IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

RICHARD ROSS BOWEN,

Plaintiff-Appellant,

vs.

No. CV-2007-061
Court of Appeals No. 29,625

MESCALERO APACHE TRIBE,

Defendant-Appellee.

ANSWER BRIEF

On Appeal from the Twelfth Judicial District Court
Lincoln County, New Mexico
The Honorable Karen Parsons, Presiding

KELEHER & McLEOD, P.A.
David W. Peterson
Thomas C. Bird
Javier Junco
Post Office Box AA
Albuquerque, New Mexico 87102
Telephone: (505) 346-4646

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I. SUMMARY OF THE PROCEEDINGS

The Mescalero Apache Tribe (the "Tribe") respectfully submits this Answer Brief to address the arguments presented in Mr. Bowen's Brief-in-Chief. ["BIC"]. The Summary of Proceedings set out in Mr. Bowen's brief does not fully recount the relevant history of the case. The Tribe respectfully submits the following summary, in accord with Rule 12-213 (B) NMRA 2009, to provide the Court with a more complete account of the background.

A. Nature Of The Case.

Mr. Bowen claims negligent hire and negligent retention arising out of an off-premises criminal assault and robbery allegedly committed by an off-duty employee of the Tribe's Gaming Enterprise acting outside the course and scope of his employment. The district court dismissed Mr. Bowen's claims for lack of subject matter jurisdiction due to tribal sovereign immunity, for lack of duty, and for lack of proximate cause. Mr. Bowen appeals from the district court's ruling.

B. Course Of Proceedings.

In Plaintiff's Original Complaint (the "Complaint"), Mr. Bowen alleged that he won a large sum of money at a casino where the Tribe employed Michael Gray ("Mr. Gray") as a cards dealer. [RP 2]. Mr. Gray allegedly stalked Mr. Bowen at the casino, gave Mr. Bowen a ride home, and returned to Mr. Bowen's residence the next day to attack and rob Mr. Bowen of his winnings. [RP 2-3]. Mr. Bowen

maintained that the Indian Gaming Compact between the Tribe and the State of New Mexico required the Tribe to "only hire individuals to work in its casinos who were qualified for a gaming license" and claimed negligent hire, negligent retention, negligent supervision, and breach of a third party beneficiary contract. [RP 2-4].

The Tribe filed its Motion and Supporting Memorandum Brief for (1) Dismissal for Lack of Subject Matter Jurisdiction Due to Sovereign Immunity and in the Alternative, (2) Summary Judgment for Absence of Duty and Proximate Cause. [RP 153-195]. The Tribe moved pursuant to Rule 12(B)(1) and Rule 1-056. [RP 153]. The district court heard argument on contested issues presented by the Motion. *Id.* at 423-438. Mr. Bowen and the Tribe filed requested findings of fact and conclusions of law. [RP 443-463].

On May 20, 2009, the district court entered its findings of fact and conclusions of law. [RP 464-483]. The fact findings that Mr. Bowen does not challenge are as follows:

a. The Tribe is a federally recognized sovereign Indian tribe that entered into a Indian Gaming Compact with the State of New Mexico (the "Compact"). *Findings of Fact* ¶¶ 1, 3. The Tribe established two relevant tribal entities: The Mescalero Apache Gaming Commission (the "Gaming Commission") and the Inn of the Mountain Gods Resort and Casino (the "Inn of the Mountain

Gods). *See id.* ¶¶ 5, 11. The Gaming Commission is a governmental regulatory authority, and the Inn of the Mountain Gods is a tribal business enterprise. *Id.* ¶¶ 5, 11, 21, 26. The Inn of the Mountain Gods operated the Casino Apache Travel Center (the "Travel Center") where it employed Mr. Gray as a card dealer. *Id.* ¶ 2, 5. Mr. Bowen patronized the Travel Center on the evening of January 9, 2006 and early morning of January 10, 2006. *Id.* ¶ 2. Mr. Gray gave Mr. Bowen a ride home and, as a result, learned where Mr. Bowen resided. *Id.*

b. Mr. Gray did not act in the course and scope of his employment in either giving Mr. Bowen a ride home or in committing the assault and robbery. *Id* ¶ 8. Mr. Gray returned to the residence approximately sixteen hours later and attacked and robbed Mr. Bowen. *Id.* Mr. Bowen and Mr. Gray are not tribal members, and Mr. Bowen resided in Ruidoso, New Mexico, outside the exterior boundaries of the Mescalero Apache Reservation. *Id.* ¶ 6, 7.

c. Federal law, tribal law, and the Compact assigned various responsibilities to the Gaming Commission in its role as the tribal regulatory authority regarding gaming. *Id.* ¶¶ 10-12, 22, 23-26. Those responsibilities included determining the suitability of applicants for employment as key employees, including card dealers. *Id.* ¶ 9, 10-14, 25. In so doing, the Gaming Commission had authority to conduct background investigations regarding key employees, and grant, deny, condition, suspend, revoke, and renew licenses for key

employees. *Id.* ¶ 12. The Gaming Commission's suitability determinations include review of criminal history record information obtained from the Federal Bureau of Investigation (the "FBI"). *Id.* ¶ 13.

d. The regulatory functions of the Gaming Commission, including licensure, are separate and distinct from the operational functions of the Inn of the Mountain Gods. *Id.* ¶ 25. The National Indian Gaming Commission ("the "NIGC")[1] provided guidelines on its regulations clarifying that a tribal governmental authority has the sole responsibility for making licensure suitability determinations and for conducting associated background investigations. *Id.* ¶ 26. The guidelines preclude involvement in these regulatory functions by the persons employed by the gaming operation. *Id.*

e. The Compact contains two separately defined terms that apply to the Gaming Commission and the Inn of the Mountain Gods. *Id.* ¶ 22-23. The "Tribal Gaming Agency," defined in the Compact as a "tribal governmental agency," is the Gaming Commission. *Id.* The "Gaming Enterprise," which is defined in the Compact as the "tribal entity having authority to" conduct gaming, is the Inn of the Mountain Gods. *Id.* Section 8 of the Compact waives tribal sovereign immunity for certain claims proximately caused by the "Gaming

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[1] The NIGC is a federal regulatory agency of the United States established pursuant to the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 *et seq.* ("IGRA"). IGRA authorizes the NIGC to issue implementing regulations.

Enterprise." *Id.*

f. At the time Mr. Gray applied, the Gaming Commission conducted a background investigation, including review of criminal history record information provided by the FBI. *Id.* ¶ 13. The investigation revealed no convictions and no pending criminal charges. *Id.* ¶ 14. Mr. Gray's application revealed a dismissed charge for assault against a household member. *Id.* The Gaming Commission's investigation confirmed that these magistrate court charges had been dismissed "*pros/nolle*" prior to Mr. Gray's application and licensure. *Id.* After Gray's application and hire, assault charges were refiled in district court. *Id.* ¶ 15. The jury acquitted Mr. Gray on assault charges, but convicted him of reckless driving, NMSA 1978, § 66-8-113. *Id.* ¶ 15.

