IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

JEREMIAH SIPP, aka
SAGE RADER, and HELLA RADER

Plaintiffs-Appellants,

vs.

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

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

Defendants-Appellees.

BRIEF IN CHIEF

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Oral Argument Requested

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I. SUMMARY OF PROCEEDINGS

This appeal stems from the dismissal of the personal injury complaint filed by appellants Jeremiah Sipp, aka Sage Rader, and Hella Rader (collectively, "Mr. Rader"). The district court dismissed all claims against all defendants, including Buffalo Thunder, Inc. ("BTI"), Buffalo Thunder Development Authority, the Pueblo of Pojoaque, the Pueblo of Pojoaque Gaming Commission, and Pojoaque Gaming, Inc. ("PGI").[1] The district court determined that Mr. Rader's claims did not fall within the Pueblo's waiver of sovereign immunity and granted the Pueblo's motion to dismiss. Because Mr. Rader's allegations sufficiently allege circumstances that fall within the immunity waiver, this Court should reverse the district court's order of dismissal and remand for further proceedings.

I. STATEMENT OF FACTS

The Pueblo and the State of New Mexico entered into the *Tribal-State Class III Gaming Compact Pueblo of Pojoaque-State of New Mexico* ("the Compact"). **[RP 034]** Pursuant to the Compact, the Pueblo waived sovereign immunity for injuries to visitors to a "Gaming Facility" that were caused by the conduct of the "Gaming Enterprise." **[RP 049]** Section 8 of the Compact, titled "Protection of Visitors," specifically states as follows:

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[1] Because the district court did not differentiate between the claims of the two plaintiffs against any of the defendants, Mr. Rader refers to all defendants as "the Pueblo," unless an entity is specifically identified.

> Policy Concerning Protection of Visitors. The safety and protection of visitors to a Gaming Facility is a priority of the Tribe, and it is the purpose of this Section to assure that any such persons who suffer bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise have an effective remedy for obtaining fair and just compensation. To that end, in this Section, and subject to its terms, the Tribe agrees to carry insurance that covers such injury or loss, agrees to a limited waiver of immunity from suit, and agrees to proceed either in binding arbitration proceedings or in a court of competent jurisdiction, at the visitor's election, with respect to claims for bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise. For purposes of this Section, any such claim may be brought in state district court, including claims arising on tribal land, unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitor's personal injury suits to state court.

[RP 049] The Compact defines "Gaming Enterprise" as "the tribal entity created and designated by the Tribe as having authority to conduct Class III Gaming pursuant to this Compact." **[RP 036]** The Compact further defines "Gaming Facility" as "the buildings or structures in which Class III Gaming is conducted on Indian Lands." **[RP 036]**

Mr. Rader alleged the following facts in his *First Amended Complaint for Damages*, filed November 28, 2016. **[RP 059]** Mr. Rader worked for Dial Electric, from which BTI purchased electric lights and supplies for installation in the casino parking lot. **[RP 060]** The lights purchased were to be installed in part of the "Gaming Enterprise and Gaming Facility" as defined in the Compact. **[RP 060, 034, 36]** Mr. Rader was on the premises of Buffalo Thunder to deliver the lights. **[RP 060]** While delivering the lights, Mr. Rader was moving in and out of a receiving

area of Buffalo Thunder, when a Buffalo Thunder employee lowered the electric garage door and struck Mr. Rader's head. [**RP 061**] Mr. Rader was rendered unconscious and suffered severe head and spinal injuries. [**RP 061**]

The Pueblo moved to dismiss the *First Amended Complaint* for lack of subject matter jurisdiction. [**RP 084**] The Pueblo argued, in relevant part, that no waiver of sovereign immunity permitted suit based on either federal law or the Compact. [**RP 088, 90-93**] The Pueblo provided two declarations. The Crosby Declaration states that BTI is a "tribally-chartered, for-profit corporation wholly owned by Pueblo for the purpose of developing, constructing, operating, and managing Buffalo Thunder Resort®, a trade name that is not a legal entity." [**RP 029**] The Padilla Declaration states that BTI has a license to conduct gaming at Buffalo Thunder Resort and Casino®, which includes both Buffalo Thunder Resort® and a "physically distinct casino." [**RP 033**] The Padilla Declaration further states that BTI is a Gaming Enterprise pursuant to the Compact, BTI "is only authorized by its license . . . to operate gaming at that casino," and the casino had no garage door. [**RP 033**] As a result, the Pueblo maintained that the injury did not occur at a "Gaming Facility" as defined by the Compact. [**RP 093**] The Pueblo additionally argued that because Mr. Rader was not present at the casino to gamble or play games, he was not a "visitor" pursuant to the Compact. [**RP 093**]

