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

RICHARD ROSS BOWEN,

Plaintiff-Appellant,

vs.

MESCALERO APACHE TRIBE,

Defendant-Appellee.

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

APPELLANT'S BRIEF-IN-CHIEF

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I. SUMMARY OF PROCEEDINGS

Appellant Ross Bowen was savagely beaten by Michael Gray, a dealer at the Apache Travel Center Casino ("Travel Center"), on January 10, 2006.

Ross Bowen won a large sum of money playing blackjack at the Apache Travel Center Casino on January 9, 2006. (R.P. 305-306, 350 - depo. pg. 89). Bowen met Michael Gray that evening. (R.P. 304, 344, depo pg. 56). Gray had dealt cards for Bowen for part of the evening, engaged him in conversation, and gave Bowen a ride home when the casino closed in the early morning hours of January 10, 2006. (R.P. 304-308). On the evening of January 10, 2006, knowing where Bowen lived because of the ride the night before, Gray returned to Bowen's apartment with a blunt instrument, gained entrance to Bowen's apartment because of their acquaintance at the casino, beat Bowen with the instrument repeatedly, left him for dead, and stole Bowen's winnings. (R.P. 344-346, 349-350).

To conduct its gaming business, federal law requires that the Mescalero Apache Tribe enter into a Gaming Compact with the State of New Mexico. The Tribe did so and the Compact which was in force at the time Gray attacked Bowen is dated June 1, 2004. (R.P. 134, 309). In Section 8 of the Compact, under the title "Protection of Visitors" the Tribe agreed (in part) to the following:

A. "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... 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".**

D. "The Tribe, by entering into this Compact and agreeing to the provisions of this section, **waives its defenses 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. 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.** The Tribe agrees that in any claim brought under the provisions of this Section, New Mexico law shall govern the substantive rights of the claimant, and shall be applied, as applicable, by the forum in which the claim is heard, except that the tribal court may but shall not be required to apply New Mexico law to a claim brought by a member of the Tribe. (Emphasis added)
(R.P. 310-311).

Appellant sued Appellee for his injuries sustained, claiming that the Tribe was negligent in its hiring and retention of Gray, that Appellant was injured as a result of the conduct of the Gaming Enterprise by the Tribe and that the District Court had

jurisdiction because of the waiver of immunity contained in the Compact. (R.P. 1). Appellant sued under the theories of negligent hiring, negligent retention and third party beneficiary. Appellee filed a Motion to Dismiss pursuant to NMRA 1-012(B)(1) NMSA 1978 asserting that the waiver of sovereign immunity contained in the Compact did not apply to Appellant and the District Court therefore had no jurisdiction; and the Tribe filed a Motion for Summary Judgment claiming that Appellant could not as a matter of law prove that his injuries were proximately caused by the Tribe's negligence. (R.P. 153).

The District Court granted the Motion to Dismiss and the Summary Judgment in favor of the Tribe by its Order entered May 20, 2009. (R.P. 464-483). The Court also entered Findings of Fact and Conclusions of Law setting forth the basis for its decision. (Id.)

This Appeal followed. Notice of Appeal was timely filed on June 4, 2009. (R.P. 13).

II. ARGUMENT

A. Summary of the Argument

The Gaming Enterprise is the Inn of the Mountain Gods, including the Apache Travel Center, housing the casino where Mr. Bowen gambled. This lawsuit is not against the Gaming Commission for licensing Mr. Gray – it is against the Tribe which

employed him and retained him. The case is against the Mescalero Apache Tribe because the Tribe waived its sovereign immunity to protect visitors to its casino. (R.P. 310-311). The Tribe waived its immunity from suit with "respect to claims for bodily injury or property damage proximately caused by the Gaming Enterprise." (R.P. 310).

The District Court was mistaken in concluding that the Tribe's waiver of immunity did not extend to this case. The waiver for injuries proximately caused by the conduct of the Gaming Enterprise obviously applies to this case. Mr. Bowen would not have been harmed but for the conduct of the gaming enterprise. The Tribe breached the compact by claiming otherwise.

The Tribe owed a duty to protect Ross Bowen from its dangerous employee, Michael Gray. Whether the Tribe's retention of Gray was the proximate cause under New Mexico law of Mr. Bowen's injuries is a question of fact, not a question of law. Under the comparative fault doctrine, the Tribe will be liable only for the damages caused by its breach of duty.

The District Court's dismissal of this case for lack of jurisdiction and grant of summary judgment of proximate cause grounds should be overturned and this case reversed.