The fact findings that Mr. Bowen challenges on appeal are as follows:

There is no evidence that the Tribe knew or should have known of the refiling of assault charges, that Mr. Gray went to trial, or that the jury reached a verdict acquitting him on assault charges and convicting him of reckless driving. *Id.* ¶ 16 . There is also no evidence that Mr. Gray stalked or paid undue attention to Mr. Bowen at the Travel Center on the evening of January 9 and early morning of January 10, 2005. *Id.* ¶ 18. Nor is there evidence that the Tribe knew or should have known that Mr. Gray stalked or paid undue attention to Mr. Bowen at the Travel Center on those dates. *Id.*

The district court made the following conclusions of law:

Regarding jurisdiction, the district court concluded that state courts generally lack jurisdiction to adjudicate claims against Indian tribes and that Mr. Bowen failed to meet his burden of demonstrating an applicable waiver of sovereign immunity. *Conclusions of Law* ¶¶ 2, 14, The district court ruled the Compact's limited waiver of immunity inapplicable on three independent grounds—the waiver did not apply to (1) injuries that occur outside of a Gaming Facility, *id.* ¶¶ 29-31, (2) suitability determinations regarding employment of key employees, *id.* ¶¶ 23-28, and (3) claims not proximately caused by the conduct of the Gaming Enterprise, *id.* ¶¶ 15-22.[2] As to each ground, the district court concluded that Mr. Bowen had failed to meet "the burden of persuasion under Rule 1-012(B)(1)" and the "the burden of demonstrating genuine issues of material facts under Rule 1-056". *Id.* at 22, 28, and 31.

The district court had scheduled the non-jury trial of this matter for June 10 and 11, 2009. [RP 211-213].

C. Summary Of Facts Relevant To Issues On Appeal.

With two exceptions, Mr. Bowen does not challenge the district court's findings of fact. [BIC 5-7]. Unchallenged findings are binding on appeal, *Stueber*

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[2] The district court also concluded that the Compact's limited waiver did not extend to claims for punitive damages. *Conclusions of Law* ¶ 32, [RP 505]. Mr. Bowen did not contest that conclusion below and does not contest that conclusion on appeal.

v. Pickard, 112 N.M. 489, 491, 816 P.2d 1111, 1113 (1991). Appellate courts review substantial evidence issues only if the appellant apprises the court of all evidence bearing upon the issue, both favorable and contrary to appellant's position. *Chavez v. S.E.D. Laboratories*, 2000-NMSC-034, ¶ 26, 129 N.M. 794, 14 P.3d 532. Failure to fulfill this obligation results in waiver of substantial evidence challenges. *See* NMRA 2009 2-213(A) (3).

Accordingly, the Tribe divides this summary into (1) summary of facts regarding challenged findings, and (2) summary of facts supplemental to the courts findings.

1. Facts Regarding Challenged Findings.

Mr. Bowen challenges Finding No. 16:

> 16. There is no evidence that the Tribe knew or should have known of the refiling of assault charges, that Gray went to trial, or that the jury reached a verdict acquitting him on assault charges and convicting him of reckless driving.

Mr. Bowen identifies three facts as relevant to this challenge: (1) passage of time between the refiling and the assault, [BIC 6], (2) the absence of mechanisms "to follow up on its employees' criminal history and involvement," *id.* at 3, 6-7, Mr. Gray's mother and sister, who worked for the Tribe's Gaming Enterprise, knew of and failed to report the criminal charges pending against Mr. Gray while he worked as a card dealer. *Id.* at 7-8.

Mr. Bowen inaccurately identifies the refiling date as July 31, 2004 citing RP 330. That page of the record proper is from Mr. Gray's application and does not identify the refiling date. Mr. Gray was initially charged on July 31, 2004 in magistrate court, then dismissed *pros nolle* on October 13, 2004; the prosecutor refiled charges on December 13, 2004 in district court. [RP 257, 239]. The Gaming Commission processed Mr. Gray's license beginning November 24, between the October 13, 2004 dismissal of the magistrate court case and the December 13, 2004 refiling. [RP 257, 239, 327]. The docket misidentified the defendant as "GRAY MICAHEL," [sic] misspelling Mr. Gray's first name, [RP 239], such that the refiled case will not be revealed by an electronic search (http://www.nmcourts.gov/caselookup/app) using Mr. Gray's correctly spelled name.

The Gaming Commission retains continuing jurisdiction to suspend and revoke post-licensure. [RP 411]. The Gaming Commission "retain[s] the right to conduct additional background investigations of any person required to be licensed at any time while the license is valid." [RP 404]. The Gaming Commission records and investigates unusual occurrences related to gaming within the gaming facilities. [RP 400]. Its staff investigates alleged misconduct by key employees. A Gaming Commission agent participated in the investigation into Mr. Gray's verbal dispute regarding the lack of condiments for a baked potato served to Mr.

Gray in the employee dining room. [RP 271, 287].

Nothing in the record indicates that the Gaming Enterprise employed Mr. Gray's mother or sister in a managerial capacity. Mr. Gray's mother and sister were aware that the jury acquitted Mr. Gray of assault. [RP 338-339].

Mr. Bowen also challenges Finding No. 18:

> 18. There is no evidence that Gray stalked or paid undue attention to Plaintiff Bowen at the Travel Center on the evening of January 9 and early morning of January 10.

Mr. Bowen identifies surveillance records [RP 304-308] as evidence of stalking. Records from the evening of January 9, 2006 and the early morning of January 10, 2006 show four direct interactions between Mr. Gray and Mr. Bowen: at 20:59:10, Mr. Gray took Mr. Bowen's "player club card to track his action on the table," at 21:18:47 Mr. Gray looked under the black jack table and found Mr. Bowen's cell phone and returned it to him, at 2:14:15 Mr. Gray had a conversation with Mr. Bowen near some slot machines, and at 2:21:54, Mr. Bowen got into Mr. Gray's truck. A few minutes later, the truck left for Ruidoso. *Id.*

2. Additional Relevant Facts.

The Compact defines "Gaming Facility" as "the buildings or structures in which Class II Gaming is conducted on Indian Lands." [RP 9]. The Compact defines "Indian Lands" as "all lands within the exterior boundaries of the Tribe's reservation" and other categories of trust or allotment land, specifically excluding,

however, any land within the boundaries of a municipality that is outside the boundaries of the Tribe's reservation or confirmed Spanish land. *Id.* Mr. Bowen's residence is outside the boundaries of the Tribe's reservation and within the municipality of Ruidoso. [RP 24]. The record contains no evidence that Mr. Bowen's residence is within the boundaries of a confirmed Spanish grant.

NIGC Regulation 558.1 provides that, "unless a tribal-state compact allocates responsibility to an entity other than a tribe ... [t]he licensing authority for class II or class III gaming is a tribal authority." [RP 186-187]; 25 CFR 558.1.

NIGC Regulation 558.2 provides that "[a]n authorized tribal official shall" review information regarding key employee applicants "to make a finding concerning the eligibility of a key employee ... for employment in a gaming operation." The tribal official must apply "the standards adopted in a tribal ordinance" in determining whether the "employment of the person poses a threat to the public interest or to the effective regulation of gaming, or creates or enhances the dangers of unsuitable, unfair, or illegal practices." If the tribal official so determines, the "tribal gaming operation shall not employ that person in a key employee ... position." [RP 360-361]; 25 CFR 558.2.