Mr. Rader responded and argued that (1) the district court was obligated to assume the factual allegations made in the complaint are true; (2) state courts have subject matter jurisdiction over personal injury actions filed against tribal entities arising from the negligent acts of casinos owned and operated by tribal entities; and, (3) the Compact waives immunity for visitors and is not limited to "casino patrons." **[RP 129-30, 132, 135-36]** Mr. Rader additionally asserted that the receiving area and the casino were housed in one building. **[RP 136]** Last, Mr. Rader requested discovery, if the district court was inclined to determine the allegations in the *First Amended Complaint* were insufficient to establish subject matter jurisdiction. **[RP 136]** At the hearing on the *Motion*, Mr. Rader argued that the Pueblo's Padilla Declaration did not establish that the casino and the rest of the resort were separate buildings. **[3-29-17 TR 14:15-15:10, 23:2-7]** Mr. Rader additionally argued that he did not have to be a "casino patron" to be a visitor under the Compact. **[3-29-17 TR 15:25-16:11]**

The district court granted the Pueblo's motion to dismiss. **[RP 205; 11-1-17 CD 11:36:28-11:40:50]** In its *Order Granting Motion to Dismiss*, the district court noted the definition of "Gaming Facility" as well as the Compact's policy concerning protection of "visitors." **[RP 206]** Ultimately, the district court concluded that Mr. Rader's allegations did not "fall within the above immunity-

waiver, visitor-protection provision of the Compact." [**RP 206**] Mr. Rader appeals the district court's dismissal of his complaint.

II. ARGUMENT

The district court incorrectly dismissed Mr. Rader's case for lack of subject matter jurisdiction. Contrary to the district court's determination, Mr. Rader was a visitor who fell within the immunity-waiver, visitor-protection provision of the Compact. Mr. Rader preserved the arguments on appeal in *Plaintiffs' Response to Defendants' Motion to Dismiss First Amended Complaint for Lack of Subject Matter Jurisdiction* [**RP 126-137**] and by his arguments at the March 29, 2017 Hearing on the *Motion*, as set forth with citations to the record in the preceding section.

This Court reviews *de novo* the question of a tribe's sovereign immunity. *Martinez v. Cities of Gold Casino*, 2009-NMCA-087, ¶ 22, 146 N.M. 735. Generally, in a motion to dismiss brought under Rule 1-012(b)(6) NMRA, this Court may accept as true the facts pleaded in the complaint and review *de novo* the trial court's application of the law to the facts. *R & R Deli, Inc. v. Santa Ana Star Casino*, 2006-NMCA-020, ¶ 2, 139 N.M. 85 ("*R & R Deli*"). "A complaint should not be dismissed unless there is a total failure to allege some matter essential to the relief sought" and for the purposes of a motion to dismiss, this Court considers "whether the plaintiff might prevail under any state of facts provable under the claim." *Guzman v. Laguna*

Dev. Corp., 2009-NMCA-116, ¶ 16, 147 N.M. 244 (internal quotation marks and citation omitted).

If, however, the motion to dismiss factually attacks the basis for the district court's subject matter jurisdiction, pursuant to Rule 1-012(B)(1) NMRA, the district court may review evidence outside the complaint and decide disputed questions of fact. *See South v. Lujan*, 2014-NMCA-109, ¶ 8, 336 P.3d 1000. The *South* Court explained that the district court *may* consider evidence when addressing a Rule 1-012(B)(1) motion and that the motion is *not* converted to a motion for summary judgment. 2014-NMCA-109, ¶ 9. If the "resolution of the jurisdictional question is intertwined with the merits of the case," however, "the court is required to convert a [Rule 1-012(B)(1)] motion to dismiss to a Rule [1-012(B)(6)] motion . . . or a summary judgment motion." *South*, 2014-NMCA-109, ¶ 9 (alterations in original). Under Rule 1-056 NMRA, summary judgment is appropriate only if there are no disputed material facts and the burden shifts to the party opposing summary judgment if the proponent of summary judgment establishes a prima facie case that no genuine issue of material fact prevents summary judgment. Rule 1-056(B), (C); *Lexington Ins. Co. v. Rummel*, 1997-NMSC-043, ¶ 9, 123 N.M. 774.

The district court had subject matter jurisdiction over the lawsuit and the Pueblo waived its sovereign immunity over personal injury suits like Mr. Rader's. Mr. Rader further sufficiently alleged that he was a visitor to a Gaming Facility who

was injured as a result of the conduct of the Gaming Enterprise. The district court should have determined either that Mr. Rader's allegations (1) were sufficient to establish jurisdiction or (2) raised a disputed question of fact relating to subject matter jurisdiction that warranted further discovery. This Court should reverse the district court's ruling and remand for discovery and trial.