B. The standard of review is *de novo.*

This is an appeal from an Order dismissing the case for lack of jurisdiction under Rule 1-012(B)(1) and from a summary judgment disposing of claims brought by the Appellant on the merits. This Court reviews the Order *de novo*. *Sam v. Sam*, 2006 NMSC 022, 139 N.M. 474, 134 P.3d 761; *Herrera v. Quality Pontiac*; 2003-NMSC-018, 134 N.M. 43, 73 P.3d 181; *Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-3, 136 N.M. 682, 104 P.3d 548; *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, 132 N.M. 207, 46 P.3d 668.

All points raised below were preserved in the lower court by the pleadings on record and referenced in this Brief.

C. The Tribe owed a duty to protect Ross Bowen, a visitor to its casino and the Tribe should have known of Gray's pending criminal case.

Although the Findings of Fact entered by the District Court are not necessary to support the summary judgment, to her credit, Judge Parsons wanted the parties and this honorable Court to know the basis for her decision. Appellant objects to Findings of Facts 16 and 18. These findings are as follows:

> Finding of Fact 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 a jury reached a verdict acquitting him on assault charges and convicting him of reckless driving. (R.P. 517)

> Finding of Fact 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, 2005. Nor is there evidence that the Tribe knew or should have known that Gray stalked or paid undue attention to Plaintiff Bowen at the Travel Center on those dates. (R.P. 518)

In considering the Motion for Summary Judgment, the District Court was required to consider the facts in the light most favorable to the Appellant and all inferences must be drawn in favor of the Appellant as the non-movant. *Celaya v. Hall*, 2004-NMSC-005, ¶7,135 N.M. 118, 85, P.3d 242 (2004).

Finding No. 16 is incorrect because a question of fact exists in this case whether the Tribe owed a duty to investigate further regarding Michael Gray's criminal background and history after he was employed. The Tribe had almost 18 months before Gray attacked Richard Bowen to learn that in fact the very same criminal charges that Gray stated on his application had been dismissed had been refiled. The charges were refiled July 31, 2004. (R.P. 330). The attack occurred January 10, 2006. (R.P. 233).

The record does not indicate that the Tribe had any system or procedure in place to follow up on its employees' criminal history and involvement. Rather, the Tribe expected the employees to let the Tribe know when the employee was charged with or convicted of a crime. (R.P. 331). The protection of visitors, therefore, hinged on self-reporting-an act which could cost the employee his job. (Id.)

Whether the Tribe had a duty to independently verify and check on Gray's criminal charges is a question of fact that should be decided by the jury and not by the Court in a summary judgment proceeding. *See, e.g., Davis v. The Board of County Commissioners of Dona Ana County*, 1999-NMCA-110, 127 N.M. 785, 987 P.2d 1172. The investigator for Gray's licensure, Laura Woodul, testified that Mr. Gray was the only individual whose criminal history she ever checked after the fact. (R.P. 318-319). This uncovered the subsequent charges and led to his dismissal. It is incorrect to say that there is no evidence the Tribe knew or should have known of the assault charges against Gray. The Tribe's self-reporting requirement was toothless and doomed to failure. The Tribe should have known of the assault charges pending against its employee Michael Gray.

Finding No. 18 is incorrect because the summary of videotapes from the Casino on January 9 show that Gray was paying undue attention to Mr. Bowen, to the point of giving him a ride home. (R.P. 304-308). By 2:00 a.m. or so on January 10, Gray was clearly approaching Mr. Bowen first at the Wheel of Fortune, second at the slot machines – apparently to offer Mr. Bowen a ride home. The two had been in frequent contact since at least 9:00 p.m. (Id.)

Michael Gray's mother, Mary Gray, and his sister, Brenda Markulik, worked for the Tribe. They were aware of the criminal charges against Michael Gray while

he was working for the Tribe. (R.P. 336-338). There is no evidence that either the mother or sister were disciplined for not reporting Mr. Gray's violent tendencies or criminal charges.

Herrera v. Quality Pontiac, supra also supports the duty of the Tribe to Ross Bowen. The Supreme Court ruled in that case that the auto dealership owed a duty to protect third parties from harm resulting from leaving keys in a parked car in the dealer's unlocked lot. The car was stolen and two persons killed by the thief driving the car. The duty owed by the Tribe to Ross Bowen is more direct and obvious in this case than in *Herrera*. The Tribe placed Gray in a position to be directly involved with Bowen and gain Bowen's trust. It placed Gray in a position to know of Bowen's winnings. Gray could only find, beat and rob Bowen because of the conduct of the gaming enterprise. Having Michael Gray in the casino was the equivalent of leaving the key in the ignition, inviting harm to occur.

The Tribe did not have to know what evil would be unleashed by the conduct of its Gaming Enterprise in order for it to be liable. No malice or intent on the part of the Tribe is alleged. All that is required, however, for immunity to be waived by the Tribe is that the injury be proximately caused by the conduct of the Gaming Enterprise. The Compact says so!