The NIGC has issued guidance regarding these regulations that states that tribes should segregate the regulatory function of determining suitability for employment from the tribal gaming operation:

> Section 558.1 of the NIGC's regulations provides that the licensing authority for class II and class III gaming is a tribal authority. Effective regulatory oversight requires that there be a separation between the regulation and operation of tribal gaming activities. Because the licensing of key employees and primary management officials is a governmental responsibility, the tribal government is solely responsible for conducting background investigations, making suitability determinations and issuing licenses. Section 522.2(c) requires tribes to submit to the NIGC, during the ordinance review process, a description of procedures for issuing licenses to key employees and primary management officials. To meet this requirement, a tribe must identify the governmental entity responsible for issuing licenses.
>
> Since licensing is a governmental responsibility, the person(s) responsible for reviewing and approving investigative work and making suitability determinations must be employed by the tribal government. To avoid any possible conflict of interest, such person(s) should not be employed by the gaming operation.

(Emphasis added). [RP 88, 381-382]; NIGC Bulletin No. 94-4 (full text at http://www.nigc.gov/ReadingRoom/Bulletins/BulletinNo19944/tabid/186/Default.aspx.

The NGIC approved the Gaming Ordinance by letter dated September 17, 2003. [RP 385]. The Gaming Ordinance establishes the Gaming Commission [RP 394], and identifies the Gaming Commission as the governmental entity responsible for issuing licenses and making the associated findings "concerning the eligibility or suitability of ... [a] key employee ... for employment

or involvement in a gaming enterprise." [RP 181-183, 394, 395, 405]. In doing so, the Gaming Commission applies the standard of whether "employment or involvement of the applicant poses a threat to the public interest, or to the effective regulation of gaming or creates or enhances the danger of unsuitable, unfair, or illegal practices, methods, or activities in the conduct of gaming." [RP 405].

The NGIC has also issued guidance that tribal gaming enterprises should be isolated from FBI criminal history record information and that such information should only be disseminated to designated government officials:

> The FBI has authorized dissemination of the criminal history record information (CHRI) reports only to tribal governments (See FBI Policy Statement attached to NIGC Bulletin 93-1). Accordingly, before CHRI information is disseminated to a tribe, it will be necessary for that tribe to designate the governmental officials who will have access to the information for purposes of making licensing determinations. Individuals employed by or working in the gaming operation should not be designated as individuals who will receive CHRI information. Failure to limit distribution of the CHRI in this manner could jeopardize a tribe's right to receive CHRI information from the NIGC.

(Emphasis added.) [RP 188, 381-382]; NIGC Bulletin No. 94-4. The Gaming Ordinance designates the Gaming Commission as the governmental entity to have access to FBI criminal history record information. [RP 403] ("The NIGC will obtain a criminal history record from the Federal Bureau of Investigation on each applicant and forward such information to the Mescalero Apache Tribal Gaming

Commission."). Consistent with the NIGC guidance, the record contains no indication that the Gaming Commission disseminated CHRI to the Tribe's Gaming Enterprise, the Inn of the Mountain Gods.

Apart from the Gaming Ordinance, a separate tribal resolution establishes the Inn of the Mountain Gods as an "unincorporated enterprise." Mescalero Apache Tribe Resolution No. 03-05, [RP 418-421]. Resolution No. 03-05 created the enterprise for purposes including promoting and fostering the business and economic development endeavors of the Tribe. It provides that, "as an independent Tribal Enterprise," the Inn of the Mountain Gods is subject to tribal reporting, licensing, and sales requirements, and the provisions of the Gaming Ordinance. [RP 420]. The Inn of the Mountain Gods employed Mr. Gray. [RP 183].

The Compact, [RP 7-33], contains the following pertinent definitions and provisions:

> SECTION 2. Definitions.
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> * * *
>
> B. "Compact" means this compact between the State and the Tribe.
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> * * *
>
> C. "Gaming Employee" means a person connected directly with the conduct of Class III Gaming, or handling the proceeds thereof or handling any Gaming Machine; . . .

* * *

D. "Gaming Enterprise" means the tribal entity created and designated by the Tribe as having authority to Conduct Class III Gaming pursuant to this Compact.

* * *

E. "Gaming Facility" means the buildings or structures in which Class III Gaming is conducted on Indian Lands.

* * *

G. "Key Employee" means that term as defined in 25 CFR Section 502.14.

* * *

P. "Tribal Gaming Agency" means the tribal governmental agency which will be identified to the state Gaming Representative as the agency responsible for actions of the Tribe set out in the Compact. It will be the single contact with the State and may be relied upon as such by the State."

Q.

* * *

SECTION 4. Conduct of Class III Gaming.

A. Tribal Gaming Agency. The Tribal Gaming Agency will assure that the Tribe will:

1. operate all Class II Gaming pursuant to this Compact, tribal law, the IGRA and other applicable Federal law;

* * *

2. provide for the physical safety of patrons in any Gaming Facility;

* * *

6. participate in licensing of primary management officials and key employees of a Class II Gaming Enterprise;

* * *

8. record and investigate any and all unusual occurrences related to Class III Gaming within the Gaming Facility.

* * *

SECTION 5. Licensing Requirements.

A. License Required. The Gaming Facility operator, but not including the Tribe, including its principals, primary management officials, and key employees, . . . shall apply for and receive a license from the Tribal Gaming Agency before participating in any way in the operation or conduct of any Class III Gaming on Indian Lands. . . .

B. License Application. Each applicant for a license shall file with the Tribal Gaming Agency a written application in the form prescribed by the Tribal Gaming Agency, along with the applicant's fingerprint card, current photograph and the fee required by the Tribal Gaming Agency.

C. Background Investigations. Upon receipt of a completed application and required fee for licensing, the Tribal Gaming Agency shall conduct or cause to be conducted a background investigation to ensure that the applicant is qualified for licensing.

D. Provision of Information to State Gaming Representative. Whenever the Tribal Gaming Agency is required by federal or tribal law or regulations to provide to the National Indian Gaming Commission ("the Commission") any information, document or notice relating to the licensing of any key employee or primary management official of the Gaming Enterprise, a copy of such information, document or notice shall also be provided to the State Gaming Representative. The State Gaming Representative shall be entitled to the same right to request additional information concerning an applicant licensee, to comment on the proposed licensing of any applicant licensee, and to supply the Tribal Gaming Agency with additional information concerning any applicant licensee, as is enjoyed by the Commission.

* * *

SECTION 8. Protection of Visitors.

A. 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 its 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 visitors' personal injury suits to state court. [Emphasis added].

* * *

D. Specific Waiver of Immunity and Choice of Law. The Tribe, by entering into this Compact and agreeing to the provisions of this section, waives its defense of sovereign immunity in connection with any claims for compensatory damages for bodily injury or property damage up to the amount of fifty million dollars ($50,000,000) per occurrence asserted as provided in this section. **This is a limited waiver and does not waive the Tribe's immunity from suit for any other purpose.** [Emphasis added]. The Tribe shall ensure that a policy of insurance that it acquires to fulfill the requirements of this section shall include a provision under which the insurer agrees not to assert the defense of sovereign immunity on behalf of the insured up to the limits of liability set forth in this Paragraph.

II. ARGUMENT

A. The Court Should Adopt A Standard Of Review Deferential To A District Court's Factual Determinations Regarding The Absence Of Jurisdiction.

Mr. Bowen contends that a *de novo* standard of review applies in this case. [BIC at 5]. Mr. Bowen's position is ostensibly correct, in that New Mexico courts reviewing tribal challenges to state court jurisdiction have applied a *de novo* review standard, but with little or no discussion. *See e.g., Kosiba Pueblo of San Juan*, 2006-NMCA-057, 139 N.M. 533, 135 P.3d 234, ¶ 7; *Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, ¶ 4, 136 N.M. 682, 104 P.3d 548; *Guzman v. Laguna Development Corp,* 2009-NMCA-116, ¶ 16, 2009 N.M. App. LEXIS 139 ("When reviewing a district court's grant of a motion to dismiss, we accept as true the facts pleaded in the complaint, and we review *de novo* the district court's application of the law to those facts").