A. The District Court Had Jurisdiction Pursuant to the Compact Over Personal Injury Lawsuits Arising from Injuries to Visitors

Generally, Indian tribes have common-law sovereign immunity from suit. *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 7, 132 N.M. 207. Congress, however, can authorize suits against tribes through legislation. *Id.* A tribe can also waive its own immunity. *Id.* The Indian Gaming Regulatory Act ("IGRA") is a federal law that "provides a comprehensive regulatory framework for gaming activities on Indian lands" and establishes "the framework under which Indian tribes and states could negotiate compacts permitting Class III gaming on Indian reservations located within state territory." *Gallegos*, 2002-NMSC-012, ¶ 9 (internal quotation marks and citations omitted).

According to IGRA, tribes and states may enter into compacts—like the Compact at issue in the present case—concerning "gaming activities on Indian lands." 25 U.S.C. § 2710(d)(3)(B). Tribes and the states can negotiate provisions relating to both (1) "the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the

licensing and regulation of such activity;" and (2) "the allocation of criminal and civil 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). The New Mexico Supreme Court has construed Section 2710(d)(3)(C)(i) & (ii) to permit the states and tribes to negotiate the choice of forum and choice of law for visitors' personal injury lawsuits and to shift jurisdiction to state courts. *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, ¶ 45, 141 N.M. 269.

The Tenth Circuit Court of Appeals recently decided to the contrary and held that IGRA does not permit tribes to bargain for jurisdiction shifting in gaming compacts. *Navajo Nation v. Dalley*, 896 F.3d 1196, 1200 (10th Cir. 2018). In the district court, the Pueblo argued that federal law governs the subject-matter jurisdiction inquiry because, tribal sovereign immunity is "'a matter of federal law and is not subject to diminution by the states'" and reliance on state interpretations of federal law is therefore "'questionable.'" [**RP 092**, quoting *Armijo v. Pueblo of Laguna*, 2011-NMCA-006, ¶¶ 10, 21, 149 N.M. 234]

The decisions of the Tenth Circuit Court of Appeals, however, are not binding on this Court. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 58, n.11 (1997); *Lockhard v. Fretwell*, 506 U.S. 364, 37-76 (1993) (Thomas, J., concurring); *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 610 (1989); *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶58, 130 N.M. 386 (Serna, J., concurring). The Supremacy Clause

does not require state courts to defer to federal circuit courts, even regarding questions of federal law:

> Although the state courts are not bound to adhere to federal standing requirements, they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law. Indeed, inferior federal courts are not required to exist under Article III, and the Supremacy Clause explicitly states that 'the Judges in every State shall be bound' by federal law.

ASARCO, Inc., 490 U.S. at 610. This Court is, however, bound by the decision of the New Mexico Supreme Court in *Doe v. Santa Clara Pueblo*. *See Alexander v. Delgado*, 1973-NMSC-030, ¶¶ 9-10, 84 N.M. 717 ("Implicit in [NMSA 1978, Section 16-7-14 (1972)] is the concept that the Court of Appeals is to be governed by the precedents of this court."); *see also State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 20, 135 N.M. 375; *Hoffman v. Sandia Resort & Casino*, 2010-NMCA-034, ¶ 5, 148 N.M. 222 ("[The Court of Appeals has] no authority to decline to follow precedent established by our superior courts.").

In the district court, the Pueblo characterized reliance on state law, and *Doe v. Santa Clara Pueblo* as "questionable," because tribal sovereign immunity is a matter of federal law and "is not subject to diminution by the states." [**RP 092**] In the present case, however, reliance on *Doe* is not "questionable," because the New Mexico Supreme Court in no way diminished tribal sovereignty. To the contrary, the *Doe* Court determined that IGRA "envisioned, and authorized tribes to contract for

jurisdiction shifting, if they wished, as part of a much larger, global settlement of complex issues that was necessary to make tribal gaming work." *Doe*, 2007-NMSC-008, ¶ 45. The *Doe* Court read federal law, IGRA, to authorize tribes to address the question of subject matter jurisdiction independently, to achieve negotiation goals. This approach by the *Doe* Court broadens, not diminishes, tribal sovereignty. Thus, the deference to federal law for the purpose of assuring broad tribal sovereignty is not served by reliance on federal law to the total degradation of the *Doe* Court's holding.