D. A question of fact exists on the Tribe's negligent retention of Gray.

The issues of sovereign immunity and proximate cause are tied together in this appeal. The District Court decided, in fact, that immunity from suit was not waived because there was no causal link tying the Tribe's employment of Gray to Bowen's injuries. (R.P. 527-528). The case is framed in the Court's findings (and by the Tribe) as a negligent hiring case.

Appellant does not believe that Gray should have ever been hired, but this is a negligent retention case more than it is a negligent hiring case. Gray's ongoing criminal charges involving violent behavior (R.P. 233-257), combined with the violent temperament he displayed on the job in a cafeteria incident, raise issues as to whether the Tribe should have still employed Gray as a dealer on January 9 and 10, 2006. The cafeteria incident resulted in Gray's suspension for a short time. Gray became angry over no butter or sour cream for a baked potato and he threatened other employees because of it. (R.P. 272-281, 292-303).

Subpart F of this brief discusses this topic in connection with proximate case.

E. Ross Bowen is a third party beneficiary of the compact. Immunity has not been waived.

This is also a third party beneficiary case. (R.P. 4). Plaintiff is a beneficiary of the compact between the State and the Tribe. This alone gives the Court jurisdiction.

Section 8 of the Compact (R.P. 310), entitled "Protection of Visitors", subpart A reads in part: "The Tribe... agrees to a limited waiver of its immunity from suit... with respect to claims for bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise." (Id.)

Appellant was a visitor to the casino and his injuries were proximately caused by the conduct of the gaming enterprise. He is an intended beneficiary of the Compact. *See Tarin's Inc. v. Tinley*, 2000-NMCA-048, 129 N.M. 185, 3 P.3d 680 (Ct. App. 2000).

Did the Tribe breach the Compact, causing harm to Plaintiff? It did. Section 8 (D) of the Compact provides in part "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..."** (R.P. 311) (Emphasis added). The Tribe violated this portion of the Compact by bringing its Motion to Dismiss. Consequently, the sovereign immunity arguments of the Tribe must be disregarded: the Tribe has no right to make them.

The District Court determined that the Tribe had not waived its immunity for this suit in part because the term "proximate cause" was undefined and ambiguous. The Compact provides in Section 8 (D) that New Mexico law governs "the

substantive rights of the claimant." (R.P. 180). Proximate case is not an ambiguous term in New Mexico, as concluded by Judge Parsons in Conclusion No. 16 (R.P. 527). It is defined by UJI-13-305 as follows:

> An act or omission is a "cause" of injury or harm if it contributes to bringing about the injury or harm and if the injury would not have occurred without it. It need not be the only explanation for the injury or harm, nor the reason that is nearest in time or place. It is sufficient if it occurs in combination with some other cause to produce the result. To be a "cause" the act or omission, nonetheless, must be reasonably connected as a significant link to the injury or harm.

This Instruction is given every week to juries in New Mexico. It is not ambiguous, and any rule of construction benefiting the Tribe due to any ambiguity therefore has no application.

F. Proximate cause is a question of fact in this case.

The clear, unambiguous language of the Compact is that the Tribe assumes liability and waives its immunity for "injuries proximately caused by the conduct of the Gaming Enterprise". Bowen's injuries arose only because of the Gaming Enterprise. He was attacked and injured because: (1) the Mescalero Apache Tribe conducted a Gaming Enterprise at the Travel Center; (2) Ross Bowen gambled at the Travel Center; (3) Michael Gray was employed at the Travel Center and met Bowen in the course of his employment; (4) Gray knew of Bowen's winnings because Gray was employed at the Travel Center; (5) Gray was in a position to give Bowen a ride

home because he was employed at the Travel Center and the Gaming Enterprise and the Gaming Enterprise was conducted there; and (6) Gray knew where to find Bowen and attack him and steal his winnings because of the Gaming Enterprise.

The compact does not define proximate cause, but it ties proximate cause to the conduct of the Gaming Enterprise. Ross Bowen was injured because of the conduct of the Gaming Enterprise. But for the gaming enterprise, there would have been no injury. That is all the Compact requires for the waiver of immunity.

F & T Company v. Woods, 92 N.M. 697, 594 P.2d 745 (1979) is the case relied on by the Tribe and the District Court. *Woods* is different than this one in significant respects: (1) There was not present in that case the intervening contractual agreement between the state and the Tribe which imposed responsibility on the Tribe to protect visitors for injuries arising out of the conduct of its enterprise; and (2) In the *Woods* case, entry into the apartment for the attack was not granted freely. The assailant had to break in. In this case, Bowen let Gray into his apartment because Bowen knew Gray due to the conduct of the Gaming Enterprise.