The Tribe urges the Court to adopt, in the limited context of factual challenges to the applicability of an Indian gaming compact waiver, the federal approach to factual subject matter jurisdiction challenges. That approach affords deferential review to a district court's jurisdictional fact determinations and allows weighing of jurisdictional facts, rather than applying a Rule 1-056 standard. *See* the discussion of *Moore's Federal Practice,* § 12.30[4], below. New Mexico courts have previously discussed this approach. *See Valenzuela v. Singleton,* 100

N.M. 84, 90-91, 666 P.2d 225, 231-32 (1982)(Donnelly, dissent); *Southern Union Gas Co. v. New Mexico Pub. Util. Comm'n*, 1997-NMSC-056, ¶ 23, 27, 124 N.M. 176, 947 P.2d 133 (same) (Minzner and McKinnon dissenting separately); *c.f., Protection and Advocacy System v. City of Albuquerque*, 2008-NMCA-149, ¶ 17, 145 N.M. 156, 195 P.3d 1 (recognizing authority that factual submissions do not convert a Rule 12(b)(1) motion into a Rule 56 motion and adopting a standard that a plaintiff's factual submissions submitted in favor of standing are to be viewed favorably)

The Rule 1-056 standard requires that all factual conflicts go to trial before the district court has even determined the existence of its authority to hear the case. Applying that standard in the context of this case replaces the "strong presumption" against waivers of tribal sovereign immunity with, at least up to the point of trial, a presumption favoring the party asserting jurisdiction. *See Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, ¶ 7, 136 N.M. 682, 104 P.3d 548. Where a tribe challenges the existence of a waiver on factual grounds, the district court should first determine the existence of its authority over the defendant; otherwise the tribe's immunity from the burden of suit is destroyed. *See Manning v. Mining & Minerals Div. of the Energy, Minerals, & Natural Res. Dep't*, 2004-NMCA-052, ¶ 4, 135 N.M. 487, 90 P.3d 506 ("[W]e are persuaded that the State's sovereign immunity ... is not merely immunity from liability for damages,

it is immunity from a suit seeking such damages, ... and, that reaching the merits of a federal claim that is barred by the State's sovereign immunity deprives the State of its "entitlement not to ... face the ... burdens of litigation." *Id.* at ¶ 13 (quoting *Carrillo v. Rostro*, 114 N.M. 607, 615, 845 P.2d 130, 138 (1992)) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, (1985)) (internal quotation marks omitted).

Consistent with the strong presumption against waivers of tribal sovereign immunity, federal courts place the "burden of proof on a Rule 12(b)(1) motion on the party asserting jurisdiction." Wright & Miller, *Federal Practice & Procedure,* §1350 -- Motion to Dismiss -- Lack of jurisdiction over the subject matter, at 226; *Doe v. Roman Catholic Diocese of Boise, Inc.*, 1996-NMCA-057, 121 N.M. 738, 741, 918 P.2d 17, 20 (noting the close parallel between Rule 1-012 and its federal counterpart and finding instructive "federal authority interpreting Rule 12 and discussing the applicable standard of review for evaluating a motion to dismiss.")

"Challenges to subject matter jurisdiction through a Rule 12(b)(1) motion to dismiss come in two different forms--facial and factual attacks." *Moores' Federal Practice*, § 12.30[4]. A facial attack addresses the sufficiency of the pleading and the trial court accepts the allegations in the complaint as true. But, where subject matter jurisdiction is challenged factually, "the allegations [of the Complaint] have no presumptive truthfulness, and the court that must weigh the evidence has

discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve disputed jurisdictional facts." *Id; Doe v. Roman Catholic Diocese of Boise, Inc.*, 1996-NMCA-057, 121 N.M. 738, 741, 918 P.2d 17, 21 (recognizing in the context of Rule 1-12(B)(2), the court has discretion to permit--or deny--discovery to help resolve disputed jurisdictional facts "either upon written affidavits or through a pretrial evidentiary hearing.")

Under federal procedure, it is well-established that "a district court 'has authority to consider matters outside the pleadings when subject matter jurisdiction is challenged under Rule 12(b)(1).'" *Harris v. P.A.M. Transport. Inc.*, 339 F.3d 635, 637, n.4 (8th Cir. 2003) (quoting *Osborn v. United States,* 918 F.2d 724, 728, n.4 (8th Cir. 1990) (citing *Land v. Dollar,* 330 U.S. 731, 735 n.4, 91 L. Ed. 1209, 67 S. Ct. 1009 (1947) (*overruled on other grounds*)). Unlike a motion to dismiss under 12(b)(6), consideration of matters outside the pleadings does not convert a Rule 12(b)(1) motion to a motion for summary judgment. *Id.*

The difference between the two rules "is rooted in the unique nature of the jurisdictional question." *Osborn,* 918 F.2d 724 at 729 (quoting *Williamson v. Tucker,* 645 F.2d 404, 413 (5th Cir. 1981)). "[A] district court has 'broader power to decide its own right to hear the case' than it has when the merits of the case are reached." *Id.* Jurisdictional issues, whether they involve questions of law or fact, are for the court to decide. *Id.* "Because at issue in a factual 12(b)(1) motion is the

trial court's jurisdiction – its very power to hear the case – there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Osborn,* 918 F.2d at 730. As a result, "no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of undisputed material facts will not preclude the trial court from evaluating for itself the merits of the jurisdictional claims." *Id.* "Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist." *Id.*

Under the federal approach, the district court's jurisdictional finding is afforded deference on review. *Moore's Federal Practice*, § 12.30[5] (noting that the appellate court will accept the factual determination that underpins a decision to dismiss based on a factual challenge to jurisdiction unless it is clearly erroneous.). In this case, for each ground independently supporting immunity, the trial court found that the "Plaintiff has met neither the burden of demonstrating genuine issues of material fact under Rule 1-056 nor the burden of persuasion under Rule 1-012(B)(1)." [RP 478, 480, 481]. The Court should afford the Rule 1-012(B)(1) determination deference and review under the substantial evidence standard. Application of a *de novo* standard essentially requires resolution under Rule 1-056 and thereby reduces the presumption against waiver of tribal sovereign immunity to a presumption in favor of waiver, at least through trial.

B. The District Court Correctly Applied The Legal Doctrines Which Protect Tribal Sovereignty.

State courts typically lack jurisdiction over tribal defendants. "[A]s a general proposition of Indian law derived from the sovereign status of Indian tribes, tribal courts have exclusive jurisdiction over claims arising on tribal lands against tribes, tribal members, or tribal entities. *Doe v. Santa Clara Pueblo*, 2007-NMSC-8, ¶ 18, 141 N.M. 269, 154 P.3d 644; *see Williams v. Lee*, 358 U.S. 217, 220, 223 (1959) (holding that state court jurisdiction in such circumstances would impermissibly "infringe on the rights of reservation Indians to make their own laws and be ruled by them"). An Indian gaming compact, negotiated under the comprehensive scheme of the Indian Gaming Regulatory Act, 25 U.S.C § 2701 ("IGRA"), however, may have shifted jurisdiction from tribal to state court if the claim falls within the scope of an applicable waiver of sovereign immunity. *See Doe v. Santa Clara Pueblo*, 2007-NMSC-008, 141 N.M. 269, 154 P.3d 644.