The Tenth Circuit in *Dalley* concluded that tribes do not have authority to negotiate subject matter jurisdiction in gaming compacts that are authorized by IGRA. 896 F.3d at 1200. The *Dalley* Court limited the tribe's authority to contract and negotiate regarding its own immunity. In reaching this conclusion, the *Dalley* Court relied on the Supreme Court of the United States decision in *Michigan v. Bay Mills Indian Cmty*, 134 S.Ct. 2024 (2014) ("*Bay Mills*"). *Dalley*, 896 F.3d at 1209. The question in *Bay Mills* was whether "tribal sovereign immunity bars Michigan's suit against the Bay Mills Indian Community for opening a casino outside Indian lands." *Bay Mills*, 134 S.Ct. at 2028. In considering whether IGRA permitted the tribe to negotiate a sovereign immunity waiver, the *Bay Mills* Court 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. *Bay Mills*, 134 S.Ct.

at 2032. The Court concluded that "gaming activity" means "the stuff involved in playing Class III games." *Id.*

The *Dalley* Court extended the *Bay Mills* holding to different subsections of IGRA—Section 2710(d)(3)(C)(i) & (ii)—which permits the tribe to negotiate "the application of criminal and civil laws and regulations of the Indian Tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity," as well as the allocation of jurisdiction "between the State and the Indian Tribe necessary for the enforcement of such laws and regulations." *Id.* The *Dalley* Court determined that because "such activity" must refer to "gaming activity" as defined in *Bay Mills*, a personal injury claim arising from a slip-and-fall in the casino bathroom was not "directly related, and necessary for, the licensing and regulation of" gaming activity, and the tribes did not have authority under IGRA to negotiate jurisdiction. *Dalley*, 896 F.3d at 1210.

The New Mexico Supreme Court in *Doe* evaluated the meaning of "directly related to, and necessary for" and concluded that, based on an extensive analysis of IGRA's legislative history and other provisions of the Compact, "Congress intended the compacting provision of IGRA to allow the states and tribes broad latitude to negotiate regulatory issues." *Doe*, 2007-NMSC-008, ¶ 45. Provisions relating to a multitude of issues were included in the Compact, "just as the jurisdiction shifting provision was included, because the State and the Pueblos understood their

importance, and IGRA allows the two interested parties to work such matters out for themselves." *Id.* ¶ 43. The *Doe* Court acknowledged that the tribe should have expansive autonomy to negotiate contracts. The *Dalley* Court found the *Doe* Court's reliance on IGRA's legislative history to be "mistaken," based on the *Bay Mills* decision. *Dalley*, 896 F.3d at 1209.

The *Bay Mills* Court, however, did not address the meaning of "directly related to, and necessary for" any activity, because the issue before the *Bay Mills* Court was whether a different subsection of IGRA permitted a state to sue a tribe "to enjoin class III gaming activity on Indian lands and conducted in violation of any Tribal-State compact . . . that is in effect." *Bay Mills*, 134 S.Ct. at 2028-29. To address the state's argument, the *Bay Mills* Court needed to determine whether the tribe's authorization, licensure, and operation of the casino from Indian lands was sufficient "gaming activity on Indian lands" to authorize suit by the state in federal court, even though the casino was not on Indian lands. *Id.* at 2032. The state of Michigan's argument in support of federal jurisdiction failed, because the Court determined that "gaming activity" meant "just what it sounds like—the stuff involved in playing class III games," and other sections separately addressed the regulation and licensing of gaming activities. *Id.* at 2032-33. The *Bay Mills* Court therefore concluded that the gaming activity occurring in a casino located outside of Indian lands did not trigger federal court jurisdiction for the state of Michigan under

IGRA, even though the tribe conducted the casino's operations from Indian lands. *Id.* at 2032-33. The *Bay Mills* Court was not required to consider what activities might be "directly related to, and necessary for, the licensing and regulation" of "gaming activity" or what might be necessary for "the enforcement of such laws and regulations[.]" Sections 2710(d)(3)(C)(i), (ii). The definition of "gaming activities" as set forth by the *Bay Mills* Court 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.

This Court is bound only by the New Mexico Supreme Court and the Supreme Court of the United States. The New Mexico Supreme Court has evaluated IGRA and determined that the tribe had broad authority to negotiate the question of jurisdiction and sovereign immunity. *Doe*, 2007-NMSC-008, ¶45. The Supreme Court of the United States has not held to the contrary. Pursuant to *Doe*, under Section 8 of the Compact, the state district court has jurisdiction over, and the Pueblo has waived its immunity for, a personal injury law suit by a visitor to a Gaming Facility for injury or property damage proximately caused by the conduct of the Gaming Enterprise. [**RP 049**] Thus, pursuant to the Compact, the Pueblo waived its sovereign immunity for Mr. Rader's personal injury claim if he was a "visitor" to "a Gaming Facility" and his injury was caused by the conduct of a "Gaming Enterprise" under the Compact.

