IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

GLORIA MENDOZA,

Worker-Appellant,

v.

Court of Appeals Number: 35,520
(WCA No. 15-02355)

ISLETA RESORT AND CASINO
and HUDSON INSURANCE,

Employer/Insurer-Appellees,

and

STATE OF NEW MEXICO UNINSURED
EMPLOYERS' FUND,

Statutory Third Party.

APPELLEES' ANSWER BRIEF TO APPELLANT'S BRIEF IN CHIEF

Civil Appeal from New Mexico Workers' Compensation Administration

The Honorable Leonard J. Padilla
Workers' Compensation Judge

ORAL ARGUMENT REQUESTED

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STATEMENT OF COMPLIANCE

This brief complies with Rule 12-305(C)(1) NMRA as it was prepared using a proportionally spaced type style or typeface in a 14 font size and Times New Roman type style. This brief contains 8020 words in the body as defined in Rule 12-213(F)(1) NMRA and complies with the limitation in Rule 12-213(F)(3). The word-processing program used for this brief was Microsoft Office Word, version 2010.

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SUMMARY OF PROCEEDINGS

Many of Appellant Gloria Mendoza's ("Appellant") statements in the Summary of the Proceedings cannot be relied upon. Much of the Summary of the Proceedings appears to be an attempt to cast the employer and its insurance company in a bad light before these facts have been defended, developed or proven, to divert from the facts and proceedings relevant to the issues on appeal. Because the Workers' Compensation Administration ("WCA") does not have jurisdiction, Appellees Isleta Resort and Casino and Hudson Insurance,[1] as employer and employer's insurance company respectively, have made a limited appearance to contest jurisdiction and have not responded to these allegations. However as a general matter, Appellees deny these allegations.

A. Nature of the Case

This is an appeal from two orders issued by the WCA: (1) the Order Granting the Employer and Insurer's Motion to Dismiss ("Order of Dismissal" **RP 205-08**); and (2) the Order Denying Worker's Motion to Reconsider Order Granting Worker's Motion to File Second Amended Worker's Compensation Complaint ("Order Denying Reconsideration of Tribal First as a Party" **RP 203-04**.

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[1] The WCA has dismissed Tribal First **(RP 91-92)**, which Appellant has appealed **(RP 209-211)**. To the extent that Tribal First is an entity that can appear in this action, Tribal First joins this answer. Isleta Resort & Casino, Hudson Insurance and Tribal First are collectively referred to as "Appellees." Appellees appear in this action for the limited purpose of contesting the jurisdiction of the WCA and the New Mexico Court of Appeals.

The WCA dismissed the complaint, finding that neither the Pueblo of Isleta nor Congress waived the Pueblo of Isleta's sovereign immunity regarding workers' compensation claims and that the Pueblo of Isleta, not WCA, had jurisdiction over Appellant's claims for workers' compensation. (**RP 207**). In light of the Order of Dismissal, the WCA found Appellant's motion to reconsider the order concerning filing a second amendment of the complaint and the dismissal of Tribal First as a party moot. (**RP 203**).

B. Course of Proceedings and Disposition in the WCA

Appellant filed a complaint with WCA on November 16, 2015 (**RP 001-10**), alleging that Appellant had injured her right knee at work while pushing chairs on August 24, 2015. (**RP 80 ¶ 1**). Appellant also filed a First Amended Workers' Compensation Complaint on November 23, 2015, primarily adding "Tribal First and/or Uninsured Employers Fund" as defendants. (**RP 1-3 and 14-22**).

Pursuant to the WCA rules, a mandatory mediation was held on January 7, 2016 (**RP 28-29**), at which Appellees were not represented by counsel. (**RP 36**). As required by WCA rules, the mediator issued a recommended resolution. (**RP 36-43**). Following the issuance of the recommended resolution, undersigned counsel entered a special appearance to contest jurisdiction (**RP 45-46**) and filed a rejection of the mediator's recommended resolution (**RP 48-49**). Appellees filed a motion to dismiss in lieu of an answer on March 2, 2106. (**RP 57-77, 104-05**).

Appellant then filed a motion to file a second amended complaint on March 7, 2016 (**RP 80-86**), and filed an untimely response to the motion to dismiss on April 5, 2016 (**RP 121-193**). On March 16, 2016, the WCA held a hearing on Appellant's motion to file a second amended complaint **(RP 88-90)** and found that Appellant should be given leave to add Hudson Insurance as a party and dismissed Food Industry Self Insurance Fund of New Mexico and Tribal First as parties **(RP 91-92)**. On March 21, 2016, Appellant filed a motion to reconsider the order, requesting the WCA to reconsider its dismissal of Tribal First. (**RP 93-94**).

The WCA held hearings on Appellees' motion to dismiss (**RP 119-20**) and on Appellant's motion for reconsideration on April 12, 2016 (**RP 116-118**). The WCA then issued the Order of Dismissal (**RP 205-08**) and the Order Denying Reconsideration of Tribal First as a Party. (**RP 203-04**). On April 25, 2016 the Appellant filed a Notice of Appeal of the Order of Dismissal, not of the Order Denying Reconsideration of Tribal First as a Party. (**RP 209-15**).

Having filed a motion to dismiss in lieu of an answer (**RP 57-77**), Appellees did not answer the complaint, and the WCA did not hold an evidentiary hearing or make findings of fact apart from identifying the parties as it relates to jurisdiction. (**RP 205-08**). This was appropriate, as sovereign immunity protects a sovereign from the expense and burden of litigation. See *Kiowa Indian Tribe of Oklahoma. v. Hoover*, 150 F.3d 1163, 1171-72 (10th Cir. 1998).