New Mexico case law supports Appellant's right to a trial in this case and proximate cause should be decided after a full presentation of the case. In *Pittard v. Four Seasons Motor Inn, Inc.*, 101 N.M 723, 688 P.2d 333 (N.M. App. 1984), a boy was sexually assaulted by an employee of the Defendant hotel. Plaintiff sued the

Hotel for negligent hiring and retention of the employee. The employee, Perales, had a drinking problem while he was employed by the defendant and admitted to being violent when he drank. There was evidence in the case from which a jury could find that the defendant employer was aware or should have been aware that the employee had a drinking problem and a propensity for violence. Notice to the employer of his alcoholism and tendency toward violent behavior was all that was required in *Pittard* to make the sexual assault by that employee foreseeable to the employer. As a result, the court reversed the trial court and remanded for a new trial on the negligent hiring and retention claim.

The second case is *Spencer v. Health Force, Inc.*, 2005 NMSC 2, 137 N.M. 64, 107 P.3d 504 (2005). The employee was a care giver for a quadriplegic and had stolen some of the decedent's medication. The employer had not performed any criminal background check on the employee prior to his employment but the employee had convictions for burglary, aggravated assault, armed robbery ,credit card fraud, embezzlement and shoplifting. The *Spencer* court noted that for an employer to be liable for negligent hiring and retention, there had to be a connection between the employer's business and the injured plaintiff, quoting *Valdez v. Warner*, 106 N.M. 305, 742 P.2d 517 (N.M App. 1987). In *Spencer*, the Supreme Court noted that the particular consequences are not required to be foreseen, but a defendant employer is

still liable even though it might not anticipate the precise way the injury would occur, so long as the employer had knowledge of the employee's previous violent behavior. General harm or consequence from the employee's violent past should be foreseeable. *Id. at 22-23.*

The compact does not limit the waiver of immunity and its application to injuries sustained on the lands of the Mescelaro Apache Tribe. It does not limit the waiver of immunity or the Tribe's duty to injuries caused while an employee is in the course and scope of employment. The District Court's decision that Gray's lack of course and scope when he attacked Bowen somehow excuses the Tribe does not fit within the frame of the compact.

G. Comparative fault calls for this case to go to trial.

Pure comparative fault was adopted as the law in New Mexico in 1981 by the case of *Scott v. Rizzo*, 96 N.M. 682, 690, 634 P.2d 1234, 1242 (1981). The *Woods* case, relied on by Appellee so heavily for its proximate cause argument, was decided before the adoption of comparative negligence. *Pittard* was decided after. Although neither case discusses the issue, the comparative fault system in New Mexico argues persuasively that the facts in this case should be determined by the fact finder as a matter of law. The unfair, contributory negligence system that preceded *Scott v. Rizzo* would require a different analysis of the *Woods* case today.

A judge or jury might decide after hearing the evidence that Mr. Gray is 100% at fault. Fault might be apportioned between Gray and the Tribe. Taking from Mr. Bowen the opportunity to have that decision made after a full presentation of the facts is not just – particularly in the face of a compact in which the Mescalero Apache Tribe agrees to take responsibility. The Tribe will liable only for its share of damages caused by the Tribe.

III. CONCLUSION

By its agreement in the compact, the Tribe agrees to treat people like Ross Bowen fairly. By its actions, the Tribe does all it can to not treat him fairly. The Court should not be complicit in this injustice.

This case was decided on summary judgment. At least the following factors should have prevented the Court from determining of the case under Rule 1-056: (1) The Tribe owed a duty to Ross Bowen, both under the Compact and by New Mexico common law; (2) The issue of proximate cause is one of fact, not of law, both because of the language in the compact and New Mexico common law; A jury must decide the issue of proximate cause, not the Court; (3) Whether the Tribe negligently retained Bowen is a question of fact; and (4) Gray's status as a third party beneficiary of the compact and the Tribe's breach in bringing the Motion to Dismiss requires that the Order of Dismissal for lack of jurisdiction be reversed.

The distinction between the Gaming Commission and the Gaming Enterprise means nothing insofar as this case is concerned. Appellant's claim is against the Tribe, not against the Commission, which investigates the background of employees. Gray was already hired before the Commission performed any sort of investigation. It is the Tribe who hired him and the Tribe who retained him. The Tribe's ability to carry on its Gaming Enterprise is based on its compact with the State of New Mexico. The Courts should not approve the Tribe's refusal to honor its obligations under the Compact.

The Motion for Summary Judgment should be denied.

Respectfully submitted,

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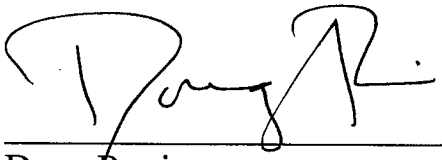

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I hereby certify that a true and correct
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