B. Mr. Rader Was A Visitor Pursuant to the Compact and His Allegations Therefore Fell Within the Immunity-Waiver, Visitor-Protection Provision of the Compact

In district court, the Pueblo argued that Mr. Rader was not a visitor, because he was acting as an employee delivering lights when he was injured. [**RP 092-93**] Mr. Rader's visitor status, however, was a factual matter and his allegations were sufficient to withstand the Pueblo's motion to dismiss. Mr. Rader alleged that he was a New Mexico resident at the time of the injury and that BTI was the entity through which the Pueblo does business at the Buffalo Thunder resort. [**RP 059-60**] According to the *First Amended Complaint*, BTI purchased the lights and supplies from Mr. Rader's employer and Mr. Rader was delivering the lights that BTI purchased when he was injured. [**RP 060**] Mr. Rader alleged that the lights were intended to be installed in the casino parking lot and to become part of the casino. [**RP 060-61**]

Whether a plaintiff is a "visitor" as contemplated by the Compact is a question of fact. *Guzman*, 2009-NMCA-116, ¶ 17. "Both patrons and guests of a gaming enterprise are included under the term visitor as used in the waiver." *Id.* ¶ 18 (citing *R & R Deli*, 2006-NMCA-20, ¶ 25). In *Guzman*, an employee of a Native American tribal entity consumed alcohol during his shift, clocked out of work, had a conversation about a possible promotion, and after leaving, got into a fatal car crash on the way home. 2009-NMCA-116, ¶ 3. The defendant tribal entity in *Guzman*

relied on this Court's decision in *R &R Deli* and argued that as a matter of law, the employee was not a "visitor" because he was an employee of the tribe and "not like a regular patron or guest to whom the waiver applies." *Id.* ¶ 19.

In *R & R Deli*, this Court considered whether a similar tribal-state compact waived immunity for suits based in contract and tort arising from cancellation of a restaurant lease that was located within a casino on tribal property. 2006-NMCA-020, ¶¶1, 2. The *R & R Deli* Court held that "the drafters of the gaming compact intended to provide a limited waiver of sovereign immunity for purposes of providing a remedy to casino patrons who suffer physical injury to their persons or property." *Id.* ¶ 24. The *Guzman* Court noted that the *R &R Deli* Court held that "[b]usiness entities 'who enter into business transactions with the Pueblo' are not considered visitors to whom the waiver applies." *Guzman*, 2009-NMCA-116, ¶ 18 (quoting *R & R*, 2006-NMCA-20, ¶ 25). The *Guzman* Court continued, however, and explained that the *R & R* holding was based in part on the relative bargaining position of two business entities and the "the unremarkable fact that business entities cannot suffer the type of 'bodily injury' contemplated in the waiver." 2009-NMCA-116, ¶ 21. The Court determined that the bargaining position of an employee, like the *Guzman* employee, was not analogous to the bargaining power of a business entity in *R & R*. *Guzman*, 2009-NMCA-022, ¶ 21. Because the *Guzman* employee was "a person capable of suffering a physical injury to his person or property," the

Guzman plaintiff could plead "and at least attempt to prove that their claims [fell] within the waiver provision." *Id.* ¶ 22.

At the time of the incident, Mr. Rader was a person capable of suffering physical injury to his person or property, just as the *Guzman* employee was a person capable of suffering physical injury to his person or property. *See Guzman*, 2009-NMCA-116, ¶ 22. The *Guzman* Court addressed the *R & R* holding in two ways. First, *Guzman* broadened the definition of "visitor" to include "[b]oth patrons and guests of a gaming enterprise." 2009-NMCA-116, ¶ 18. Second, *Guzman* had the effect of limiting the application of the *R &R* holding to cases involving contracts between tribes and business entities. *Guzman*, 2009-NMCA-116, ¶ 22. The *Guzman* Court did not focus on whether the injured person was an employee or a slot-machine player. *Id.* Mr. Rader is like the employee leaving work in *Guzman*—a person capable of sustaining injury—and nothing like the restaurant negotiating a lease in *R & R*, which was an entity that could contract for a remedy and could not suffer personal injury.

