IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

GLORIA MENDOZA, ANTHONY CHAVEZ, MARIA GALLEGOS, individually and on behalf of all other similarly situated Plaintiffs,

Plaintiffs,

v. Case No. 1:19-CV-00991-SCY-KK

FIRST SANTA FE INSURANCE SERVICES, INC. n/k/a HUB INTERNATIONAL INSURANCE SERVICES, INC., HUDSON INSURANCE and ALLIANT SPECIALTY INSURANCE SERVICES, INC. d/b/a TRIBAL FIRST,

Defendants.

MOTION TO REMAND

COME NOW the Plaintiffs, Gloria Mendoza, Anthony Chavez and Maria Gallegos, individually and on behalf of all other similarly situated Plaintiffs, and hereby move this Court for an order remanding the case back to state court because there is no valid basis for this Court to exercise subject matter jurisdiction over purely state law claims and the *Notice of Removal* is defective for failing to obtain consent from all served Defendants.

INTRODUCTION

1. Background

Plaintiffs Gloria Mendoza, Anthony Chavez and Maria Gallegos (referred to collectively as "Plaintiffs" unless otherwise noted) were injured during the course and scope of their employment with Isleta Resort & Casino in 2015 and 2017. Defendant Hudson Insurance is the workers' compensation insurer for the claims made by Plaintiffs (referred to as "Hudson" hereafter).

Defendant Alliant Specialty Services, Inc. d/b/a Tribal First is the third party administrator for Hudson (referred to as "Tribal First" hereafter). Neither Hudson, nor Tribal First, are tribal entities and are not owned or operated by the Pueblo of Isleta. Hudson is a Delaware corporation and Tribal First is a California corporation.

Plaintiff Mendoza injured her knee while performing her work as a janitor or "custodial porter" at Isleta Resort & Casino in August 2015. After Tribal First, on behalf of Hudson, denied her claim for medical benefits related to the work injury, Plaintiff Mendoza filed a claim for workers' compensation benefits pursuant to the Workers' Compensation Act, NMSA 1978 52-1-1 *et seq.*, with the New Mexico Workers' Compensation Administration. Tribal First denied Plaintiff Mendoza's claim for statutory workers' compensation benefits for reasons that varied over time. Initially, Tribal First denied her claim because the work injury was not reported "within 24 hours" which is not the law in New Mexico as workers have fifteen days to provide notice of an injury per NMSA 1978, Section 52-1-29. Plaintiff Mendoza then provided documented proof that her injury had indeed been reported to her employer within 24 hours despite that not being statutorily required. Then, Tribal First denied the claim arguing that it–Tribal First–was entitled to enjoy "the full extent of the Tribe's sovereign immunity" but neither Tribal First, nor Hudson, are tribal entities to which sovereign immunity applies. [Doc. 1, Exhibit B, ¶ 22]

Plaintiff Mendoza responded to the defenses raised by Tribal First/Hudson by establishing that the Pueblo of Isleta had unequivocally and expressly waived sovereign immunity as a defense to workers' compensation claims pursuant to the 2015 Gaming Compact entered into with the State of New Mexico. *See* NMSA 1978, Section 11-13-1, *et seq.*, (1997, as amended through 2015)

(Section 4(B)(6) states that no defense of sovereign immunity would be available to appeals of adverse decisions of a workers' compensation insurer). Plaintiff Mendoza also argued that even if it was determined that the Pueblo of Isleta was entitled to claim sovereign immunity as a defense, non-tribal entities Hudson/Tribal First were not entitled to the defense and that NMSA 1978, Section 52-1-4(C) of the New Mexico Workers' Compensation Act required Hudson/Tribal First to be directly and primarily liable for the claims made against the employer. *See* NMSA 1978, Section 52-1-4(C) (employer **or** insurer shall be primarily and directly liable to worker).