Indian tribes have the same common-law immunity from suit as other sovereigns, but it may be waived if a tribe makes an express and unequivocal waiver. *R & R Deli v. Santa Ana Star Casino*, 2006-NMCA-20, ¶ 10, 139 N.M. 85, 128 P.3d 513. "Because a tribe need not waive immunity at all, it is free to prescribe the terms and conditions" of the waiver, and "[a]ny such conditions or limitations must be strictly construed and applied." *Id.* (Internal quotation marks and citation omitted). "There is a strong presumption against waiver of tribal

sovereign immunity," and "waivers of sovereign immunity should be strictly construed, with all ambiguous provisions interpreted in favor of the tribe." *Sanchez,* 2005-NMCA-003, ¶¶ 7, 10; *see Kosiba v. Pueblo of San Juan,* 2006-NMCA-57, ¶¶ 11-12, 139 N.M. 533, 135 P.3d 234 (state court lacked jurisdiction because the limited waiver in the Compact applied to injuries caused by the conduct of the "Gaming Enterprise," not to those allegedly caused by tribal Gaming Commission which was a separate and distinct entity).

C. The District Court Correctly Ruled That Mr. Bowen Failed To Overcome The Strong Presumption Against Waiver Of Tribal Sovereign Immunity.

1. The Court Should Affirm Because Mr. Bowen Failed To Demonstrate A Waiver Applicable To Injuries That Occur Outside Of A Gaming Facility And Has Abandoned The Issue On Appeal.

Mr. Bowen's injuries did not occur in a Gaming Facility, while he was a patron in a Gaming Facility, nor while he was on "Indian lands." The district court correctly concluded that Mr. Bowen failed to demonstrate that his claims fell within territorial limitations on the Compact's waiver. [RP 480-81]. The Compact waives sovereign immunity only for certain claims by "visitors to a Gaming Facility." Compact § 8.A. "Gaming Facility," a defined term in the Compact, means "the buildings or structures in which Class III Gaming is conducted on Indian lands." Compact § 2.E. The territorial boundary on the responsibility for patron safety is reflected in Compact § 4A.2, which addresses "the physical safety

of patrons in any Gaming Facility." (Emphasis added.) Broadly construing the waiver to encompass off-premises injuries when the claimant is no longer a visitor violates the rules of construction requiring a strict interpretation.

A comparison of the 2004 Compact at issue with the 1997 codification of a previous Compact, NMSA 1978, § 11-3-1, supports the narrow construction advanced by the Tribe. The 2004 Compact waives immunity for bodily injury and property damage claims by "visitors to a Gaming Facility ... proximately caused" by the conduct of the Gaming Enterprise." Compact § 8.A. This Compact contains no express, unequivocal waiver for claims, such as Mr. Bowen's, that occur outside of the Gaming Facility, but allegedly arise from the activities of the Gaming Enterprise. By contrast, the 1997 Compact expressly waived immunity for "a visitor's claim" for bodily injury or property damages "proximately cased by the Gaming Enterprise and ... occurring outside of the Gaming Facility but arising from the activities of the Gaming Enterprise." NMSA 1978, § 11-3-1 § 8.A. The differences between the prior and current versions of the Compact language indicate that the Compact was amended to make the waiver inapplicable to claims like Mr. Bowen's. *See, e.g., Aguilera v. Bd. of Educ. of Hatch Valley Schools*, 2006-NMSC-015, ¶ 19, 139 N.M. 330, 132 P.3d 587 ("Normally, when the Legislature amends a statute, we presume it intends to change existing law.") Absent an express waiver such as that contained in the 1997 Compact, no such

waiver can be implied. *Sanchez*, 2005-NMCA-003, ¶¶ 7, 10.

The opinion in *Guzman v. Laguna Development Corp.*, 2009-NMCA-116, ¶¶ 13-14, ___ N.M. __ , ___ P.3d ___ (No. 27,827, June 25, 2009), decided since the district court's ruling, does not require a different result. Anthony Guzman allegedly consumed alcohol while working at a tribal gaming enterprise, stayed after work after clocking out to discuss a possible promotion with his supervisor, left the premises, and then died in a single car accident on I-40. *Id.* at ¶¶ 3, 4. The parties did not argue, and the *Guzman* court did not address, the territorial limitations of the Compact waiver. Regarding the waiver, the Court only decided that whether an employee could be a "visitor" could not be determined at the pleading stage. *Id.* at ¶¶ 17 and 23. The *Guzman* case does not provide authority for the argument that Compact waivers can have extra-territorial effect. *See, e.g., Fernandez v. Farmers Ins. Co. of Ariz.*, 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) (stating that cases are not authority for propositions not considered).

Here, the district court based its determination on the territorial limitations of the waiver not at issue in *Guzman*. This case involved a factual challenge, not the facial challenge at issue in *Guzman*. Moreover, Mr. Bowen was not an employee, as was Anthony Guzman.

Mr. Bowen makes no argument based on *Guzman*. In fact, Mr. Bowen made no argument on this issue at all. The Brief-in-Chief suggests, tangentially, that Mr.

Bowen's status as a visitor to the casino made the waiver effective in relation to his claims. [BIC at 5, 10].

Mr. Bowen cites no authority and makes no argument, however, in support of remote applications of the waiver. "The burden is on the appellant to clarify how the trial court erred." *Robertson v. Carmel Builders Real Estate*, 2004-NMCA-056, ¶ 25, 135 N.M. 641, 92 P.3d 653. The Court need not address issues mentioned in "a passing reference" as such issues are not supported by argument, as required by Rule 12-213(A)(4). *Rio Grande Kennel Club v. City of Albuquerque*, 2008-NMCA-093, 144 N.M. 636, 190 P.3d 1131; *State v. Pettigrew*, 116 N.M. 135, 137-38, 860 P.2d 777, 779-80 (Ct.App.1993) (issues "raised at earlier stages in the appellate proceedings but not argued in the briefs, are deemed abandoned.")

2. Mr. Bowen Failed To Demonstrate A Waiver Applicable To Suitability Determinations Regarding Employment Of Key Employees.

"In order to support an instruction on negligent hiring and retention, there must be evidence that the employee was unfit . . . and that the employer knew or should have known that the employee was unfit." *Valdez v. Warner*, 106 N.M. 305, 307, 742 P.2d 517, 519 (Ct. App. 1987), (citing *F & T Co. v. Woods*, 92 N.M. 697, 594 P.2d 745 (1979)). Fitness and suitability are synonymous. Webster's Encyclopedic Unabridged Dictionary ("fit ... -- Syn. 1. suitable"). Thus, Mr.

Bowen's negligent hire and retention claims require that Mr. Gray's employer negligently determined his suitability for employment.

But federal law and associated provisions in the Compact and the Gaming Ordinance remove the Gaming Enterprise from suitability determinations. NIGC interpretations of its regulations provide that "[e]ffective regulatory oversight requires there be a separation between the regulation and operation of tribal gaming activities" and, "because the licensing of key employees . . . is a governmental responsibility, the tribal government is solely responsible for conducting background investigations, making suitability determinations, and issuing licenses." Further, persons making suitability determinations "should not be employed by the gaming operation" in order "to avoid any possible conflict of interest." *See High Ridge Hinkle Joint Venture v. City of Albuquerque*, 119 N.M. 29, 39, 888 P.2d 475, 485 (Ct.App.1994) (courts "ordinarily defer to an agency's interpretation of its own enactments.")