In the district court, the Pueblo argued that to be a visitor, Mr. Rader had to have a "gaming purpose." [**RP 093, 3.29.17TR7:23-8:1, 25:24:-26:4**] The Compact does not support this argument, nor does *Bay Mills*, the case on which the Pueblo relied. In Section 8, the Compact notes only that the "safety and protection of visitors to a Gaming Facility is a priority of the Tribe" and continues to outline the agreement

as it relates to personal injury lawsuit. The Compact does not require that visitors have a "gaming purpose" or that visitors be in the act of gaming when they are injured for the Compact's protections for visitors to apply. Further, although *Bay Mills* defines "gaming activity" narrowly for the purposes of the jurisdictional question at issue in that case, the *Bay Mills* Court's construction of the IGRA term "gaming activity" does not directly inform what the parties meant by "visitor" in Section 8 of the Compact. The *Bay Mills* decision does not address the meaning of the word "visitor" in a tribal-state compact. No question arose in *Bay Mills* about which visitors or what type of visitors the compacts intended to or could protect. Thus, the *Bay Mills* Court's construction of the IGRA term "gaming activities" does not limit the meaning of "visitor" as used in Section 8 of the Compact.

The term "visitor" is limited in Section 8 only by the phrase "to a Gaming Facility." The meaning of "visitor" in New Mexico law has long been broadly understood to have a broad and encompassing meaning: "[a] visitor is a person who enters or remains upon the premises with the [express] [or] [implied] permission of the [owner] [occupant] of the premises." UJI 13-1302 NMRA. In 1994, the New Mexico Supreme Court rejected long-standing common law distinctions between business and public invitees.

> A landowner or occupier of premises must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of the injury, and the burden of avoiding the risk. This duty

> of care shall extend to all persons, other than trespassers, who enter property with the defendant's consent, express or implied.

Ford v. Bd. of County Comm'rs, 1994-NMSC-077, ¶ 7, 118 N.M. 134; *see* UJI 13-1302 NMRA). The general duty to all persons is in line with the broad construction of "visitor" outlined in *Guzman*, which includes persons who are injured and does not consider the injured person's status as an employee. *Guzman*, 2009-NMCA-022, ¶ 22. The *R & R Deli* plaintiff relied on UJI 13-1302 and *Ford* to argue that the contracting restaurant was a "visitor" under the Compact, and the *R & R Deli* Court was not persuaded by the argument. *R & R Deli*, 2006-NMCA-020, ¶¶ 23-24. The Court stated that the plaintiff "has not shown how the definitions used in the UJI or the distinction between licensees and business visitors eliminated in *Ford* would inform our inquiry into the intent of the drafters of the gaming compact." *R & R Deli*, 2006-NMCA-020, ¶ 24. The UJI and *Ford* are relevant to the Compact drafter's intent, because the Compact adopts New Mexico law, New Mexico law at the time the Compact was drafted was clear, and the parties to the Compact used the term "visitor" and "patron" distinctly.

At the time the Compact was drafted in 2005, the state of New Mexico law regarding "visitors" was clear and broad: "A visitor is a person who enters or remains upon the premises with the [express] [or] [implied] permission of the [owner] [occupant] of the premises." UJI 13-1302 (as amended in 1996). [**RP 057**] Section 8 of the Compact adopts the law of the State of New Mexico for claims brought

pursuant to the "Policy Concerning Protection of Visitors" section. [**RP 049-50**] The Compact further uses the term "visitor" in its "Policy Concerning Protection of Visitors," and uses the term "patron" in other sections. [**RP 037, 49-50**] The drafters of the Compact clearly drew a distinction between the two terms and used the broader term in the "Policy Concerning Protection of Visitors" section of the agreement. The adoption of New Mexico law in Section 8, New Mexico's longstanding broad treatment of visitors, as well as the use of the term "visitor," as opposed to "patron," in the Protection of Visitors Section, indicate the drafter's intent to incorporate existing visitor protections under New Mexico law into the Compact.

Mr. Rader was a visitor, pursuant to the Compact, and as a result, the waiver of sovereign immunity in this case applies to Mr. Rader's allegations. This Court should therefore reverse the district court's dismissal order and remand for further proceedings.

C. Mr. Rader Was A Visitor to A "Gaming Facility" and His Allegations Therefore Fell Within the Immunity-Waiver Under the Compact

The Pueblo maintained in the district court that Mr. Rader's injuries did not happen while he was a visitor in a Gaming Facility and provided declarations in support of that position. [**RP 031-33, 92-93**] The Compact, however, does not require that the injury occur within a Gaming Facility, Mr. Rader's allegations were sufficient to establish that he was a visitor to the Gaming Facility, and the

declarations did not refute Mr. Rader's allegations. This Court should reverse the order of dismissal.

