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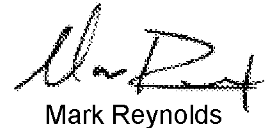

Mark Reynolds

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

JEREMIAH SIPP, a.k.a. SAGE
RADER, and HELLA RADER,

Plaintiffs-Appellants,

v.

No. A-1-CA-36924
Santa Fe County
D-101-CV-2016-01615
Hon. David K. Thomson

BUFFALO THUNDER, INC.,
BUFFALO THUNDER
DEVELOPMENT AUTHORITY,
PUEBLO OF POJOAQUE,
PUEBLO OF POJOAQUE
GAMING COMMISSION, and
POJOAQUE GAMING, INC.,

Defendants-Appellees.

DEFENDANTS-APPELLEES' ANSWER BRIEF

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INTRODUCTION

Defendants-Appellees the Pueblo of Pojoaque ("Pueblo"), Buffalo Thunder Development Authority ("BTDA"), Pueblo of Pojoaque Gaming Commission ("PPGC"), Pojoaque Gaming, Inc. ("PGI"), and Buffalo Thunder Inc. ("BTI") (collectively, "Defendants") file this answer brief per Rule 12-210(C)(2)(b) NMRA. The District Court's dismissal decision should be affirmed for multiple reasons. First, Plaintiffs-Appellants Jeremiah Sipp ("Sipp") and Hella Rader ("Rader") bear the burden to avoid Defendants' sovereign immunity and cannot do so with unsupported assertions regarding Defendants' factual challenge to subject-matter jurisdiction. Second, Defendants retain immunity and state courts lack jurisdiction here because the relevant gaming compact provision has terminated per its own condition subsequent, based on a federal court ruling rejecting jurisdiction shifting for personal injury suits. Third, even without that contractual limit, a United States Supreme Court decision limits the scope of tribal-state gaming compacts—including possible tort claim jurisdiction shifting—to matters that directly involve gaming activity, which does not encompass Sipp's allegation of hitting his head on a garage door at a loading dock while delivering a parking lot light. Finally, even if the relevant gaming compact provision has not been terminated or so limited, Sipp did not meet his burden below of establishing that he was a "Gaming Facility" visitor and Rader never alleged either that she was such a visitor or that she suffered any physical harm, all as required to assert state court claims here.

SUMMARY OF FACTS AND PROCEEDINGS

Plaintiffs filed this action in 2016, alleging that in 2014 Sipp was injured at Defendants' premises while doing business as an employee of Dial Electric ("Dial"), when he struck his head on a large electric garage-type door at a Buffalo Thunder receiving area. RP 2. Only Sipp alleged physical injuries, while Rader, as Sipp's wife, alleged losses of consortium, household services, and community income. RP 2-3. Plaintiffs' allegations did not distinguish among the Defendants. *See* RP 1.

Defendants moved to dismiss for lack of subject-matter jurisdiction, asserting the Pueblo's exclusive jurisdiction and all Defendants' sovereign immunity. RP 17-26. Defendants explained and documented via two declarations that BTDA is the Pueblo's political subdivision, PPGC is a governmental agency, only PGI and BTI are "Gaming Enterprise[s]" as defined under the relevant tribal-state gaming compact ("Gaming Compact"), and only BTI operates Buffalo Thunder casino, where there is no receiving area with a garage-type door. RP 18-19, 26, 28-36. Also, the jurisdiction-shifting and immunity-waiver provision of the Gaming Compact had previously become void per its own terms once a federal court had ""finally determined . . . that IGRA[, *i.e.*, the Indian Gaming Regulatory Act,] does not permit the shifting of jurisdiction over visitors' personal injury suits to state court.'" RP 24-25 (quoting RP 49). Finally, Defendants explained that Plaintiffs did not allege and could not establish an injury by a "Gaming Enterprise" at a "Gaming Facility" as required for state jurisdiction under the Gaming Compact. RP 25-26.

Plaintiffs then filed a First Amended Complaint, which added allegations that Sipp was at BTI's premises as Dial's employee delivering electric lights purchased by BTI from Dial for installation in a casino parking lot, and that the lights were part of the Gaming Enterprise and Gaming Facility as defined in the Gaming Compact. RP 60. Plaintiffs did not change their claims or their injury allegations, or allege that Rader had been injured at Defendants' premises. RP 59-62. They also made no allegations against BTDA or PPGC, and only alleged that the Pueblo owns PGI and BTI, which together operate Buffalo Thunder Resort and Casino ("BTRC"). *Id.*

The District Court denied the first motion to dismiss as moot due to the First Amended Complaint, as Defendants had proposed. RP 82, 102. Also, Defendants moved to dismiss the First Amended Complaint. RP 84-94. In that, Defendants again asserted exclusive jurisdiction over these claims in the Pueblo's Court and sovereign immunity in state court. RP 86-91. In addition, the relevant Gaming Compact provision had become void per its terms. RP 81-92. Defendants also explained that Plaintiffs still did not allege a casino patron injury at a Gaming Facility or establish how parking lot light delivery provided state court jurisdiction. RP 92-93.