C. Summary of the Facts Relevant to the Issues Present for Review

The Order Granting Appellee's Motion to Dismiss found that the Pueblo of Isleta is a federally recognized Indian tribe. (**RP 206**). The WCA also found that Isleta Resort and Casino is a tribal enterprise wholly owned and operated by the Pueblo of Isleta. *Id.* The WCA found that the Pueblo of Isleta has not waived its sovereign immunity in relation to workers' compensation claims. *Id.* The WCA also found that Isleta Pueblo, in the 2015 Gaming Compact, waived immunity only for tort claims brought by casino customers and that said waiver applies only to customers of the casino, not to its employees. *Id.* The WCA also found that the gaming compact is a contract between the State and the Pueblo, and Appellant did not have standing to raise a claim that the Pueblo of Isleta failed to provide a workers' compensation program as favorable as the State of New Mexico. (**RP 206-07**). Lastly, the WCA found that Tribal First and/or FISIF is the administrator for the Isleta Resort and Casino's Insurer and that Isleta Resort and Casino is an indispensable party to Worker's claim, and the claim cannot proceed without Isleta Resort and Casino. (**RP 207**). The WCA did not make findings about Appellant's alleged injuries or allegations of bad faith. (**RP 205-08**).

D. A Majority of Appellant's Facts are Unreliable.

Within Appellant's "nature of the case and course proceeding" and the "summary of facts relevant to the issues presented for review" and throughout the

brief, Appellant fails to cite to the record for approximately half of her factual assertions. **BIC 1-8**. Further, Appellant fails to distinguish between Appellant's allegations and the WCA's findings of facts. *Id.* Also, many of the unsupported allegations do not appear in the complaint or are raised for the first time on appeal. **BIC 1-8** and First Am. Comp. (**RP 14-25**). The Court should disregard these unsupported "facts" and distinguish between allegations and findings.

The New Mexico Rules of Appellate Procedure require the brief in chief to cite "to the record proper, transcripts of proceedings or exhibits supporting each factual representation" for each fact. Rule 12-213(A)(3) NMRA. "Briefs are not the proper method to establish facts on appeal." *Poorbaugh v. Mullen*, 1982-NMCA-141, ¶ 17, 99 N.M. 11. Matters not of record are not before the reviewing court on appeal. *Id.* Appellants should properly present appellate courts with issues, arguments and proper authority; mere reference in a conclusory statement will not suffice and is in violation of the rules of appellate procedure. *Holt v. New Mexico Dep't. of Taxation & Revenue*, 2002-NMSC-034, ¶ 5 n.1, 133 N.M. 11.

i. Statements of fact without proper citation should not be considered.

Appellant's factual allegations are scattered throughout the brief in chief, not just the summary of proceedings, without citations as required by Rule 12-213(A)(3), and are too numerous to list individually. As one example, Appellant states that "[l]ater, the notice defense was dropped and Tribal First claimed that

Isleta Resort & Casino had not waived its sovereign immunity." **BIC 6**. Not only is there no citation, but this statement is wrong. Pursuant to Rule 1-012 NMRA, which is incorporated by WCA Rule 11.4.4.13(B) NMAC, Appellees filed a motion to dismiss in lieu of an answer based on jurisdiction and immunity. (**RP 57-77**). Appellees have not "dropped" a defense as Appellees have not even answered the complaint to assert defenses other than jurisdiction. (**RP 57-77**).[2]

Another example is Appellant's reference to another case, which purportedly involved Isleta Pueblo and another insurer, in which the Pueblo did not raise a defense of sovereign immunity in support of this claim. **BIC 1-2**. Appellant fails to cite to the record proper, a case name or case number. *Id*. Appellant fails to cite to any legal authority to support the implication that Appellees are barred from raising an immunity defense because the Pueblo allegedly failed to raise the immunity in a separate case. *Id*. These statements are not matters of record and should not be before the reviewing court on appeal. *Poorbaugh*, 1982-NMCA-141; *Oldham v. Oldham*, 2011-NMSC-077, ¶ 20, 149 N.M. 215 (The reviewing court will not review issues raised in appellate briefs that are unsupported by cited authority).

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[2] Another statement which has a citation but is incorrect is that "counsel for the Employer and Hudson Insurance admitted that Tribal First was a 'trade name' of Hudson Insurance . . . ." **BIC 5**. The statement is incorrect because counsel stated that Tribal First was a trade name of the third party administrator, not Hudson Insurance, who is the insurer. **4-12-16 CD 9:48:20**.

As a last example, the brief in chief contains multiple, unsupported allegations regarding Appellant's counsel's apparent thought process regarding various amendments in an attempt to sue the proper parties. **BIC 1-4**. Whether these allegations are true or not, they are irrelevant to the jurisdiction and immunity issues on appeal. (**RP 203-08**). Therefore, the Court of Appeals should not consider these unsupported allegations. *Poorbaugh*, 1982-NMCA-141; *Oldham*, 2011-NMSC-077.

ii. The Court of Appeals should not review allegations not reviewed by the WCA

It is the WCA's jurisdiction, not the reviewing court's, to review the evidence and determine the burden of persuasion, and the Court of Appeals should not accept mere allegations as "facts" or any implication that the WCA has made findings of facts not supported by the record. *Scott v. Jordan*, 1983-NMCA-022, 99 N.M. 567 (It is for the trial court, not the appellate court on review to pass on the weight of the evidence and determine whether the burden of persuasion has been met). The summary of facts contains numerous allegations concerning the Appellant's alleged injury, her job duties, her notification of the accident to the casino, and other related allegations. **BIC 1, 5-6, 27-28**. Generally, most of these allegations do not cite to the record and are not findings of the WCA or even allegations contained in the First Amended Complaint. *Id.*; *see also* (**RP 14-22, RP 121-193**).

Therefore, the Appellant's Summary of the Proceedings should be reviewed with caution, taking into account what is truly relevant on appeal, what is not supported by the record, and what is in the jurisdiction of the appellate court.