Suitability determinations relate directly to fitness for employment. NIGC Regulation 558.2 makes clear that a suitability determination concerns "the eligibility of a key employee ... for employment in a gaming operation." 25 U.S.C. § 558.2.

Thus, the sole responsibility for determining fitness and suitability for employment as a key employee lies with the Gaming Commission. The Compact

waiver is limited to injuries proximately caused by the conduct of the Gaming Enterprise and does not extend to the Gaming Commission. Consequently, no waiver applies to Mr. Bowen's negligent hire and retention claims. *See Kosiba v. Pueblo of San Juan,* 2006-NMCA-57, ¶¶ 11-12, 139 N.M. 533, 135 P.3d 234. In *Kosiba*, this Court concluded that the Compact § 8 waiver did not apply to claims against a Gaming Commission. It noted that, the term "Gaming Enterprise" is a defined term of art and, "[u]nder the compact, the Gaming Commission is a distinct entity, separate and apart from the Gaming Enterprise." Further, "[u]nder Section 5 of the compact, the Gaming Commission is the entity that issues gaming licenses." *Id.* at 11. Thus, the *Kosiba* court held the following:

> Under the Compact, the governmental actions of the Gaming Commission in regulating gaming are clearly distinguishable from the commercial activities of the Gaming Enterprise. Plaintiff, whose loss of his gaming license is alleged to have been caused by improper governmental action of the Gaming Commission, lacks standing to assert the waiver of immunity contained in Section 8, which is limited to victims whose injuries are caused by the conduct of the Gaming Enterprise. Plaintiff failed to establish a waiver of the Tribe's and the Gaming Commission's immunity from suit on the claims asserted by Plaintiff.

Id. at 12.

Similarly, in this case, Mr. Bowen's claims relate to the governmental actions of the Gaming Commission in making suitability determinations for the licensure and employment of key employees such as Mr. Gray. The rationale

supporting dismissal is no less applicable to the negligent retention claim. After licensure, the Gaming Commission maintains jurisdiction to revoke and suspend licensure.

3. Mr. Bowen's Failure To Demonstrate Proximate Cause, In The Context Of The Compact's Limited Waiver, Necessitates Affirmance.

a. In The Context Of The Compact Waiver, The Ambiguity Of "Proximate Cause" Requires A Construction Favorable To The Tribe.

Changes to the causation jury instruction UJI 13-305 in 2004 reflect the ambiguity of the term "proximate cause." The amendments eliminated the word "proximate" in order to "make the instruction clearer to the jury." Incorporation of a highly fact specific inquiry typically resolved at trial into an immunity analysis, which presents a threshold issue in this case, further demonstrates the ambiguity of the term in the context of the limited waiver of immunity in the Compact. Applicable rules of construction require resolution of the ambiguity in favor of the Tribe.

Blacks Law Dictionary, 6th Ed., recognizes many definitions for the term "proximate cause," many of which are narrower than the definition under New Mexico case law. *Id.* (proximate cause is the dominant, moving or producing cause, or is the nearest in the order of responsible causation, or is the last negligent act contributing to an injury). Although it is not clear that one of these definitions

should apply, at a minimum the proximate cause analysis in this context should emphasize the foreseeability and policy aspects of proximate cause, concepts that are closely related to the concept of duty. *Chavez v. Desert Eagle Distrib. Co.*, 2007-NMCA-018, ¶ 17, 25.

Mr. Bowen argues that, "but for the gaming enterprise, there would have been no injury. That is all the Compact requires for the waiver of immunity." [BIC at 12]. This argument impermissibly collapses proximate cause into cause in fact. *See Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 6 (both "proximate cause and cause in fact are necessary elements of a negligence claim"). At a minimum, to be consistent with applicable rules of construction, "proximate cause" as used in the Compact waiver, must mean more than cause in fact.

b. This Case Closely Resembles *F & T Co. v. Woods*.

In *F & T Co. v. Woods*, 92 N.M. 697, 594 P.2d 745 (1979), our Supreme Court held that an assault by an off-duty, off-premises employee was not foreseeable as a matter of law, and thus dismissed the plaintiff's negligent hiring and retention claims for lack of proximate cause. *Id.* at 701, 694 P.2d at 749. The factual and legal intersections between *Woods* and this case are significant. *Woods* involved an off-premises criminal assault by an employee who first visited the victim's residence in the course and scope of his employment to deliver an appliance, returned later to the residence, and committed the crime when off-duty.

Id., 92 N.M. at 698, 594 P.2d at 746. In this case, Mr. Gray did not visit Mr. Bowen's residence within the course and scope of his employment like the employee in *Woods*, but did meet Mr. Bowen while at work. When Mr. Gray gave Mr. Bowen a ride home, Mr. Gray was off-duty and the Travel Center had closed. More than 16 hours later, Mr. Gray returned to Mr. Bowen's residence and committed the crime.

The facts regarding the employer's knowledge of involvement in previous crimes are weaker in this case than in *Woods*. The *Woods* perpetrator was an ex-convict. *See Pittard,* 101 N.M. at 730, 688 P.2d at 340 (discussing the employee's prior record in *Woods*). Mr. Gray had no convictions or pending charges at the time of hire. The Gaming Commission knew of the dismissed domestic violence charge, but there is no evidence that it failed in its obligation to keep CHRI unavailable to Mr. Gray's employer, the Inn of the Mountain Gods. Assault charges were later refiled against Mr. Gray, but the jury found him guilty of only reckless driving. It exonerated Mr. Gray on the assault charges. A computer search for information regarding the refiled charges would have availed nothing due the docket's misspelling of Mr. Gray's name.

By comparison, information known to the *Woods* employer linked the employee/perpetrator to an on-going investigation of rapes in the area. *Id.*, 92 N.M. at 701, 594 P.2d at 749. In this case, nothing connected Mr. Gray to nearby

crimes. The only trouble known to Mr. Gray's employer was the confrontation Mr. Gray had with other employees over the lack of potato condiments, for which he apologized and was disciplined.

The *Woods* case held that, as a matter of law, no evidence had been introduced justifying submission of negligent hire and retention claims to the jury. *Id.* In *Woods,* "knowledge of a past criminal record and unfocused police questioning did not make the employee's conduct foreseeable." *See Pittard,* 101 N.M. at 730, 688 P.2d at 340 (discussing why the evidence in *Woods* was insufficient to justify submission of the negligence claims to the jury). Similarly, knowledge of a past criminal charge, an unknown conviction for reckless driving, and a verbal confrontation for which Mr. Gray apologized and was disciplined, did not make Gray's conduct foreseeable in this case.

Mr. Bowen attempts to distinguish *Woods* on the grounds that the *Woods* assailant had to break in, while Mr. Bowen granted access to Mr. Gray. The break in and Mr. Gray's return to Mr. Bowen's home were unknown to the respective employers. Mr. Bowen also suggests that two other cases, *Pittard v. Four Seasons Motor Inn, Inc.*, 101 N.M. 723, 688 P.2d 333 (Ct. App. 1984) and *Spencer v. Health Force, Inc.,* 2005-NMSC-002, 137 N.M. 64, 107 P.3d 504, more closely resemble this case than does *Woods*. [BIC at 13-14]. The *Pittard* Court itself stated that "[t]his case is distinguishable [from *Woods*]. Plaintiffs' son was

sexually assaulted by defendant's employee, Perales, on the business premises while Perales was on duty." *Pittard*, 101 N.M. at 730, 688 P.2d at 340 (Emphasis added.) In this case, Mr. Gray was off-duty, off-premises, and off-reservation. The *Woods* case more closely resembles Mr. Bowen's situation, which involved an off-premises, off-duty assault.