Plaintiffs did not dispute the lack of subject-matter jurisdiction or sovereign immunity waiver in state court absent the Gaming Compact. *See* RP 126-137, 142. Instead, they responded in part that no court had finally determined that IGRA does not allow jurisdiction-shifting over casino injury claims. RP 133. They also argued but did not provide evidence that the casino and the receiving area are in the same

building. *See* RP 136. They also asserted that if the District Court was concerned about facts, it should allow discovery on Defendants' interrelationships. RP 136.

After completion of briefing and oral argument on the second motion to dismiss, *see* RP 141-51; 3/29/2017 Tr., the Plaintiffs sought, the Defendants agreed to, and the District Court ordered a delay of discovery pending a ruling on the motion to dismiss. RP 171-73, 179-80; 10/19/2017 Hr'g Mins. The District Court then dismissed the First Amended Complaint for lack of subject-matter jurisdiction without specific factual findings because Plaintiffs' allegations did not fall within the immunity-waiving visitor-protection provision of the Compact. RP 206.

ARGUMENT

The District Court dismissal for lack of subject-matter jurisdiction must be affirmed because Plaintiffs did not establish a waiver of any Defendants' sovereign immunity or a relevant factual dispute warranting discovery. As a simple contractual matter, the relevant Gaming Compact provision terminated per its own condition subsequent when a federal court ruled that IGRA precludes jurisdiction shifting for personal injury tort claims. Also, even without that contract limit, a United States Supreme Court decision requires limiting the scope of such claims to those that directly involve gaming, which Sipp's alleged loading dock delivery injury did not. Finally, the Gaming Compact provision does not encompass either Sipp's loading dock claims or Rader's derivative claims since they did not establish that either was a Gaming Facility visitor or that the latter experienced any physical injury.

I. Sipp and Rader Bear the Burden to Establish a Sovereign Immunity Waiver, Which Must Be Strictly Construed, and Their Counsel's Unsupported Factual Assertions Cannot Avoid Affirmance.

As before the District Court, Sipp and Rader do not dispute on appeal that the Gaming Compact provides the only possible basis for establishing state court jurisdiction and avoiding all Defendants' sovereign immunity here. *See* RP 88-92, 142; Br. in Chief at 7-8, 14, 20. Plaintiffs also aptly acknowledge that if a motion to dismiss attacks the factual basis for subject-matter jurisdiction, the district court may decide disputed questions of fact without converting the motion into a motion for summary judgment unless the jurisdictional question is intertwined with the merits. Br. in Chief at 6 (citing *South v. Lujan*, 2014-NMCA-109, ¶ 9, 336 P.3d 1000); *see South*, 2014-NMCA-109, ¶¶ 8-9. However, Plaintiffs also assert that Defendants bear the burden of refuting jurisdiction and that Plaintiffs raised factual issues about Defendants' interrelations which concerned both jurisdiction and the merits and warranted discovery. Br. in Chief at 7, 23 (citing RP 136).

The Plaintiffs' arguments here overlook their own acknowledgement that the "sole question" in this case involves an asserted sovereign immunity waiver. Appellants' Docketing Statement at 3. For this, a tribal sovereign immunity waiver must be "'express and unequivocal[,]'" and such a waiver and any conditions or limitations on it "'must be strictly construed and applied.'" *Hoffman v. Sandia Resort & Casino*, 2010-NMCA-034, ¶ 12, 148 N.M. 222, 232 P.3d 901 (quoting *R & R Deli, Inc. v. Santa Ana Star Casino*, 2006-NMCA-020, ¶ 10, 139 N.M. 85, 128 P.3d

513 (2005)). Therefore, there is a "strong presumption against waiver of tribal sovereign immunity[,]" and "all issues should be interpreted favorably for the tribes and restrictively against the claimant." *Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, ¶¶ 7, 16, 136 N.M. 682, 104 P.3d 548 (2004). Also, the party opposing immunity bears the burden of demonstrating an unequivocal waiver. *Rosette, Inc. v. U.S. Dep't of the Interior*, 2007-NMCA-136, ¶ 26, 142 N.M. 717, 169 P.3d 704; *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685-86 (8th Cir. 2011) (citing cases). This entails that a plaintiff must establish a tribal sovereign immunity waiver for asserted claims. *See Kosiba v. Pueblo of San Juan*, 2006-NMCA-057, ¶ 12, 139 N.M. 533, 135 P.3d 234; *Bales v. Chickasaw Nation Indus.*, 606 F. Supp. 2d 1299, 1306-07 (D.N.M. 2009). Also, a lack of tribal sovereign immunity waiver precludes state court subject-matter jurisdiction, *Armijo v. Pueblo of Laguna*, 2011-NMCA-006, ¶ 24, 149 N.M. 234, 247 P.3d 1119 (2010), and such a jurisdictional defense may be asserted at any time, even on appeal, Rule 12-321(B)(1) NMRA.