The Compact provides that the "safety and protection of visitors to a Gaming Facility is a priority of the Tribe" and that the purpose of the "Protection of Visitors" section of the Compact, Section 8, is designed to assure that "any such persons who suffer bodily injury . . . proximately caused by the conduct of the Gaming Enterprise have an effective remedy[.]" **[RP 049]** Thus the Compact provides a remedy for visitors to a Gaming Facility who are injured by the conduct of the Gaming Enterprise. The Compact does not require that the injury occur within the Gaming Facility.

The *First Amended Complaint* alleges that BTI does business as Buffalo Thunder Resort and Casino and purchased the lights that Mr. Rader was delivering when he was injured and that the employee who dropped the garage door on Mr. Rader was a "Buffalo Thunder" employee. **[RP 060]** The allegations further state that the lights were intended to be part of the Gaming Facility. A reasonable inference arises that the BTI purchased the lights to be delivered to the casino, the Gaming Facility. **[RP 060]** *See Aetna Cas. & Sur. v. Bendix Control Div.*, 1984-NMCA-029, ¶ 17, 101 N.M. 235 (noting that to plead sufficient personal jurisdiction, the pleader "must state sufficient facts in the complaint to support a reasonable inference that defendant can be subjected to jurisdiction within the state."

(internal quotation marks and citation omitted)). The reasonable inference is that BTI ordered and purchased the lights for the casino, requested delivery of the lights to that facility, and Mr. Rader delivered the lights to BTI—Mr. Rader was on the casino premises because of BTI's invitation. These allegations were sufficient to establish subject matter jurisdiction and a waiver of sovereign immunity under the Compact.

In the district court, the Pueblo maintained that the burden shifted to Mr. Rader to refute the Pueblo's evidence with evidence and affidavits. [**RP 143**] Nothing suggests, however, that the burden shifts to the proponent of jurisdiction—Mr. Rader—in motions to dismiss for lack of subject matter jurisdiction on sovereign immunity questions. The Pueblo pointed to personal jurisdiction cases to argue that the burden shifted to Mr. Rader to produce evidence to refute the Pueblo's declarations and other evidence. [**RP 143**] Specifically, the Pueblo cited *Doe v. Roman Catholic Diocese Boise, Inc.*, 1996-NMCA-057, 121 N.M. 738. [**RP 143**]

In that case, the defendant challenged personal jurisdiction under Rule 12(B)(2)—governing personal jurisdiction motions—and the Court held that after a timely motion under that rule, the proponent of personal jurisdiction bore the burden to establish jurisdiction. *Id.* ¶ 9. Pursuant to the *South* decision, however, a motion under Rule 1-012(B)(1) *may* rely on additional evidence by the party opposed to jurisdiction, but if the contested jurisdictional facts implicate the merits of the case,

the motion must be treated as either a Rule 1-012(B)(6) motion—and the allegations presumed to be true—or a Rule 1-056 motion—where disputed facts prevent summary judgment. *South*, 2014-NMCA109, ¶ 9. The *South* Court further explained that the defendant, and not the jurisdictional proponent, bears the burden to show a lack of jurisdiction. *Id.* ¶ 14. Thus, *South* treats Rule 1-012(B)(2) motions attacking subject matter jurisdiction differently that Rule 1-012(B)(1) motions attacking personal jurisdiction. Nothing in *South* suggests that an evidentiary burden shifts to the plaintiff at the motion to dismiss stage in a Rule 1-012(B)(2) motion, particularly if the facts implicate the merits of the case.

The disputed jurisdictional facts in the present case implicate the merits of the case. The parties contest whether Mr. Rader was invited to a Gaming Facility and by which entity. These facts implicate the merits of the case: the existence of a duty, the reasonableness of any defendant's actions, and who caused Mr. Rader's injury. As a result, the district court was required to decide the matter based on the truth of the allegations—which is what the court did—or convert the motion to a motion for summary judgment. If the Court had converted the motion, which it did not, Mr. Rader would be entitled to "an opportunity to respond to the introduction of material outside the pleadings" and comply with the requirements of Rule 1-056. *Ennis v. Kmart Corp.*, 2001-NMCA-068, ¶ 21, 131 N.M. 32. The Pueblo specifically argued to the district court that the motion should not be converted to a motion for summary

judgment. [**RP 089, 143**] Mr. Rader therefore did not respond in a manner consistent with Rule 1-056. Mr. Rader did, however, identify, in the alternative, particular issues that would require discovery. [**RP 136**] Mr. Rader requested discovery regarding the relationships between the defendant entities, their responsibilities, and their legal status. [**RP 136**] These are matters uniquely within the Pueblo's knowledge. Limited discovery, on the issues relating to subject matter jurisdiction, would have been appropriate to permit Mr. Rader to develop evidentiary support for his jurisdictional allegations. *See Doe v. Roman Catholic Diocese Boise, Inc.*, 1996-NMCA-057, ¶ 8 (explaining that in the context of personal jurisdiction issues, the district court may "permit discovery to help decide the issue"). If the district court were to have converted the motion to a motion for summary judgment, it should have permitted Mr. Rader to conduct limited discovery.