ARGUMENT

I. APPELLANT MISTAKES THE STANDARD OF REVIEW

Appellant asserts that both a whole record review and a de novo review apply. **BIC 8-9**. The Appellant's assertion that the whole record review applies is incorrect, and Appellees assert that a de novo review applies to review of sovereign immunity and jurisdiction. **BIC-8**. Although the whole record review standard does apply to administrative evidentiary hearings, there was not final evidentiary hearing, and this standard does not apply to issues of law. *Selmeczki v. N.M. Dep't of Corr.*, 2006-NMCA-024, ¶ 13, 137 N.M. 122. Appellees agree with Appellant's statements that questions about whether an Indian tribe is entitled to sovereign immunity and subject matter jurisdiction are decided under a de novo review. **BIC 8-9**; *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 6, 132 N.M. 207; *Guzman v. Laguna Dev. Corp.*, 2009-NMCA-116, ¶ 16, 147 N.M. 244.

Appellant also asserts in the legal argument portion of her brief that the WCA's grant of Appellees' motion to dismiss should be treated as a grant of summary judgment and that this Court should view the "whole record in the light most favorable to the party opposing summary judgment to determine if there is

any evidence that places a genuine issue of material fact in dispute." **BIC 10.** Appellant asserts that such a standard is required because the lower court considered evidence outside the pleadings. **BIC 9-10.**

However, this matter was dismissed due to a lack of subject matter jurisdiction under Rule 1-012(B)(1) NMRA,[3] and it is well-established that "[w]hen making a rule 12(b)(1) motion, a party may go beyond the allegations in the complaint to challenge the facts upon which jurisdiction depends, and may do so by relying on affidavits or other evidence properly before the court." *Coffey v. United States*, 870 F. Supp. 2d, at 1202, 1215 (D.N.M. 2012)[4]; *c.f., Prot. and Advocacy Sys. v. City of Albuquerque*, 2008-NMCA-149, ¶ 17, 145 N.M. 156 (recognizing authority that factual submissions do not convert a Rule 12(B)(1) motion into a Rule 56 motion). Unlike a motion to dismiss under Rule 1-012(B)(6), to look at matters outside the pleadings does not convert a Rule 1-012(B)(1) motion to a motion for summary judgment. *Prot. and Advocacy*, 2008-NMCA-149, ¶ 17; *but see Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003,

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[3] Appellant concedes that this matter was dismissed due to lack of subject matter jurisdiction based on Rule 1-012(B)(1). **BIC 21.**

[4] "Because the language of Rule 1-012 closely parallels that of its federal counterpart, Rule 12 of the Federal Rules of Civil Procedure, we find federal authority interpreting Rule 12 and discussing the applicable standard of review for evaluating a motion to dismiss instructive." *Doe v. Roman Catholic Diocese of Boise, Inc.*, 1996-NMCA-057, ¶ 5, 121 N.M. 738 (citations omitted).

¶ 21, 136 N.M. 682 (applying summary judgment standard of review in appeal on grant of motion to dismiss based on sovereign immunity).

This distinction is critical here, as Appellant has asserted that the WCA should have found genuine issues of material fact in dispute and that the WCA should have "ordered a continuance to allow Worker to conduct discovery." **BIC at 26-27**. Subjecting an immune entity to discovery is precisely the "burdens of litigation" which sovereign immunity is intended to protect against. *Kiowa Indian Tribe*, 150 F.3d at 1171-72. The presence or absence of genuine issues of material facts does not control this Court's review or otherwise allow the Court to find whether the WCA possessed jurisdiction over Appellant's claim. Instead, the determination of whether an Indian tribe or an entity under the tribe's control possesses sovereign immunity from suit in state court is a pure question of law which an appellate court reviews de novo. *Gallegos,* 2002-NMSC-012, ¶ 6; *Martinez v. Cities of Gold Casino*, 2009-NMCA-087, ¶ 22, 146 N.M. 735.

Regarding review of the third issue on appeal on the motion to reconsider, the WCA denied the motion, finding that the issue was moot because the WCA lacked jurisdiction. (**RP 203-04**). Denials of a motion to reconsider are reviewed for abuse of discretion. *GCM, Inv. v. Kentucky. Cent. Life Ins. Co.*, 1997-NMSC-052, ¶ 28, 124 N.M. 186. If the Court of Appeals found jurisdiction, thereby removing mootness, then all other issues raised by Appellant should be remanded to the

WCA, and the Court of Appeals does not have jurisdiction to weigh and review evidence regarding factual allegations not yet decided by the WCA. *Scott*, 1983-NMCA-022.

II. THE WCA CORRECTLY HELD THAT IT LACKED JURISDICTION DUE TO THE PUEBLO'S SOVEREIGN IMMUNITY

A. The Gaming Compact Does Not Waive the Pueblo's Sovereign Immunity for Workers' Compensation Claims in State Court.

New Mexico and federal courts both "recognize tribal sovereign immunity as a legitimate legal doctrine of significant historical pedigree." *Hoffman v. Sandia Resort and Casino*, 2010-NMCA-034, ¶ 6, 148 N.M. 222 (citing *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 172 (1977)); *Gallegos*, 2002-NMSC-012.[5] Similarly, both courts recognize a "strong presumption against waiver of tribal sovereign immunity." *Sanchez,* 2005-NMCA-003, ¶ 7 (citing *Demontiney v. United States ex rel. Bureau of Indian Affairs*, 255 F.3d 801, 811 (9th Cir. 2001)). Absent an "unequivocal and express waiver of sovereign immunity or congressional authorization, state courts lack the power to entertain lawsuits against tribal entities." *Gallegos*, 2002-NMSC-012, ¶ 7; *C&L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (waivers must be "clear"); *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673

[5] "Tribal immunity is a matter of federal law and is not subject to diminution by the states." *Gallegos*, at ¶ 7 (citation omitted); *see Kiowa Tribe of Oklahoma. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998).