These points are not undermined by Plaintiffs' contention based on *South* that Defendants bear the burden to dispute jurisdiction. Br. in Chief at 22 (citing *South*, 2014-NMCA-109, ¶ 14). *South* addressed whether state jurisdiction would infringe on tribal authority, *South*, 2014-NMCA-109, ¶¶ 15-16, and the statement on which Plaintiffs rely here was a "*see*" citation quote of *State v. Begay*, 1987-NMCA-025, ¶ 6, 105 N.M. 498, 734 P.2d 278, which concerned whether an accident occurred in Indian country, *Begay*, 1987-NMCA-025, ¶ 4. Neither of those cases involved tribal

sovereign immunity, which is subject to a different analysis than infringement of tribal sovereign authority. *See Hamaatsa, Inc. v. Pueblo of San Felipe*, 2017-NMSC-007, ¶¶ 26-27, 388 P.3d 977 (2016); *Armijo*, 2011-NMCA-006, ¶¶ 16-20.

Finally, to the extent that this Court addresses factual matters beyond the Compact, Plaintiffs' unsupported factual assertions cannot avoid affirmance. Defendants supported their motions to dismiss with declarations by the Pueblo's Tribal Secretary and PPGC's Director. RP 18-19 (relying on RP 28-33), 85-86 (same). In response, Plaintiffs did not provide any evidence, but merely asserted at the end of their response brief that "should the Court have a concern about the factual sufficiency on which the motion rests, plaintiffs request that the Court stay any decision on the motion in order to permit discovery . . . ." RP 72, 136. That argument by Plaintiffs' counsel is not evidence. *See South*, 2014-NMCA-109, ¶ 14 (quoting *In re Application of Metro. Invs., Inc.*, 1990-NMCA-070, ¶ 15, 110 N.M. 436, 796 P.2d 1132). Also, Plaintiffs did not raise a need for discovery at oral argument, *see* 3/29/2017 Tr., or propound any discovery. Instead, Plaintiffs sought to extend the discovery schedule while waiting for a ruling on dismissal. *See* RP 171-72. As in *Hoffman*, Plaintiffs now complain that they "should have been given the opportunity to propound discovery" about application of tribal sovereign immunity before dismissal, but "at no time during . . . this suit did [they] attempt to file any discovery . . . ." 2010-NMCA-034, ¶ 10; *cf.* Br. in Chief at 7, 23. These insufficient

efforts and assertions cannot satisfy Plaintiffs' burden to establish an express and unequivocal waiver of tribal sovereign immunity in the face of contrary evidence.

II. No Jurisdiction Exists Here Because the Relevant Compact Provision Terminated According to Its Terms Based on a Final Federal Court Ruling That IGRA Does Not Allow Such Jurisdiction Shifting.

A. *The relevant Compact provision includes a condition subsequent under which the jurisdiction shifting ended once a federal court ruled that IGRA does not permit that.*

Especially given the Plaintiffs' burden and without a need to address any evidentiary issues, this Court should easily affirm the dismissal below. The Gaming Compact provision on which Plaintiffs rely for state court jurisdiction—Section 8(A), at RP 49—cannot provide jurisdiction here because it terminated per its own terms once a federal court finally determined that IGRA does not permit jurisdiction shifting for visitors' personal injury suits. In particular, Section 8(A) concludes with the following sentence:

> For purposes of this Section, any such claim may be brought in state district court, including claims arising on tribal land, unless it has been finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court.

RP 49. That contractual provision has been triggered because *Pueblo of Santa Ana v. Nash* ("*Nash*"), 972 F. Supp. 2d 1254 (D.N.M. 2013), finally determined that IGRA "does not authorize an allocation of jurisdiction from tribal court to state court over a personal injury claim arising . . . . on Indian land . . . ." *Id.* at 1255, 1266.

Because this Compact provision refers in the disjunctive to either "a state or federal court" and a federal court here has so ruled in *Nash*, it is irrelevant that the New Mexico Supreme Court previously ruled differently on that issue in *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, 141 N.M. 269, 154 P.3d 644, and *Mendoza v. Tamaya Enterprises, Inc.*, 2011-NMSC-030, 150 N.M. 258, 258 P.3d 1050. *Cf. Nash*, 972 F. Supp. 2d at 1258-62 (discussing *Doe* and *Mendoza*). Rather, per *Doe*, this Court may not "ignore the clear language of the Compact," and "[a]s with any other contract, the choice of words can be pivotal." *Doe*, 2007-NMSC-008, ¶ 15.