In *Spencer*, the employer, a long-term home health provider to disabled individuals, retained a care giver despite the care giver's admitted theft of the victim's narcotic medication. *Spencer*, 2005-NMSC-2, at ¶¶ 2-3. The employer had also failed to do a statutorily mandated background check, which would have revealed extensive prior convictions for burglary, aggravated assault, armed robbery, credit card fraud, embezzlement, and shoplifting. *Id.* at ¶ 2.

The facts here are very different. The Gaming Commission performed a background check and Mr. Gray had no prior convictions. Moreover, the incident in this case occurred off-premises at Mr. Bowen's home where Mr. Gray had no employer-related business. In *Spencer*, the employer's business consisted of providing home healthcare and the employer knew that employees would be in the homes of its vulnerable clients. The *Spencer* Court determined that a reasonable jury could find proximate cause with facts very different from the ones here; the *Woods* Court held proximate cause lacking as a matter of law under facts very similar to this case.

Mr. Bowen asserts without authority that that the Tribe should have had mechanisms in place to "follow up on its employees' criminal history and involvement." [BIC at 6]. This argument overlooks the facts that federal regulations segregated Mr. Gray's employer from the Gaming Commission's regulatory responsibilities for determining employment suitability, and that no waiver of immunity applies to suitability determinations. Applicable federal guidelines required isolation of Mr. Gray's employer from the extensive CHRI available to the Gaming Commission. Furthermore, the Gaming Commission maintains jurisdiction to conduct additional background investigations. The Gaming Commission records and investigates unusual occurrence related to gaming in the gaming facilities and investigates alleged misconduct by key employees. Mr. Bowen can provide no reasonable basis in this situation for an obligation to "follow-up," owed by Mr. Gray's employer.

Even had the Inn of the Mountain Gods known of a reckless driving conviction, that information would bear on his suitability to be a driver, not a card dealer. Mr. Bowen has not shown that the Inn of the Mountain Gods employed Mr. Gray's sister and mother in a capacity that would justify imputing knowledge of the reckless driving conviction to Mr. Gray's employer, or requiring his employer to act upon it.

c. The Parallels Between This Case And *F & T Co. v. Woods* Require A Straightforward Application Of *Stare Decisis*.

In light of the legal and factual similarities between *Woods* and this case, *stare decisis* compels following *Woods*. The principle of *stare decisis* "dictates adherence to precedent." *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶ 7, 133 N.M. 661, 68 P.3d 901. The doctrine promotes "the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed 2d. 720 (1991)). Adherence to precedent is essential to promoting public confidence in the administration of the law because of the anti-majoritarian nature of the judicial system. *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 44, 135 N.M. 375, 89 P.3d 47; *Bogle Farms, Inc. v. Baca*, 1996-NMSC-051, ¶ 29, 122 N.M. 422, 925 P.2d 1184.

Departure from *stare decisis* demands special justification. *Padilla*, 2003-NMSC-011, ¶ 7. Particular questions bear upon the possibility of overturning a precedent:

1. Whether the precedent is so unworkable as to be intolerable;

2. Whether the parties justifiably relied on the precedent so that reversing it would create an undue hardship;

3. Whether the principles of law have developed to such an extent as to leave the old rule "no more than a remnant of abandoned doctrine;" and

4. Whether the facts have changed in the interval from the old rule so as to have 'robbed the old rule' of justification.

Trujillo v. City of Albuquerque, 1998-NMSC-031, ¶ 34, 125 N.M. 721, 965 P.2d 305. While *stare decisis* considerations are said to be strongest in commercial settings, *see, e.g., Beavers v. Johnson Controls World Servs., Inc.*, 118 N.M. 391, 399, 881 P.2d 1376, 1384 (1994), it would seem that such considerations would be no less in the context of intergovernmental compacts between sovereigns.

To the extent that the Court of Appeals can overrule a Supreme Court precedent, it should decline to do so. *Woods* is cited frequently in recent decisions, including the *Spencer* case relied upon by Mr. Bowen. This case does not involve, like *Herrera*, changes in circumstances over the decades that have robbed the old rule of justification. *See Chavez* (noting that the *Herrera* decision relied on statistical evidence demonstrating the high rate of car thefts in Albuquerque and the that stolen vehicles are now "much more likely to be involved in automobile accidents.

Mr. Bowen's single argument regarding changed circumstances is misguided. He asserts that the adoption of comparative fault would "require a different analysis of the *Woods* case today." [BIC at 14]. But the amelioration of

the sometimes harsh effects of the all or nothing approach of contributory negligence has no effect on the *Woods* case. The reasoning in *Woods* rested on concepts of forseeability and proximate cause which were not altered with the adoption of comparative fault. Contrary to Mr. Bowen's implication that negligent employers are only liable for their apportioned fault in a comparative fault regime, [BIC at 15], joint and several liability continues for employers that negligently hire and retain. *See Medina v. Graham's Cowboys, Inc.*, 113 N.M. 471, 475, 827 P.2d 859, 863 (Ct. App. 1992).[3]

4. Mr. Bowen Incorrectly Argues That Compact Insurance Requirements Waive Immunity.

Mr. Bowen argues that he is a third party beneficiary of a Compact provision that requires the Tribe to procure insurance under a policy that includes "a provision under which the insurer agrees not to assert the defense of sovereign immunity on behalf of the insured." [BIC 9-10]. Mr. Bowen mistakenly construes the provision as absolutely divesting the Tribe of the right to assert sovereign immunity as a defense. The proper construction is that a tribe may direct the assertion of the immunity defense, but the insurance policy must preclude the insurer from asserting the defense unilaterally. Otherwise, the provision clearly

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[3] The Tribe reserves the right to assert the defense that the Compact waiver precludes the application of joint and several liability. This reservation, however, does not diminish the argument that for most employers, joint and several liability would still apply to negligent hire and retention.

would conflict with the clear language that "[t]his is a limited waiver and does not waive the Tribe's immunity from suit for any other purpose." *See, e.g., Niederstadt v. Town of Carrizozo*, 2008-NMCA-053, ¶ 19, 143 N.M. 786, 182 P.3d 769 (provisions in a statute must be construed together to produce a harmonious whole); *Aspen Landscaping, Inc. v. Longford Homes of N.M., Inc.*, 2004-NMCA-063, ¶ 14, 135 N.M. 607, 92 P.3d 53 (stating the same rule as a canon of contract construction).

D. The District Court Correctly Ruled That Mr. Bowen Failed To Establish Duty And Proximate Cause.

Standard of Review: Whether a duty exists is a question of law for the courts to decide." *Romero v. Giant Stop-N-Go of New Mexico*, 2009-NMCA-59, ¶ 5, 212 P.3d 408. On review, a *de novo* standard applies. *See, e.g., Blake v. Pub. Serv. Co. of N.M.,* 2004 NMCA 2, ¶ 5, 134 N.M. 789, 82 P.3d 960 (reviewing *de novo* an award of summary judgment, based on a purely legal determination on the threshold issue of duty). Where the facts are not in dispute, proximate cause is an issue of law to be decided by the Court. *Galvan v. Albuquerque,* 85 N.M. 42, 45, 508 P.2d 1339, 1342 (Ct. App. 1973).