F.2d 315, 319 (10th Cir. 1982); (waivers "cannot be implied but must be unequivocally expressed"). Thus, the only question that this Court must decide is whether the Pueblo of Isleta has unequivocally and expressly waived its sovereign immunity from suit in the courts of the State of New Mexico, including the WCA.

Critical to this issue, "[b]ecause a tribe need not waive its sovereign immunity at all, it is free to 'prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.'" *R&R Deli, Inc. v. Santa Ana Star Casino*, 2006-NMCA-020, ¶ 10, 139 N.M. 85 (citing *Missouri River Servs., Inc. v. Omaha Tribe*, 267 F.3d 848, 852 (8th Cir. 2001)). Any terms, conditions, or limitations on such a waiver "must be strictly construed and applied." *R&R Deli,* 2006-NMCA-020, ¶ 10. Therefore, a tribe may effect a waiver of immunity that specifies the forum in which the suit may be brought, or that provides limitations on remedies or damages available. *Id.* at ¶ 12. New Mexico courts have reliably applied those limitations to a tribe's consent to be sued. *See id.* at ¶ 13 (applying forum and relief limitations in a tribe's waiver of immunity and consent to suit); *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, ¶ 27, 141 N.M. 269 ("when a sovereign tribe waives its immunity from suit, it may also choose the forum in which the resulting litigation will occur, including state court") (citation omitted).

Workers' compensation claims are treated no differently, and New Mexico courts have consistently applied the doctrine of tribal sovereign immunity to dismiss workers' compensation claims from the jurisdiction of state courts. *See Antonio v. Inn of the Mountain Gods Resort and Casino*, 2010-NMCA-077, 148 N.M. 858, *cert. denied*, 2010-NMCERT-007, 148 N.M. 610 (July 13, 2010) (affirming WCA's order dismissing claim against tribal enterprise based on tribal sovereign immunity); *Peña v. Inn of the Mountain Gods Resort and Casino*, No. 29,799, (N.M. Ct. App. Jan. 31, 2011) (non-precedential), 2011 WL 704478, *cert. denied*, 2011-NMCERT-003, 150 N.M. 619 (Mar. 10, 2011) (affirming WCA's order granting tribal enterprise's motion to dismiss on the basis of tribal sovereign immunity). New Mexico courts have consistently held that a tribe's purchase of workers' compensation insurance policies, participation in the state's workers' compensation program, or internal employment policies do not separately or collectively constitute a waiver of tribal sovereign immunity. *Martinez*, 2009-NMCA-087, ¶ 27 ("We disagree with the latter portion of Worker's argument that the purchasing of a workers' compensation insurance policy implicitly requires a tribe or tribal entity to surrender to state court jurisdiction."); *Antonio*, 2010-NMCA-077, ¶ 17 (same); *Sanchez*, 2005-NMCA-003, ¶¶ 16, 18 (holding that the tribe's "employment handbook does not constitute an implied waiver of sovereign immunity" and "waivers of sovereign immunity cannot be created by implication

through activities such as participation in the state's workers' compensation program").

Although Appellant concedes that she is not arguing that the Pueblo implicitly waived its sovereign immunity, Appellant's argument requires this Court to find such an implicit waiver by piecing together various implied waiver arguments. **BIC 11**. Specifically, Appellant argues that compact language describing that the Pueblo must create an appeal process "in an administrative or judicial proceedings and as to which no defense of tribal sovereign immunity would be available" creates an express and unequivocal waiver of tribal sovereign immunity for suits in state courts. **BIC 13** ("Worker contends that 'no defense of sovereign immunity is available' to Employer/Insurer based on the clear language of the 2015 Compact.") (citing 2015 Gaming Compact at Sec. 4(B)(6)). In addition, Appellant argues that the "impartial forum" language does not limit such an appeal to tribal court or otherwise creates an express and unequivocal waiver for her claim to be brought against the Pueblo in state court. **BIC 16** ("The WCA is such an impartial forum, has subject matter jurisdiction over workers' compensation claims and Worker is not required to pursue this claim through Isleta's Tribal Court based on the clear language of the Compact.") (citing 2015 Gaming Compact at Sec. 4(B)(6)). Because none of these cited provisions actually contain an express waiver of the Pueblo's sovereign immunity from suit in state

court, Appellant's argument amounts to an implied waiver argument. This Court has rejected attempts in workers' compensation claims to find a waiver "through inference and implication" or through the totality of combined implied wavier arguments. *Sanchez*, 2005-NMCA-003, ¶ 23.

To be clear, there is an actual and explicit waiver of immunity from suit in state courts in the Gaming Compact that applies to personal injury claims brought by visitors to gaming facilities. *Doe v. Santa Clara*, 2007-NMSC-008, ¶ 8; *Martinez,* 2009-NMCA-087, ¶ 26. That specific waiver reads:

> 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 ten million dollars ($10,000,000) 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.

2015 Gaming Compact at Sec. 8(D)[6]. The Gaming Compact contains an additional, instructive choice of law provision that allows an injured visitor to

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[6] The 2015 Compact elsewhere states the waiver as follows: "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 Tribal, State, or other 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." 2015 Gaming Compact at Sec. 8(A). Due to conflicts in opinions between the New Mexico Supreme Court and the Federal District Court of the District of New Mexico, the Compact also states that "any such claim may be brought in state district court, including claims arising on tribal land, unless it is

select the forum in which to bring such a claim. 2015 Gaming Compact at Sec. 8(E). That choice of law provision explicitly allows such claims to be brought in state court. *Id.* ("Election by Visitor. A visitor having a claim described in this Section may pursue that claim in binding arbitration, or Tribal, State, or other court of competent jurisdiction."). Appellant does not claim that these specific waiver and choice of law provisions apply to this appeal.