Here, the quoted sentence of Section 8(A) is what has been commonly known as a condition subsequent and is now technically known as an event that terminates a duty, under which an event agreed on by the parties discharges a party's contractual obligation. *See K.L. Conwell Corp. v. City of Albuquerque*, 111 N.M. 125, 129, 802 P.2d 634, 638 (1990); *Potter v. Patterson UTI Drilling Co.*, 2010-NMCA-042, ¶ 16, 148 N.M. 270, 104 P.3d 234; Restatement (Second) of Contracts §§ 224 cmt. e, 230(1) (1981); Condition Subsequent, Black's Law Dictionary 355 (10th ed. 2014) (definition: "A condition that, if it occurs, will bring something else to an end[.]"). For this, the final decision in *Nash* ended or voided the sovereign immunity waiver otherwise previously provided in Section 8 of the Gaming Compact. This Court may neither alter that provision of the Compact nor relieve the State of New Mexico from that agreement. *See Doe*, 2007-NMSC-008, ¶ 15 (citing *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 30, 132 N.M. 207, 46 P.3d 668). If the State had

wanted to allow the Pueblo's sovereign immunity waiver to terminate some other way, it could and should have so provided, but it did not.

Nash alone aptly triggered the Compact's jurisdiction-shifting termination provision because "'[t]ribal immunity is a matter of federal law and is not subject to diminution by the states[,]'" "'thereby making any reliance on state case law interpretations of federal law and cases questionable.'" *Armijo*, 2011-NMCA-006, ¶¶ 10, 21 (quoting *Gallegos*, 2002-NMSC-012, ¶ 7 and *Bales*, 606 F. Supp. 2d at 1305). Similarly, Plaintiffs necessarily acknowledge that the Tenth Circuit in *Navajo Nation v. Dalley*, 896 F.3d 1196 (10th Cir. 2018), *reh'g denied* (10th Cir. Sept. 10, 2018), likewise has held that IGRA does not permit jurisdiction shifting in gaming compacts. Br. in Chief at 8. Absent the filing and grant of a certiorari petition and a reversal in *Dalley*, that will constitute another final federal court determination "that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court." RP 49. And as for *Nash*, this is not a matter of disregarding *Doe* or *Mendoza*, but simply applying the relevant Gaming Compact language.

B. *Plaintiffs' unsupported and irrelevant arguments about other cases cannot avoid application of this straightforward contract provision.*

While this issue was briefed and argued below, RP 91-92, 3/29/2017 Tr. 4:2-7, 5:13-7:13, it was not ruled on by the District Court, RP 206, and Plaintiffs do not address it in their Brief in Chief. Given that, Defendants respond here to Plaintiffs' opposition to this point below, RP 133-35; 3/29/2017 Tr. 16:12-17:23. Plaintiffs

there argued that *Nash* is not controlling on state courts and did not really finally determine that issue, that the court should instead follow *Doe*, *Mendoza*, and the unpublished district court decision in *Dalley*, and that the Pueblo improperly asserted that Indian tribes lack inherent power to agree to state court jurisdiction without an express grant of federal permission. *Id.* None of those arguments have any merit.

First, as noted above, this issue ultimately just concerns contract application, not precedential authority, so it does not matter that state courts are not bound to follow federal district court decisions, though both *Gallegos* and *Armijo* recognize that tribal immunity is a matter of federal law. Second, *Nash* certainly finally determined the relevant issue, as that was part of the holding in the case, *Nash*, 972 F. Supp. 2d at 1255, 1266, as *Nash* explained, *id.* at 1267. Also, the Tenth Circuit in *Dalley* understood that *Nash* determined this issue, and followed it. *See Dalley*, 896 F.3d at 1205 n.4, 1211. Third, as explained above, because of the disjunctive in the key Compact provision, the decisions in *Doe* and *Mendoza* are irrelevant. Likewise, even below Plaintiffs wrongly relied on the federal district court decision in *Dalley*, since that was on appeal and so not final, and it did not negate *Nash* previously triggering the Compact's condition subsequent. That misreliance has been confirmed since the Tenth Circuit has reversed the district court in *Dalley*.

Finally, Indian tribes certainly can waive their immunity by contract, but they also are "'free to prescribe the terms and conditions on . . . consents to be sued, and . . . . [a]ny such conditions or limitations must be strictly construed and applied.'"

Hoffman, 2010-NMCA-034, ¶ 12 (quoting *R & R Deli*, 2006-NMCA-020, ¶ 10). And here, a specific condition subsequent agreed to by the State has been triggered, thereby terminating or voiding that immunity waiver. The issue therefore is not disputing the Pueblo's ability to contract, but merely applying a contractual condition to which the State agreed. For all these reasons, this Court should recognize that the Gaming Compact's sovereign immunity waiver ended according to its own terms in 2013, based on *Nash*, before Sipp's alleged injury in 2014.

III. Federal Law Precludes State Court Lawsuits Under the Gaming Compact For Injuries Like Those Alleged Here That Do Not Result Directly From Gaming Activity.