Even if the district court could have properly relied on the Pueblo's evidence, the Pueblo's declarations do not negate Mr. Rader's allegations in the *First Amended Complaint*, or any reasonable inferences that could be drawn. The Padilla Declaration states in part as follows:

> [Pueblo of Pojoaque Gaming Commission ("PPGC")] has issued to [BTI] a license as a Gaming Enterprise with authority to conduct gaming at Buffalo Thunder Resort and Casino ("BRTC"). BRTC is a trade name that is not a legal entity, which encompasses both (1) Buffalo Thunder Resort ("BTR"), another trade name that is not a legal entity, which refers to various hotel and resort facilities that do not include any gaming, and (2) a physically distinct casino. BTI is only authorized by its license from PPCG to operate gaming at that casino,

> which does not include any receiving area with a garage-type door. I know this because in my position as PPGC Director I regularly inspect the BTI Gaming Facility to ensure compliance with the Ordinance, including that gaming by BTI does not take place anywhere besides that Gaming Facility.

[**RP 033**] The Crosby Declaration states that BTI was created for the purpose of developing, constructing, operating, and managing the "Buffalo Thunder Resort." [**RP029**] The Padilla Declaration states the "Buffalo Thunder Resort and Casino®" encompasses both (1) the Buffalo Thunder Resort including "various hotel and resort facilities that do not include any gaming" and (2) "a physically distinct casino." [**RP 033**] The Padilla Declaration states both that BTI is licensed to conduct gaming at the entire "Buffalo Thunder Resort and Casino®" and that BTI is authorized only to operate gaming at the casino. [**RP 033**] The Padilla Declaration asserts that the casino has no receiving area with a garage door. [**RP 033**]

The Padilla and Crosby Declarations are confusing and appear contradictory. The Crosby Declaration limits BTI's authority to operational oversight of the resort—which according to the Padilla Declaration does not include the casino. The Padilla Declaration indicates that BTI has a license to operate gaming both (1) in the resort and the casino together, though the resort facilities "do not include any gaming" and (2) only in the casino. It is not clear whether BTI had oversight of operations in the casino or only over gaming. The Padilla Declaration does not explain what it means that the casino is "physically distinct" and does not state that

the casino is in a separate building from other resort buildings or that the garage door/receiving area is in a separate building from the casino. Neither declaration contradicts Mr. Rader's allegation that the lights were to be made part of the Gaming Facility or that BTI ordered the lights to become part of the Gaming Facility. Neither declaration states that some entity other than BTI oversees or controls deliveries for the casino. A reasonable inference arises that BTI ordered lights for the Gaming Facility and caused them to be delivered to the Gaming Facility.

The declarations do not establish that Mr. Rader did not visit a Gaming Facility to deliver the lights that the Gaming Enterprise that ordered and purchased. Based on BTI's order and request for the lights to be delivered, Mr. Rader was a visitor of a Gaming Facility, which is all that is required by the Compact, with relation to the Gaming Facility, to implicate the Visitor Protection Policy.

Mr. Rader's allegations supported a determination that he was a visitor to a Gaming Facility under the Compact. The Pueblo's evidence did not refute those allegations and if the Pueblo's evidence created a material dispute of fact, the district court should have permitted additional limited discovery. Mr. Rader requests that this Court reverse the district court's order and remand for further proceedings.

III. CONCLUSION

The allegations were sufficient to establish that Mr. Rader was a visitor to a Gaming Facility. The district court relied on Mr. Rader's allegations, which were

sufficient to establish the district court's jurisdiction. Even considering the Pueblo's declarations, the facts asserted in the declarations do not refute the district court's jurisdiction. The district court had subject matter jurisdiction, the Pueblo waived its sovereign immunity, and the unrefuted allegations were sufficient to establish the district court's jurisdiction. This Court should reverse the district court's dismissal and remand for further proceedings.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 2018, a copy of the foregoing document was filed electronically and served via the Odyssey system to counsel of record, including:

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief uses proportionally-spaced type style (Times New Roman), contains 6470 words in the body of the brief as defined by Rule 12-213(F)(1) NMRA, and complies with the type limitation set forth in 12-213(F)(3) NMRA. The word count set forth was obtained from the word processing program Microsoft Word 2007.

/s/ Katherine Wray
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