The provisions cited by Appellant fall outside the "Specific Waiver of Immunity and Choice of Law" section of the Gaming Compact. Instead, Appellant cites the Gaming Compact's "Conduct of Class III Gaming" section which contains contractual obligations imposed upon the Pueblo to provide workers' compensation insurance. 2015 Gaming Compact at Sec. 4(B)(6). The specific clauses cited by Appellant fall within the Pueblo's contractual obligation to create a workers' compensation appeal process with the following elements: (1) it must allow a worker to appeal an adverse determination; (2) the appeal must be handled by an impartial forum; (3) the impartial forum could be the Pueblo's court; (4) the appeal must be timely decided; (5) the appeal must include a judicial or administrative proceeding; and (6) during the appeal, the Pueblo could not assert tribal sovereign immunity as a defense. *Id.* This contractual obligation between the Pueblo and the State of New Mexico does not contain any waiver of immunity

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finally determined by a state or federal court that the IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court." *Id.*

from suit in state court, nor language that authorizes the worker to elect the forum in which to bring an appeal. As a result, it does not qualify as an explicit waiver of immunity to suit in state court. *See R&R Deli, Inc.,* 2006-NMCA-020, ¶ 10 ("Because a tribe need not waive immunity at all, it is free to prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.") (quotation marks and citation omitted).

The Gaming Compact is a contract between the State of New Mexico and the Pueblo of Isleta, and "[a]s with any other contract, the choice of words can be pivotal." *Doe v. Santa Clara*, 2007-NMSC-008, ¶ 15. The vast differences between the specific waiver of immunity and the language cited by Appellant demonstrate that neither party to the Gaming Compact – the State or the Pueblo – intended to waive tribal sovereign immunity from workers' compensation claims brought in state court. By comparison, the specific waiver language states that the Pueblo "waives its defense of sovereign immunity in connection with any claims for compensatory damages for bodily injury or property damage" – whereas the provisions relied on by Appellant reads that during the appeal of an adverse determination in the tribal process "no defense of tribal sovereign immunity would be available". 2015 Gaming Compact at Sec. 8(D) and Sec. 4(B)(6). Had either the Pueblo or the State of New Mexico intended the latter provision to be a waiver, identical or even similar language could have been used. Yet the purpose and

scope of the sovereign immunity language with regard to workers' compensation appeals makes it clear that the "choice of words can be pivotal" and neither party bargained for an express or implied waiver of immunity from suit in state court. *Doe v. Santa Clara*, 2007-NMSC-008 ¶ 15.

In addition, the forum selection provisions are entirely different. The specific waiver for personal injury claims authorizes a visitor to "pursue that claim in binding arbitration, or Tribal, State, or other court of competent jurisdiction" – whereas the provisions relied on by Appellant states that the Pueblo's appeal process shall be to "an impartial forum, such as (but not limited to) the Tribe's tribal court." 2015 Gaming Compact at Sec. 8(E) and Sec. 4(B)(6). The workers' compensation provisions of the Gaming Compact, therefore, authorize the Pueblo, not the worker, to select the forum and do not include any reference to allowing such appeals to be brought in any state court, including the WCA.

In *Peña*, this Court had the opportunity to find such an implied or express waiver of immunity for workers' compensation claims in state court under identical language in the 2007 Gaming Compact. *Peña*, 2011 WL 704478 at *4; **BIC 16** ("The date of the work accident in Peña was January 17, 2009 which makes the 2007 Compact applicable."); **BIC 12** (text of 2007 Gaming Compact). Notwithstanding the same sovereign immunity and forum language in the 2007 Gaming Compact that is relied upon by Appellant here, the Court specifically

recognized that it is "firmly established that the gaming compact does not waive tribal sovereign immunity in workers' compensation claims . . . ." *Peña*, 2011 WL 704478 at *4. The language in the 2007 Gaming Compact concerning workers' compensation claims that was before this Court in *Peña*, is the identical language relied upon Appellant here. **BIC 12-13** (reciting 2007 and 2015 Gaming Compacts provisions). Therefore, Appellant's requested relief in this appeal would require this Court to overrule *Peña* and depart from the "firmly established" holdings that the Gaming Compacts do not waive tribal sovereign immunity for workers' compensation claims. *Peña*, 2011 WL 704478 at *4.

One other jurisdiction has specifically evaluated similar language in which a tribe was contractually obligated not to raise sovereign immunity as a defense to workers' compensation claims, and found that such language did not constitute an explicit waiver of immunity for purposes of state court jurisdiction. In *Bonnette v. Tunica-Biloxi Indians*, 873 So.2d 1 (La. Ct. App. 2003), the Louisiana Court of Appeals evaluated gaming compact language that stated that the tribe's workers' compensation insurance policy shall be deemed to contain "an exclusion that the insurer or the insured shall not be entitled to make any claim of sovereign immunity in defense of liability." *Id.* at 6. There, the court clarified the distinction between raising the defense of sovereign immunity from liability and raising the defense of sovereign immunity from jurisdiction. *Id.* at 7 ("the compact prohibits

the insured or insurer from raising the defense of sovereign immunity as to liability, not as to jurisdiction."). The tribe did not argue that it could never be liable for a workers' compensation claim, but rather that its own court was the proper forum under the compact. *Id.* The court agreed and held that "[c]onsidering that the compact is an agreement between the Tribe and the State, we do not find the language . . . represents the Tribe's consent to be sued by a third party in state court." *Id.*

The WCA lacked jurisdiction over this matter because Isleta Resort and Casino is a tribal enterprise of the Pueblo of Isleta, a federally recognized Indian tribe, and is therefore undisputedly immune from suit. The WCA correctly applied both the body of state and federal law that requires any waiver of immunity to be express and unequivocal, and interpreted the 2015 Gaming Compact as not waiving the Pueblo's immunity from suit in state court. The WCA's grant of Appellees' motion to dismiss, therefore, should be affirmed.

B. No Waiver Can Be Implied Based on Alleged Contractual Violations of the Compact and Appellant Lacks Standing to Bring Such a Claim.