A. **Bay Mills** ***requires limiting casino tort claim jurisdiction shifting under*** **Doe** ***and*** **Mendoza** ***to injuries that directly result from playing class III gambling, and not also off-site operations or administration.***

Plaintiffs note that this Court is not bound to follow Tenth Circuit decisions but acknowledge that this Court is bound by the United States Supreme Court. Br. in Chief at 8-9, 13. The latter matters because New Mexico courts "'are bound by decisions of the United States Supreme Court affecting federal law.'" *Katcher v. Johnson Controls World Servs., Inc.*, 2003-NMCA-105, ¶ 16, 134 N.M. 277, 75 P.3d 877 (quoting *Walker v. Maruffi*, 105 N.M. 763, 766, 737 P.2d 544, 547 (Ct. App. 1987)). In addition, courts are bound not only by the result of a prior governing decision "but also those portions of the opinion necessary to that result . . . ." *Seminole Tribe of Florida v. Florida* ("*Seminole*"), 517 U.S. 44, 67 (1996). In other

words, lower courts are bound to follow both the holding and the reasoning of the Supreme Court. *Dalley*, 896 F.3d at 1208 n.6.

All this applies here because the United States Supreme Court has held that under 25 U.S.C. § 2710(d)(7)(A)(ii), tribal sovereign immunity bars certain IGRA-related claims "because numerous provisions of IGRA show that 'class III gaming activity' means just what it sounds like—the stuff involved in playing class III games." *Michigan v. Bay Mills Indian Cmty.* ("*Bay Mills*"), 134 S. Ct. 2024, 2032 (2014). As express support for that holding, the Supreme Court first cited 25 U.S.C. § 2710(d)(3)(C)(i), the IGRA provision that authorizes tribal-state gaming compacts to address application of laws and regulations "that are directly related to, and necessary for, the licensing and regulation of such [gaming] activity[.]" 25 U.S.C. § 2710(d)(3)(C)(i); *Bay Mills*, 134 S. Ct. at 2032. As the Supreme Court explained, that and another IGRA provision make sense only if they concern "each roll of the dice and spin of the wheel" in a casino and not also "off-site . . . operation of the games." *Bay Mills*, 134 S. Ct. at 2032 (also addressing 25 U.S.C. § 2710(d)(9)). The Supreme Court further looked at numerous other provisions of IGRA and concluded that "[t]he same holds true throughout the statute[,]" namely, "gaming" means "gambling in the poker hall, not . . . off-site administrative" acts. *Bay Mills*, 134 S. Ct. at 2033 (addressing 25 U.S.C. §§ 2701(1), 2706(a)(5), 2710(b)(2)(A), 2710(b)(4)(A), 2710(c)(4), 2710(d)(1)(A), 2713(b)(1), and 2717(a)(1)).

That specific ruling and reasoning in *Bay Mills* must be followed here per *Seminole*, *Katcher*, and *Walker*, and limit the prior rulings in *Doe* and *Mendoza* on the extent to which IGRA allows Indian gaming tort-claim jurisdiction shifting. Under *Bay Mills*, tribal-state gaming compacts may only relevantly address laws and regulations "directly related to, and necessary for, the licensing and regulation of" actual gambling itself and "allocation of . . . jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations." 25 U.S.C. §§ 2710(d)(3)(C)(i), (ii). That only authorizes casino-related tort-claim jurisdiction shifting for situations where the casino "patron's injuries resulted directly from gaming activity, within the meaning of *Bay Mills*." *Dalley*, 896 F.3d at 1210 n.7. As *Dalley* explained, "[t]his conclusion is ineluctable when the plain statutory text is viewed through the prism of *Bay Mills*." *Id.* at 1208.

All this precludes the Gaming Compact from allowing jurisdiction-shifting for both Sipp's allegation of hitting his head on a garage door at a loading dock while delivering a parking lot light and Rader's derivative claims as Sipp's spouse. This conclusion simply entails recognizing that *Bay Mills* substantially limited *Doe* or *Mendoza* rather than disregarding them in favor of *Dalley*. Thus, this is most like this Court's prior recognition in *Armijo* that another United States Supreme Court decision had impliedly overruled a preceding New Mexico Supreme Court decision on application of tribal sovereign immunity. *Armijo*, 2011-NMCA-006, ¶ 21 (regarding *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998) and

Padilla v. Pueblo of Acoma, 107 N.M. 174, 754 P.2d 845 (1988)). This Court may affirm the District Court's dismissal decision on this ground even though it was not relied on below because it would not be unfair to the Plaintiffs-Appellants, since this is a legal jurisdictional issue addressed in their opening brief. *See Freeman v. Fairchild*, 2018-NMSC-023, ¶ 30, 416 P.3d 264.

