teaching skills.

tort claims as being related enough or important enough to the core goals of IGRA to warrant according them jurisdiction-shifting consideration. In the final analysis even the *Dalley* footnote 7 hypotheticals fall too far short of relating to the goals of IGRA to support Defendants' invitation to invent an unprincipled exception to long-settled rules governing jurisdiction over torts occurring in Indian Country.

For all of the foregoing reasons and as set forth in its brief-in-chief, Pojoaque requests that this Court unequivocally declare that the exclusive venue for unintentional torts of whatever kind and character, occurring in Indian Country at Indian gaming facilities operating under the auspices of IGRA, shall be in the tribal courts, and that IGRA does not authorize tribes to shift jurisdiction to the state district courts for any such claims. Pojoaque requests that this Court rule that the circumstances of this particular case are squarely governed by *Dalley* and *Nash* and declare that the First Judicial District Court, State of New Mexico lacks subject matter jurisdiction over Mr. Pena's lawsuit. Pojoaque requests that this Court further authorize it to seek injunctive relief in the event that the state district court were to proceed with Mr. Pena's lawsuit despite this Court's declaration. Pojoaque requests such other and further relief as this Court deems proper.

Respectfully submitted,

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By: **/s/** *Ripley B. Harwood*

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I HEREBY CERTIFY that on the 3rd day of August, 2021, a true and correct copy of the foregoing Plaintiffs' Reply in Support of Motion for Summary Judgment was filed electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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