Appellant briefly argues that the Pueblo waived its immunity by failing to provide worker's compensation insurance with terms as favorable as state programs. **BIC 20**. These arguments have previously been addressed and rejected by this Court, which has held that absent an express waiver of sovereign immunity,

the Gaming Compact does not create a private cause of action for alleged violations of its provisions. *Antonio*, 2010-NMCA-077, ¶ 18; *see R&R Deli*, 2006-NMCA-020, ¶ 30. Moreover, Appellant's argument, which concerns a pure factual claim that is not supported in the record below, does not involve the critical question of whether the Pueblo, its entities or insurers, explicitly waived sovereign immunity as a matter of law, which is the only relevant question on appeal.

This Court has addressed a similar argument in *R&R Deli*, in which the plaintiff alleged that a tribe had violated the Gaming Compact's requirement that it adopt laws prohibiting discrimination on the grounds of race, color, national origin, gender, sexual orientation, age or handicap. *Id.* at ¶¶ 29-30. This Court found that in addition to the fact that the non-discrimination provision was not applicable to the plaintiff, the tribe had not waived its immunity with respect to any claims for discrimination. *Id.* at ¶ 30. Although the Gaming Compact required the tribe to enact such laws, the Court held that "[b]ecause waivers of sovereign immunity must be express and unequivocal, and because the [non-discrimination] provision makes no mention whatsoever of a waiver, we decline to hold that the provision constitutes a valid wavier of the Pueblo's immunity from suit." *Id.*

In *Antonio*, this Court addressed the precise argument made by Appellant here. Specifically, the worker argued that the tribe did not have a workers' compensation program in place that was compliant with the Gaming Compact.

Antonio, 2010-NMCA-077, ¶ 18. The Court noted that "even if, as Worker argues, the Tribe did not have a workers' compensation program in place when he was injured, the Compact still does not provide a private cause of action." *Id.* (citing *Martinez*, 2009-NMCA-087, ¶¶ 25-26 (holding that the private right of action to which tribes agreed in the Compact pertains only to visitors and is inapplicable to worker's compensation claims)). As argued above, Appellant has failed to demonstrate an express an unequivocal waiver of sovereign immunity for workers' compensation claims, and there is no similar waiver for Appellant's claims that the Pueblo violated its obligations in the Gaming Compact.

Critically, Appellant's arguments concerning alleged contractual violations are pure factual claims that do not concern whether the Pueblo, its entities or insurers, explicitly waived sovereign immunity. The Pueblo denies that its workers' compensation program was not in compliance with the Gaming Compact's requirements. Appellant failed to avail herself to the Pueblo's program and seeks an end around of the Pueblo's immunity and the process defined in the Gaming Compact and by the Pueblo.

The State of New Mexico and the Pueblo of Isleta are the only parties to the Gaming Compact. *See R&R Deli,* 2006-NMCA-020 ("Gaming compacts are contracts between two parties, and we treat them as such."); *see also*, *State ex. rel Coll v. Johnson*, 1999-NMSC-036, 128 N.M. 154 (holding that private citizens did

not have standing as beneficially interested parties or under great public importance doctrine to challenge the legality of legislation authorization Indian gaming). The Gaming Compact contains a specific dispute resolution mechanism "in the event either party believes that the other party has failed to comply with or has otherwise breached any provision of this Compact . . . ." 2015 Gaming Compact at Sec. 7(A). For breaches of provisions of the Gaming Compact, there is no allowance for private party enforcement. Therefore, Appellant has no standing to raise this claim, and Appellant has cited no authority that alleged contractual violations by a party in a Gaming Compact creates an express and unequivocal waiver of sovereign immunity to allow Appellant's claims to survive.

III. THE WCA CORRECTLY HELD THAT THE PUEBLO'S IMMUNITY EXTENDS TO ITS TRIBAL ENTERPRISES AND INSURERS

Under New Mexico law, an Indian tribe's immunity extends to its enterprises. *E.g., Sanchez,* 2005-NMCA-003 at ¶ 6 ("Other entities under tribal control are extended the same sovereign immunity as the tribe itself."); *Hoffman v. Sandia Resort & Casino*, 2010-NMCA-034, at ¶ 3, 148 N.M. 222 (extending sovereign immunity to "a wholly-owned, and unincorporated enterprise of the Pueblo of Sandia"); *Gallegos*, 2002-NMSC-012, ¶¶ 43-48 (holding that a suit cannot proceed against an insurer under Rule 1-019). Similarly, a tribe's immunity also requires the dismissal of an insurance carrier due to the inability to join the

insured tribal entity, to the extent it is both immune and an indispensable party pursuant to Rule 1-019 NMRA. *Gallegos*, 2002-NMSC-012 at ¶ 44 ("Tesuque has a valid interest in the judicial determination of the effect of the insurance contract and the rights of the parties thereto, which makes it necessary to the lawsuit."). Appellant attempts to circumvent this well-settled law by relying on a single, distinguishable, out-of-jurisdiction case. **BIC 24-26** (citing *Waltrip v. Osage Million Dollar Elm Casino*, 290 P.3d 741 (Okla. 2012).

Appellant's argument is premised first on the fallacy that the New Mexico Worker's Compensation Act, NMSA 1978, Section 52-1-4(C), applies to either the Pueblo or its insurer. **BIC 22**. Appellant offers no support for her superficial application of this specific statutory provision to the Pueblo of Isleta. The Gaming Compact makes it clear that the only circumstances in which the State of New Mexico's workers' compensation program, much less the Workers' Compensation Act, could apply to the Pueblo is if the Pueblo elects to participate and "upon execution of an appropriate agreement with the State." 2015 Gaming Compact at Sec. 4(B)(6). Appellant does not allege that such agreement exists nor does she explain how the Workers' Compensation Act could otherwise apply to the Tribe. *See McClanahan v. State Tax Comm'n of Arizona.*, 411 U.S. 164, 170-171 (1973) (holding that state laws do not apply to Indian tribes except when Congress has

expressly provided that state law shall apply).[7] Here, the Gaming Compact clearly defines the tribal workers' compensation program as wholly separate and distinct from state workers' compensation law.