B. ***Plaintiffs cannot avoid* Bay Mills' *effect here because it ruled that IGRA's provisions for gaming compacts only concern the playing of class III gambling itself.***

Plaintiffs oppose application of *Bay Mills*' jurisdictional impediment here by arguing that "*Bay Mills* considered the definition of 'gaming activity' pursuant to Section 2710(d)(7)(A)(ii)—a different provision of IGRA than at issue in *Dalley* or the present case[,]" that *Bay Mills* "was not required to consider what activities might be 'directly related to . . . gaming[,]'" and that "*Bay Mills* did not diminish the tribe's authority to contract under Sections 2710(d)(3)(C)(i) and (ii), which are the IGRA subsections implicated by the present case." Br. in Chief at 10, 13. None of those arguments are availing. First, contending that *Bay Mills* addressed a different statutory subsection than those implicated here cannot avoid the necessary effect of that decision because lower courts must follow *Bay Mills*' reasoning on the meaning of gaming activity under IGRA. *Dalley*, 896 F.3d at 1208 n.6 (rejecting similar effort to evade *Bay Mills*); *see Seminole*, 517 U.S. at 67.

Second, it is readily apparent from the key paragraph of *Bay Mills* that its consideration of Section 2710(d)(3)(C)(i) was the initial and an essential aspect of

its reasoning. Thus, *Bay Mills* might not have been required to consider the present subsection but it indisputably did, and its conclusion regarding the uniform meaning of "gaming activity" throughout IGRA was necessary to its holding. In particular, *Bay Mills*' conclusion concerning that uniform meaning in IGRA was warranted and requires reading Sections 2710(d)(3)(C)(i) and (ii) in the same limited way as Section 2710(d)(7)(A)(ii) regardless of *Dalley* because courts interpret identical words used in different parts of the same statute as having the same meaning. *Chatterjee v. King*, 2012-NMSC-019, ¶ 40 n.8, 280 P.3d 283; *see Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018). Thus, after *Bay Mills* concluded that "gaming activity" only means actual gambling "throughout" IGRA based on no less than eleven subsections of IGRA, including four subsections of Section 2710(d), *Bay Mills*, 134 S. Ct. at 2032-33, one cannot tenably assert that that term has a different meaning in Section 2710(d)(3)(C) than everywhere else in IGRA. And that precludes reading IGRA to allow jurisdiction shifting for loading dock deliveries.

Finally, Plaintiffs are correct that *Bay Mills* did not diminish tribal authority, but that misses the mark regarding *Bay Mills*' relevance here. Rather, "'judicial construction of a statute is an authoritative statement of what the statute meant'" since its enactment, *State v. Lovato*, 2011-NMCA-065, ¶ 16, 150 N.M. 39, 256 P.3d 982 (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994)). Therefore, the relevant point is that IGRA never authorized Indian tribes or states to shift their jurisdiction via gaming compacts except for enforcement of matters that

are "directly related to, and necessary for the licensing and regulation of" "playing class III games." 25 U.S.C. § 2710(d)(3)(C)(i); *Bay Mills*, 134 S. Ct. at 2032. That may allow jurisdiction-shifting for some tort claims as *Doe*, *Mendoza*, and *Dalley* recognized, but that does not reasonably extend to loading dock parking lot light delivery or derivative spousal claims as asserted here. In sum, Plaintiffs' arguments here "come[] up snake eyes, because numerous provisions of IGRA show that 'class III gaming activity' means just what it sounds like—the stuff involved in playing class III games"—and not also "off-site . . . operation" or even "necessary administrative action[.]" *Bay Mills*, 134 S. Ct. at 2032.

IV. Plaintiffs' Claims All Also Fail Because Neither Plaintiff Established that They Were a "Gaming Facility" Visitor and Rader's Claims Do Not Concern "Bodily Injury" or "Property Damage."

In their final effort to avoid affirmance, Plaintiffs contend that Sipp's claims fall within the Gaming Compact's immunity-waiving, jurisdiction-shifting provision because he was a "Gaming Facility" visitor as that term is used there. Br. in Chief at 14. For this, Plaintiffs assert that Sipp should be treated like the plaintiff person in *Guzman* rather than the business plaintiff in *R & R Deli*. *Id.* at 14-16. Plaintiffs also assert that the parking lot lights that Sipp delivered were intended "to become part of the casino[,]" that "visitor" in the Gaming Compact should be interpreted broadly, that the Compact does not require that visitors have a gaming purpose or be gaming when injured, and that the Compact uses "patron" and "visitor" differently and adopts New Mexico law in the relevant section for the meaning of "visitor." *Id.* at

14, 17-19. Plaintiffs further argue that the Compact does not require that the injury occur within a Gaming Facility, that Sipp's allegations were sufficient to establish that anyway, and that disputed jurisdictional facts implicated the merits. *Id.* at 19, 22-23. Finally, Plaintiffs argue that the Pueblo's submitted declarations were confusing and contradictory and did not negate Sipp's allegations, and that Sipp identified particular issues that required discovery. *Id.* at 23-25. Plaintiffs do not explain how Rader was a "Gaming Facility" visitor or how her claims fall within the coverage of the Gaming Compact. None of Plaintiffs' arguments have merit.

