COPY

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO
NO. 29,625

RICHARD ROSS BOWEN,

Plaintiff-Appellant,

vs.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
DEC 07 2009

MESCALERO APACHE TRIBE,

Defendant-Appellee.

APPEAL FROM THE 12TH JUDICIAL DISTRICT COURT
THE HONORABLE KAREN PARSONS
D-1226-CV-2007-259

APPELLANT'S REPLY BRIEF

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Appellant, by and through his undersigned attorney, for his reply to Appellee's Answer Brief, would show the Court the following:

I. INTRODUCTION

Appellee Mescalero Apache Tribe waived its immunity from suit for injuries proximately caused by the conduct of its Gaming Enterprise. This case was brought by an individual whose injuries were proximately caused by the conduct of the Gaming Enterprise, and without such enterprise, he would not have been injured. The lengthy quotations and references to federal law and gaming regulations have no material application to this case, except to introduce the framework in which Indian gaming was created and recognized.

This case can only be decided in light of the waiver of immunity contained in the compact. It cannot be decided by NGIC regulations. The waiver of immunity is not contained in any of the federal laws cited by the Tribe nor in any of the regulations cited by the Tribe nor was the waiver forced upon the Tribe. In order to obtain additional revenues from gambling, the Tribe had to make an agreement with the State of New Mexico. That agreement contains the waiver of immunity. The obvious intent of Section 8 of the compact was to protect visitors to a casino – visitors like Richard Ross Bowen. (R.P. 310-311) The Tribe's hypertechnical attempts in this case to distance itself from the waiver of immunity to which it agreed as an economic bargain is as cynical as it is wrong. The Tribe made an agreement

and it should be required to abide by that agreement. It should not be permitted to take under the Compact without giving what it promised.

II. ARGUMENT

For the sake of brevity and, hopefully, conciseness, Appellant's reply to certain of the points raised by Appellee in its Answer Brief are simply listed in numerical order as follows:

1. Standard of Review

New Mexico law is very clear and settled on the standard of review of a Motion to Dismiss. The Court accepts as true the facts pleaded in the Complaint and reviews de novo the trial court's application of law to those facts. This has been applied both in the context of tribal sovereign immunity cases (*R & R Deli, Inc. v. Santa Ana Star Casino*, 2006 NMCA 20, 139 NM 85; 128 P3d. 513 (Ct. App. 2005); and *Guzman v. Laguna Development Corporation*, 2009 NMCA 116 P.16 (Ct. App. 2009)); and otherwise (*Environmental Control, Inc. v. City of Santa Fe*, 2002 NMCA 3, P6, 131 NM 450, 38 P3d. 891). Appellee wishes for the Court to create a special rule – to change the law – when tribal sovereign immunity is the subject of a Motion to Dismiss. No cogent reason is given as to why this kind of waiver of sovereign immunity is entitled to a more favorable review from the Court of Appeals, nor why a Motion to Dismiss on jurisdictional grounds relating to sovereign immunity should be treated differently than a Motion to Dismiss on other jurisdictional grounds.

Further, there is no New Mexico case holding that there is a strong presumption in favor of sovereign immunity for an Indian tribe when the tribe has unambiguously waived its sovereign immunity, as it did here under the compact. Appellee's argument that it is entitled to a "strong presumption" against waiver when the Compact contains a waiver is nonsensical. The case cited for the "strong presumption", *Sanchez v. Santa Ana Golf Club, Inc.*, 2005 NMCA 3, 136 N.M. 682,104 P.3d 548 (Ct. App. 2004), involved no waiver as is contained in the Compact in this case. This Court in *Sanchez* went on to say that the waiver of immunity must be express and not implied. *Id* at 136 N.M. 685. The waiver is express here.

The Tribe wants to conduct a gambling business. To do so, it had to make an agreement with the State of New Mexico. That agreement required the Tribe to waive its sovereign immunity for injuries to a visitor such as those suffered in this case. There is no reason in public policy or New Mexico precedent to treat a Motion to Dismiss involving the Tribe's claim of sovereign immunity differently than any other jurisdictional issue is treated.

2. <u>Findings and Conclusion</u>

The court's Findings and Conclusions in this case are helpful in understanding how the trial court reached its decision, but they do not carry the same weight as findings and conclusions following trial on the merits. Rule 01-052 NMRA 1978 Comp. (2009) deals with findings and conclusions following a trial. Such findings

are not necessary, according to Rule 1-052(A), on a Rule 12 or Rule 56 Motion, the Motions which the Court granted in this case. The findings in this case were actually entered as a courtesy to Appellant, but were not the result of considering and weighing the evidence as would be the case in a trial on the merits. Appellee's argument that somehow those findings and conclusions are to be given conclusive effect by this Court is incorrect. The findings and conclusions did not magically convert the Motion hearing to a trial on the merits. The Summary Judgment, of course, is reviewed de novo, with or without findings and conclusions, and the entry of findings and conclusions does not change the standard of review.