New Mexico courts have specifically found that tribal enterprises are indispensable parties in suits brought against tribal insurers and that independent claims cannot be sustained against a tribal insurer. *Gallegos*, 2002-NMSC-012 at ¶¶ 43-48 (Indian tribe is an indispensable party in action against the tribe's insurer). The New Mexico Supreme Court has found that a tribe "has a valid interest in the judicial determination of the effect of the insurance contract and the rights of the parties thereto, which makes it necessary to the lawsuit." *Id.* at ¶ 44 (citations and internal quotation marks omitted). Specifically, unlike any other typical insured party, "a tribal entity has an interest in protecting its tribal resources and controlling their dissipation and allocation under its insurance contract." *Id.* at ¶ 47. A tribe, therefore, has a "compelling in interest in protecting its sovereign right to litigate on its own behalf and in the forum of its choice." *Id.* (citation omitted). That interest, the New Mexico Supreme Court found, outweighs a

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[7] Many courts have also addressed a federal statute that applies state workers' compensation laws to federal enclaves and found that it had no effect on tribal sovereign immunity. *Middletown Rancheria of Pomo Indians v. Workers' Comp. Appeals Bd.*, 60 Cal. App. 4th 1340, 71 Cal. Rptr.2d 105 (1998); *White Mountain Apache Tribe v. Indus. Comm'n. of Arizona*, 696 P. 2d 223 (Ariz. App. 1985); *Tibetts v. Leech Lake Reservation Bus. Comm.*, 397 N.W. 2d 883, 888 (Minn. 1986).

plaintiff's "frustration at [her] inability to achieve jurisdiction over the party at the heart of the dispute." *Id.* at ¶ 51 (citation omitted).

Gallegos is entirely consistent with cases in other jurisdictions which have found that when a court lacks subject matter jurisdiction over a tribe due to sovereign immunity, the court also lacks jurisdiction over the tribe's insurer. *See e.g. Matter of Grosshans v. Sky Ute*, W.C. No. 4-777-655 (Colo. Indus. App. 2011) (The tribe's insurer did not have an independent duty to provide benefits to claimant under the Colorado Workers' Compensation Act or a duty greater than that of the tribal employer. Therefore, an independent workers' compensation claim could not be maintained against tribe's insurer.) For example, the Court of Appeals of Arizona has held that an independent action cannot be brought against an insurer when the claim is barred by tribal immunity. *White Mountain Apache Tribe*, 696 P.2d 223.

In addition, Appellant's argument requires this Court to accept an exception to tribal sovereign immunity, where a tribe waives its immunity if it purchases workers' compensation insurance from a non-tribal third-party insurer. In essence, Appellant seeks to punish the Pueblo for acquiring a workers' compensation insurance plan, rather than remaining self-insured. The Gaming Compact does not require the Pueblo to obtain workers' compensation insurance through a non-tribal, third-party insurer. Because New Mexico courts have definitively held that tribe's

do not waive immunity by procuring insurance, Plaintiff's argument that it can proceed against the Pueblo's insurer must fail. *Martinez*, 2009-NMCA-087, ¶ 27 ("We disagree with the latter portion of Worker's argument that the purchasing of a workers' compensation insurance policy implicitly requires a tribe or tribal entity to surrender to state court jurisdiction.").

To ignore the well-established law in this state that a tribe is a necessary and indispensable party that cannot be joined in a suit against its insurer, Appellant asks this Court to adopt *Waltrip*, 290 P.3d 741, despite the fact that it directly conflicts with New Mexico law. The State of Oklahoma's Estoppel Act, which is the critical law cited in *Waltrip*, does not apply in New Mexico, so not only is Worker's reliance on *Waltrip* without precedential value, it is not factually or legally relevant to this appeal. Oklahoma's Estoppel Act, which "confers third party beneficiary status on the injured worker and prevents the insurer from denying coverage based on the employer's status[,]" is the single and only legal basis upon which the Oklahoma Supreme Court allowed the suit to proceed against an insurer and in the tribe's absence. *Waltrip* 290 P.3d 741 at14, 19. No such Estoppel Act exists in New Mexico, despite Appellant's argument otherwise.

The New Mexico statute to which Worker cites a comparison – NMSA 1978, Section 52-1-4(C) – may have some similarities in language as the Oklahoma Estoppel Act, yet New Mexico courts have specifically clarified that the

"rationale [for such a provision] is straightforward: to make sure that injured workers or their dependents will be able to collect the benefits due to them even if the employer goes out of business or becomes bankrupt." *Peterson v. Wells Fargo Armored Services Corp.*, 2000-NMCA-043, ¶ 12, 129 N.M. 158. The underlying intent of an employer's financial solvency sits quite far from hauling an insurer into a state forum when a tribal remedy exists, and in violation of the tribe's interests as a necessary and indispensable party. *Gallegos*, at ¶ 44. Nevertheless, as argued above, Appellant offers no argument or justification that the New Mexico Workers' Compensation Act, let alone any specific provision of the Act, applies to this matter.

Furthermore, Appellant's reliance on *Raskob* is similarly misplaced. **BIC 23** (citing *Raskob v. Sanchez*, 1998-NMSC-045, ¶ 3, 126 N.M. 394). Although *Raskob* has been applied by this Court to allow an injured party to join an insurer in a claim filed against a tribal entity, it did so in a case in which the tribe had already waived its immunity under the specific waiver provisions for personal injury actions by visitors. *Romero v. Pueblo of Sandia*, 2003-NMCA-137, ¶ 12, 134 N.M. 553. Specifically, this Court has allowed an insurer to be joined under the *Raskob* factors, but only where the tribe itself had waived immunity and was otherwise involved and represented in the suit. *Id.* at ¶ 9. *Raskob* does not permit an end-around tribal sovereign immunity, nor does it allow a suit to proceed "with

or without Isleta Pueblo" as offered by Appellant. **BIC 23**. To apply *Raskob* to defeat both the Pueblo's sovereign immunity and its necessary and indispensable status would run afoul of decades of New Mexico law to the contrary.