A. *Rader's derivative claims for loss of consortium, household services, and community income all necessarily fail because they are not for physical harm and she was not alleged to be a casino visitor.*

Taking the last point first, the Gaming Compact provision only concerns "claims for bodily injury or property damage" for "visitors to a Gaming Facility" and makes clear that the sovereign immunity waiver for such claims "is a limited waiver and does not waive the Tribe's immunity from suit for any other purpose." RP 49 (Compact §§ 8(A), (D)). Under any rational reading, one must still actually be visiting a Gaming Facility to be covered by this provision. Also, the use of the terms "bodily" injury" and "property damage" limits potential claims to "physical harms." *R & R Deli*, 2006–NMCA–020, ¶¶ 21, 24. That "unambiguously" precludes claims for emotional injury because those do not concern "physical damage to a patron's person or property[.]" *Holguin v. Tsay Corp.*, 2009-NMCA-056, ¶ 10, 146 N.M. 346, 210 P.3d 243; *see id.* ¶¶ 11-13. In particular, a loss of consortium claim

only concerns an emotional injury "'derivative of other injuries'" rather than a bodily injury, and so is barred by tribal sovereign immunity under the Gaming Compact. *Guzman v. Laguna Dev. Corp.*, 2009-NMCA-116, ¶ 26, 147 N.M. 244, 219 P. 3d 12. In contrast to all this, there is no allegation that Rader has suffered any "bodily injury" or that she was ever anywhere near Defendants' Gaming Facility. *See* RP 61. Instead, the closest that Plaintiffs place Rader to Defendants' premises is that she "was a resident of New Mexico at the time of" Sipp's alleged injury. RP 59. Given all this, all Raders' claims must be dismissed regardless of any other aspect of this case. Plaintiffs cannot object to these issues since they concern subject-matter jurisdiction. *See* Rule 12-321(B)(1) NMRA; *Guzman*, 2009-NMCA-116, ¶ 17 n.1.

B. *Sipp's arguments and purported discovery need cannot overcome that his allegations of loading dock parking lot light delivery as a business vendor do not make him a covered casino visitor.*

Sipp's claims fare no better than Rader's. The relevant Gaming Compact provision only protects casino patrons, guests, or customers, who ordinarily have no opportunity to negotiate the terms under which they enter a Gaming Facility. *R & R Deli*, 2006-NMCA-020, ¶¶ 21, 24-25. That contrasts with business contractors or vendors, such as Dial, which have every such opportunity to negotiate immunity waivers. *See id.* ¶ 25. The latter properly encompasses Sipp's allegations since he was at BTI's premises only while "doing business with them as an employee of Dial Electric." RP 60. To be sure, Sipp is capable of and alleges physical injuries, unlike

a business entity. RP 61. However, that does not eliminate, detract from, or otherwise render moot the business nature of his visit.

Instead, the sovereign immunity waiver must be "'express and unequivocal'" and "'strictly construed and applied.'" *Hoffman*, 2010-NMCA-034, ¶ 12 (quoting *R & R Deli*, 2006-NMCA-020, ¶ 10). Also, there is a "strong presumption against a waiver of . . . immunity[,]" with "all issues . . . interpreted favorably for the tribes and restrictively against the claimant." *Sanchez*, 2005-NMCA-003, ¶¶ 7, 16 (citations omitted). Under these strict standards for which Sipp bears the burden, *see Rosette*, 2007-NMCA-136, ¶ 26; *Kosiba*, 2006-NMCA-057, ¶ 12, the term "visitor" in the Compact must not be read overbroadly.

In addition, because the Compact is a contract, *Gallegos*, 2002-NMSC-012, ¶ 30, the Compact's visitor protection provision must be read in harmony with other Compact provisions, in accordance with basic rules of contract interpretation. *See Unified Contractor, Inc. v. Albuquerque Housing Auth.*, 2017-NMCA-060, ¶ 38, 400 P.3d 290. This includes the Compact's provisions to "provide for the physical safety of patrons in any Gaming Facility" and "provide for the physical safety of personnel employed by the Gaming Enterprise[.]" RP 37-38 (Compact §§ 4(A)(2)-(3)); *see* 3/29/2017 Tr. 24:17-22 (District Court noting former). There is no corresponding provision recognizing a need to protect business vendors and their employees. Thus, the logical, consistent, and properly narrow meaning of "visitor" in the Compact is just "casino patron or casino employee." That should not also encompass casinos'

commercial business vendors' employees, who are not expressly and unequivocally covered by the Compact, and whose employment-related personal injuries are separately required by law to be covered by their own employers' workers' compensation programs. *See* NMSA 1978 § 52-1-2. Indeed, *Guzman* undermines rather than supports Sipp's claims because that case concerned a casino employee, for whom claims might be covered by the Compact, *see* RP 37, and the claims concerning him fell within the Compact only to the extent that they fell outside the Workers' Compensation Act. *See Guzman*, 2009-NMCA-116, ¶¶ 19, 22-23.