A negligence claim requires the existence of a duty from a defendant to a plaintiff, breach of that duty, which is typically based upon a standard of reasonable care, and the breach being a proximate cause and cause in fact of the plaintiff's damages. *Chavez v. Desert Eagle Distributing,* at ¶ 6; *Herrera v.*

Quality Pontiac, 2003-NMSC-018, ¶ 6, 134 N.M. 43, 73 P.3d 181. The absence of any of these elements is fatal to a negligence claim. *Romero* at ¶ 5.

"Duty ... defines the legal obligations of one party toward another and limits the reach of potential liability." *Calkins v. Cox Estates*, 110 N.M. 59, 62 n. 1, 792 P.2d 36, 39 n. 1 (1990). In the absence of a legal duty, there is "no general duty to protect others from harm." *Johnstone v. City of Albuquerque*, 2006-NMCA-119, ¶ 7, 140 N.M. 596, 145 P.3d 76. The initial step in a common law duty analysis is to determine whether a particular plaintiff and a particular harm are foreseeable. *See Herrera*, 2003-NMSC-018, ¶ 19, 134 N.M. 43, 73 P.3d 181 ("As an initial step in the establishment of a common law duty, along with the required component of policy, a potential plaintiff must be reasonably foreseeable to the defendant because of [the] defendant's actions." (internal quotation marks and citation omitted)). After assessing the foreseeability element of duty, a court determines whether policy considerations preclude the imposition of a common law duty in a particular case. *See id.* ¶ 20.

"The initial step in a common law duty analysis is to determine whether a particular plaintiff and a particular harm are foreseeable." *Chavez v. Desert Eagle Distrib. Co.,* 2007-NMCA-018, P 16, 141 N.M. 116, 151 P.3d 77. "Foreseeability is a critical and essential component of New Mexico's duty analysis because no one is bound to guard against or take measures to avert that which he or she would

not reasonably anticipate as likely to happen." Therefore, courts assess foreseeability by reference to "what one might objectively and reasonably expect, not merely what might conceivably occur." *Johnstone,* at 2006-NMCA-119, ¶ 8. This assessment is made with reference to the specific circumstances actually presented. *See, e.g., Chavez,* 2007-NMCA-018, ¶¶ 17-24, 141 N.M. 116, 151 P.3d 77 (approaching the foreseeability issue by reference to the specific allegedly negligent conduct of the business proprietor, and by reference to the specific criminal activity that allegedly ensued); and *Romero* (narrowly framing the foreseeability question as "whether the proprietor of a convenience store and gas station who fails to employ security measures should foresee that a targeted homicidal attack on its patrons is likely to result").

As addressed above in the discussion of *Woods*, foreseeability is lacking in this case. Segregated by the comprehensive regulatory framework applicable to Indian gaming from making suitability determinations, the Inn of the Mountain Gods had no reason to foresee that an employee with a one-time history of a verbal dispute would target Mr. Bowen for an off-premises crime. There is no duty to another person absent foreseeability. *Chavez,* 2007-NMCA-018 at ¶ 17.

Even if foreseeability is met in a particular case, an examination of relevant policy is also required to determine whether imposing a duty is supported by law. *Id.* at ¶ 25. For guidance on questions of policy, courts look to consider, among

other things, relevant statutes. *Id.* In this case, IGRA provides a comprehensive scheme for regulating Indian gaming. *See Doe v. Santa Clara Pueblo*, 2007-NMSC-8, ¶ 6 (The Compact was negotiated under the comprehensive scheme of IGRA, a seminal federal statute, which "established the framework under which Indian tribes and states could negotiate compacts permitting ... gaming on Indian reservations located within state territory.")

The comprehensive regulatory framework promulgated pursuant to IGRA specifically removes from the employer operating the Gaming Enterprise the role of determining the suitability of persons for employment as key employees. NIGC Regulation 558.2 provides that "[a]n authorized tribal official shall" review information regarding key employee applicants "to make a finding concerning the eligibility of a key employee ... for employment in a gaming operation." The tribal official must apply "the standards adopted in a tribal ordinance" in determining whether the employment of the person poses a threat to the public interest or to the effective regulation of gaming, or creates or enhances the dangers of unsuitable, unfair, or illegal practices." If the tribal official so determines, the "tribal gaming operation shall not employ that person in a key employee ... position." [RP 360-361]; 25 CFR 558.2. The Tribe, as recognized in the Compact and provided for in the Gaming Ordinance, has designated the Gaming Commission as the entity responsible for carrying out the function

discussed in § 558.2.

The NIGC has issued guidance regarding these regulations that states that tribes should segregate the regulatory function of determining suitability for employment from the tribal gaming operation. NIGC, the promulgator of IGRA's implementing regulations, deems that "[e]ffective regulatory oversight requires that there be a separation between the regulation and operation of tribal gaming activities." NIGC Bulletin No. 94-4; see *High Ridge Hinkle Joint Venture,* 119 N.M. at 39, 888 P.2d at 485 (addressing deference to agency interpretation of its own enactments). Courts "ordinarily defer to an agency's interpretation of its own enactments.") NIGC directed that, "[b]ecause the licensing of key employees and primary management officials is a governmental responsibility, the tribal government is solely responsible for conducting background investigations, making suitability determinations and issuing licenses." NIGC Bulletin No. 94-4.

Further, NIGC has stated that the FBI has limited dissemination of criminal history record information solely to tribal governments. *Id.* As a result, criminal history record information should not be provided access to that information. *Id.*

The Compact is consistent with NIGC regulations and guidance. Designated as the Tribal Gaming Agency under the Compact, the Gaming Commission, not the Gaming Enterprise (the Inn of the Mountain Gods) is responsible for licensure of key employees and performing associated background checks. Compact at §§ 4,

5; *see Chavez,* at ¶ 28 (the court ruled against imposing a duty, in part, because the state had not negotiated for the application of certain).

These policies, along with the policy recognized in *Woods* of placing some boundaries on liability for remote injuries, support the district court's determination that the Tribe owed Mr. Bowen no duty. In this regard, *Woods* is consistent with the *Restatement (Second) of Torts* § 317, which limits the duty of an employer to control an employee acting outside the course of employment to circumstances where the employee is on the employer's premises, on premises upon which the employee is privileged to enter only as an employee, or is using the employer's chattel.

For the reasons addressed in the discussion of *Woods*, above, the district court also correctly found that Mr. Bowen could not establish the element of proximate cause.

III. CONCLUSION

The Court should affirm the district court's dismissal of Mr. Bowen's claims against the Tribe.

Respectfully submitted,

KELEHER & McLEOD, P.A.

By David W. Peterson

David W. Peterson
Thomas C. Bird
Javier Junco
P.O. Box AA
Albuquerque, NM 87103
Telephone: (505) 346-4646
Attorneys for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Appellee's Answer Brief was served by first-class mail on November 10, 2009, to the following individual:

Doug Perrin, Esq.
The Perrin Law Firm, P.C.
1401 Elm Street, Suite 1965
Dallas, Texas 75202

David W. Peterson

David W. Peterson

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that to the best of my knowledge and belief the word count feature of the word processing system (Microsoft Word, Version 2003) used to prepare the brief indicates a word count of Ten Thousand Forty Nine [10,049], excluding the cover page, table of contents, table of authorities, signature block, certificate of service and certificate of compliance.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ David W. Peterson
David W. Peterson

Dated: November 10, 2009

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