The WCA correctly rejected Appellant's invitations to apply Oklahoma statutory and case law to this matter and correctly applied New Mexico law to find that the Pueblo is an indispensable party to any suit against its insurer.

IV. THE WCA CORRECTLY FOUND THAT APPELLANT'S MOTION TO RECONSIDER WAS MOOT[8]

WCA correctly found that Appellant's motion to reconsider was moot because the WCA lacked jurisdiction over Appellees. **(RP 203-204)**. Appellant argues that if the Court of Appeals overturns WCA's dismissal, which Appellees oppose, then the Court should also determine the proper parties to this action. **BIC 27-29**. Rather than deciding the proper parties, the Court of Appeals should remand the substantive issues raised in Appellant's motion to reconsider as the motion would no longer be moot. The Court of Appeals should not make a determination about the proper parties and should not consider Appellant's new factual arguments, as Appellant has failed to cite to the record in support of these new allegations.

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[8] Appellant's Notice of Appeal did not indicate that she was appealing the Order Denying Reconsideration of Tribal First as a Party and did not attach the same order. **(RP 209-215)**.

As an initial matter, Section C of Appellant's legal argument incorrectly asserts that the WCA denied Appellant's request to add Hudson Insurance as a party. **BIC 27-28**. The Order Granting Worker's Motion to File a Second Amended Worker's Compensation Complaint found that "Worker shall name Hudson Insurance as a party to the case." **RP 91-92**. The brief in chief contradicts itself on this issue. Appellant's Summary of the Proceedings states that the WCA ordered Appellant to add Hudson Insurance as a party, although Appellant does not cite to the record. **BIC 4 and 27**. Appellees assume that Appellant's argument that Hudson Insurance should be added as a party in Section C of the legal argument (**BIC 27-28**) is an error and that Appellant is asking that only Tribal First be added as a party.

As Appellant did in the Summary of Proceedings section, Appellant repeatedly makes additional factual allegations without citing to the record in Section C regarding the motion to reconsider. Primarily, this appears to be an attempt to demonize Tribal First and Hudson Insurance without acknowledging that the WCA has not made findings on these allegations. Appellees have not had the opportunity to answer or raise defenses against these allegations, and many of the allegations do not even appear in the First Amended Complaint. (**RP 203-04, RP 14-22**).

For example, Appellant states, without citing to the record, that "[t]here is no dispute that Tribal First has committed bad faith and unfair claims processing in this matter." **BIC 27**. Setting aside that Appellees have not answered the complaint, this is clearly a disputed allegation as such a claim was specifically denied in Appellees' Motion to Dismiss. (**RP 57-77**). Likewise, the record does not contain any findings or record that evidence was submitted regarding the Appellant's credit score or that Tribal First has made a practice of misrepresenting the law "across the nation of behalf of numerous tribes and Hudson Insurance" or that Tribal First and Hudson Insurance have "derailed" cases "from Colorado to New York". **BIC 28-29**. These statements should not be considered as they are unsupported by the record and not true. *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339 (An appellate court will not review unclear arguments, or guess at what a party's argument might be and declining to entertain a cursory argument that relied on several factual assertions that were made without citations to the record) and; *Poorbaugh,* 1982-NMCA-141.

Even if these statements were true, this Court would not have jurisdiction to decide these issues because the WCA has not yet ruled on these facts. Rather, the WCA found the motion to reconsider was moot because it lacked jurisdiction. Order Denying Reconsideration of Tribal First as a Party. **RP 203**. "[T]his tribunal entered an Order granting Employer/Insurer's Motion to Dismiss, thereby

rendering Worker's Motion to Reconsider moot." *Id.* The WCA did not make any findings regarding the denial of the claim and if it was in bad faith nor of the alleged damages of the Appellee. *Id.*

If the Court of Appeals were to find that the Pueblo had waived immunity and that the WCA had jurisdiction over the claims, which Appellees strongly dispute, then the motion to reconsider would not be moot, and the WCA should be allowed to decide the substantive issues raised in the motion to reconsider, not additional arguments made without support in the brief in chief. *See Garcia v. Garcia*, 1970-NMSC-035, 81 N.M. 277 (Findings not having been requested, reviewing court may not consider issues not shown by the record to have been presented). Therefore, if this Court found jurisdiction and a waiver of immunity, the issue of alleged bad faith should be remanded to the WCA, and Appellees should be allowed to respond and defend against such claims following the proper procedure.

CONCLUSION

This answer is filed for the sole purpose of contesting the jurisdiction of the WCA and is made without waiving any defense or objection. Specifically, this response is not a waiver of sovereign immunity. Many of Appellant's assertions are made without support and are not relevant to the questions of sovereign immunity and jurisdiction. The WCA correctly found that it lacked jurisdiction

because the Pueblo of Isleta did not waive its immunity to workers' compensation claims in the New Mexico WCA. Appellant has no standing to bring breach of contract claims regarding the Gaming Compact. The WCA correctly found that Isleta Resort and Casino is an indispensable party to this action and the matter cannot proceed against the Pueblo's insurer without the Pueblo. As the WCA does not have jurisdiction, Appellee's motion to reconsider is moot.

Appellees respectfully request that the Court of Appeals affirm the WCA's dismissal of this matter for want of jurisdiction.

REQUEST FOR ORAL ARGUMENT

Oral argument could assist the Court in consideration of the underlying record on appeal, the legal arguments and the issues raised herein. The Court should have the opportunity to ask questions of, and discuss the issues directly with, counsel for the parties.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to the following counsel of record this 27th day of October, 2016:

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