Sipp also misplaces reliance on *Ford v. Board of County Commissioners*, 1994-NMSC-077, 118 N.M. 134, 879 P.2d 766, to assert that he falls within the scope of the Compact. Br. in Chief at 17-18. *R & R Deli* rejected reliance on *Ford* regarding interpretation of this compact language because it was only intended to cover "casino patrons" or "ordinary customers, rather than . . . entities who enter into business transactions . . . ." *R & R Deli*, 2006-NMCA-020, ¶¶ 23-25. And it is undisputed that Sipp was only at BTI's premises pursuant to a business transaction.

Sipp's additional arguments also do not meet his burden to establish an "express and unequivocal" immunity waiver for his claims. The anticipated later installation of the parking lot lights that Sipp delivered does not unequivocally make state jurisdiction over his claims "directly related to, and necessary for the licensing and regulation of" "playing class III games," as required under IGRA. As a simple

matter of logic, the mere delivery of parking lights to a loading dock is not directly involved in gaming. IGRA entails a "G" for "Gaming" not a "D" for "Delivery."

Bay Mills reinforces that by implicitly limiting jurisdiction-shifting under a gaming compact to matters with a direct nexus to gambling, which Sipp's claims are not. Also, the Compact's immunity waiver only covers injuries to "visitors to a Gaming Facility" "caused by . . . the Gaming Enterprise . . . ." RP 49. But neither the loading dock nor the delivered parking lot lights constitute part of either a Gaming Enterprise—*i.e.*, an entity authorized to conduct gaming—or a Gaming Facility—*i.e.*, a building where gaming is conducted—contrary to Sipp's allegation. *Compare* RP 60 *with* RP 36; 73 Fed. Reg. 29,354, 29,358 (May 20, 2008) (finalizing federal regulation governing acquisition of land into trust for Indian gaming, rejecting comment which suggested "adding a definition of 'gaming' that includes ancillary structures such as hotels and parking" because "it is outside the scope of the regulations and inconsistent with IGRA"). In particular, Sipp's allegation of hitting his head on a loading dock garage door, RP 61, does not establish an expressly and unequivocally covered injury given Defendants' submitted declaration that BTI's casino "does not include any receiving area with a garage-type-door[,]" RP 33. Thus, Defendants' documented factual challenge properly negated Sipp allegations. *See South*, 2014-NMCA-109, ¶ 8 ("'When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations.'") (citation omitted).

Finally, Sipp's evidentiary arguments cannot satisfy his jurisdictional burden or require a remand. The only facts about which Plaintiffs claimed below that they needed discovery concerned Defendants' interrelations. RP 136. But those do not implicate the merits since Sipp's claims could only be asserted against BTI, since no other Defendant could qualify as the potentially relevant "Gaming Enterprise" under the Gaming Compact.

For that, the Gaming Compact defines "Gaming Enterprise" as "the tribal entity created and designated by the Tribe as having the authority to conduct Class III Gaming pursuant to this Compact." RP 36 (Compact § 2(D)). To address this before the District Court, Defendants supported both of their motions to dismiss with declarations by the Pueblo's Tribal Secretary and PPGC's Director. RP 18-19 (relying on RP 28-33), 85-86 (same). Those established that the Pueblo is a sovereign tribal government, BTDA is its political subdivision, PPGC is a governmental agency, and only PGI and BTI are each a "Gaming Enterprise" as defined under the Gaming Compact, but only BTI has authority to conduct gaming at BTRC, where Sipp alleges that he was hurt, whereas PGI conducts gaming elsewhere. Compare RP 2, 60 *with* RP 29, 31-33. Indeed, this Court previously has recognized that BTDA is "a political subdivision of the Pueblo[,]" PPGC is the Pueblo's instrumentality "responsible for the issuance of gaming licenses[,]" and PGI operates "the Cities of Gold Casino[.]" *Martinez v. Cities of Gold Casino*, 2009-NMCA-087, ¶¶1, 4, 146 N.M. 735, 215 P.3d 44.

Notwithstanding Defendants raising and documenting all this in their first motion to dismiss, Plaintiffs' First Amended Complaint still made no allegations against BTDA or PPGC and only alleged that the Pueblo owns PGI and BTI, which together operate BTRC. RP 60-62. Taken alone, these limited allegations preclude any claims against the Pueblo, BTDA, or PPGC, since none of them could qualify as a potentially liable "Gaming Enterprise" under the Gaming Compact. *Compare* RP 29, 31-33 *with* RP 36, 49; *Kosiba*, 2006-NMCA-057, ¶¶ 11-12 (rejecting claims against a pueblo gaming commission). In turn, Sipp's allegations against PGI must be rejected since Defendants documented that PGI does not operate the casino where Sipp alleges he was hurt. *See* RP 29, 31-33. All that remains is Sipp's claim against BTI, which fails for all the independent reasons explained above.

CONCLUSION

For all the above reasons, the District Court's dismissal of Sipp's and Rader's claims must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendants-Appellees' Answer Brief was served on November 19, 2018 on the following via the Court's electronic filing and service system:

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