3. Proximate Cause

The term "proximate cause" is not ambiguous in New Mexico, and it seems more than a little ridiculous for the Tribe to take the position that this term has an uncertain meaning. The term is defined in the Uniform Jury Instructions and has been defined in the Uniform Jury Instructions as long as they have existed, and the meaning of the term in a compact governed by New Mexico law has to be that contained in the instruction and quoted in Appellant's Brief in Chief.

The compact between the State and the Tribe is approved by the legislature, but it is not written by the legislature. The argument advanced by the Tribe that something should be read into a change between the language in the first compact regarding injuries on the tribal lands and the current compact which makes no

reference to that is therefore misplaced. The legislature is entitled to suggest modifications to a compact up to three times. Section 11-13A-4(F) NMSA 1978. There is of course no evidence as to whether that right was exercised with the Compact in this case. After three tries, the legislature cannot propose any more modifications except to correct "technical errors". (Section 11-13A-4(I) NMSA 1978. In this context, the Compact must be interpreted as it is written. The Compact does not limit its application to injuries sustained on tribal lands. The Compact could have easily included language to that effect if it intended to do so. Rather, the Tribe waives its immunity for injuries proximately caused by the conduct of the Gaming Enterprise. There is no territorial limitation on those injuries and none should be read into the Compact.

4. Comparative Fault

Appellee misapprehends the effect of comparative negligence in this case. Appellee here, as in *Herrera v. Quality Pontiac,* 2003-NMSC-018, 134 N.M. 43, 73 P.3d 181, may submit Michael Gray's fault to the fact finder at trial. The Tribe may choose not to do so.

In either event, the risk of unfairness to Appellee is removed when the decision is reached under pure comparative principles, comparing the relative conduct of Gray and the Tribe. Both could be found at fault. Only one might be found to be at fault.

The simple waiver contained in the Compact – "injuries proximately caused by the conduct of the gaming enterprise" – enters into this analysis as well. As a third party beneficiary of the Compact, Appellant is entitled to be compensated for injuries proximately caused by the conduct of the gaming enterprise. The Tribe waived its immunity so that recovery could be made for such injuries. Proximate cause is a question of fact here, as it was in *Herrera.*

5. Guzman

The case of *Guzman v. Laguna Development Corporation, supra*, supports Appellant in this case. In *Guzman*, this Court recited the familiar rule that "A complaint should not be dismissed unless there is a total failure to allege some matter essential to the relief sought...we accept well-pleaded facts as true and question whether the plaintiff might prevail under any stated facts provable under the claim.", citing *Healthsource, Inc. v. X-Ray Associates of New Mexico*, 2005 NMCA 97, P16, 138 NM 70, 116 P3d. 861. The Complaint in this case met these standards.

This Court concluded in *Guzman* that Plaintiff's claims fell within the waiver provisions of Section 8 of the compact in that case, which had the same language as the Compact here, protecting visitors and waiving immunity for claims of "bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise." In *Guzman,* the question was whether the plaintiff was a "visitor" who would be protected under the compact, and the Court concluded that was a question

of fact which could not have been determined under a Motion to Dismiss. Similarly, in this case, Appellant was a guest who was clearly a person intended to be protected under the waiver. Appellant claimed that his injuries fell within the waiver, and the only way they do not is if as a matter of law there was no waiver at all. For reasons previously explained in Appellant's Brief in Chief and in this Reply, that determination as a matter of law was incorrect.

III. CONCLUSION

Appellant prays that the Order granting summary judgment and dismissing Appellant's Complaint be reversed and this case remanded to the district court for trial.

Respectfully submitted,

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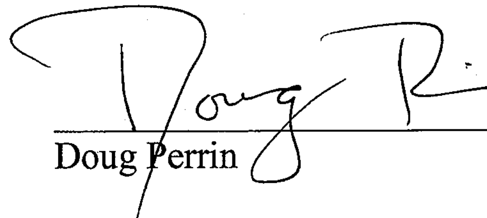

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I hereby certify that a true and correct copy of the foregoing document was forwarded to counsel of record for the Appellee as stated below:

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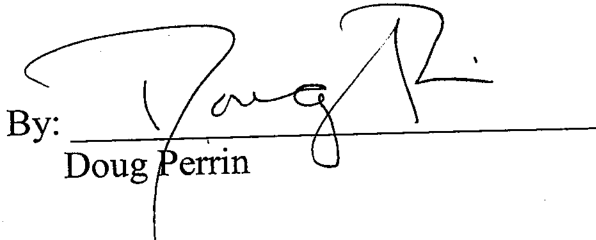
this the 7th day of December, 2009.



By: ______________________
Doug Perrin