The workers' compensation judge ("WCJ") dismissed Plaintiff Mendoza's workers' compensation case based on lack of subject matter jurisdiction due to sovereign immunity. Plaintiff Mendoza appealed that decision and the New Mexico Court of Appeals issued its published opinion in *Mendoza v. Isleta Resort & Casino*, 2018-NMCA-038, 419 P.3d 1256, *cert. granted,* 2018-NMCERT-___ (No. S-1-SC-37034, May 25, 2018) holding that Plaintiff Mendoza may proceed with her workers' compensation claim in the Worker's Compensation Administration against Hudson/Tribal First directly pursuant to section 52-1-4(C) of the Workers' Compensation Act, without a determination of whether Isleta Resort & Casino may claim sovereign immunity as a defense. *Mendoza*, ¶ 45. *See* **Exhibit #1** hereto for quick reference. The New Mexico Supreme Court granted certiorari, briefs have been filed, oral argument was presented in July 2019 and the parties currently await that Court's decision.

Plaintiff Chavez was injured while employed by Isleta Resort & Casino as a security guard in December 2017. Plaintiff Chavez injured his knee while stepping into a vault at Isleta Resort & Casino. Again, Hudson/Tribal First denied his claim for workers' compensation benefits and a

workers' compensation claim was filed in the New Mexico Workers' Compensation Administration. This case is assigned to WCJ Reginald Woodard. Again, the defense against Plaintiff Chavez's workers' compensation claim varied over time. Tribal First initially denied his claim contending that "walking is an everyday part of life" and therefore cannot form the basis for a work injury. The basis for this denial is not supported by case law in New Mexico. *See Griego v. Jones Lang Lasalle*, 2019-NMCA-007, ¶¶ 16, 20, __ P.3d __ (as worker was walking to help another employee, he fell and it was characterized as an unexplained fall arising out of his employment and deemed compensable). [Doc. 1, Exhibit B, ¶ 23]

The defenses raised in *Mendoza* as described above were also raised in Plaintiff Chavez's workers' compensation case. WCJ Woodard denied Hudson/Tribal First's motion to dismiss and ordered that Plaintiff Chavez's workers' compensation case could proceed against Hudson/Tribal First in accordance with the Court of Appeals' *Mendoza* opinion. Because *Mendoza* is a published opinion, it is to be given precedential effect despite certiorari being granted pursuant to appellate Rule 12-405(C) NMRA which states:

> A petition for a writ of certiorari filed pursuant to Rule 12-502 NMRA or a Supreme Court order granting the petition does not affect the precedential value of an opinion of the Court of Appeals, unless otherwise ordered by the Supreme Court.

WCJ Woodard declined to make any determination as to whether the Pueblo of Isleta may claim sovereign immunity as a defense to the claim and permitted Plaintiff Chavez to pursue Hudson/Tribal First directly and primarily for benefits claimed pursuant to section 52-1-4(C) as held in *Mendoza*.

Hudson/Tribal First also attempted to prevent Plaintiff Chavez's workers' compensation

claim from proceeding by filing a writ of prohibition or writ of superintending control and request for stay with the New Mexico Supreme Court, all of which were denied. *See* **Exhibit #2** hereto, New Mexico Supreme Court *Order* filed on April 17, 2019 denying extraordinary relief and any stay. Hudson/Tribal First then filed a declaratory judgment action with this Court in an effort to prevent Plaintiff Chavez's workers' compensation case from proceeding to trial. Judge Baldock declined to declare any rights claimed by the Pueblo of Isleta/Hudson/Tribal First and instead, ordered a stay of the federal court declaratory judgment action. *See* **Exhibit #3** hereto, Case No. 1:19-CV-00607-BRB-JFR, USDC *Order Staying Case* filed on October 4, 2019.

Plaintiff Chavez's workers' compensation case was tried in August 2019 and decided by WCJ Woodard resulting in the *Workers' Compensation Order* filed on September 4, 2019. WCJ Woodard determined that the claim is compensable and awarded medical and indemnity beneifts.

Plaintiff Gallegos was injured when she fell near the employee entrance of the Isleta Resort & Casino in March 2017. Plaintiff Gallegos was also a "custodial porter" or janitor. Plaintiff Gallegos suffered a torn rotator cuff as a result of the work accident. Tribal First initially denied her claim arguing that because she was not clocked in when she fell, it was not compensable. This denial is contrary to an exception to the "going and coming rule" adhered to in New Mexico. *See Dupper v. Liberty Mutual Ins. Co.*, 1987-NMSC-007, 105 N.M. 503. at 506, 734 P.2d 743 (when employee is going to or coming from her place of work, on her employer's premises, then she is within the protected ambit of the Workers' Compensation Act). Then, the same defenses raised in Plaintiffs Mendoza and Chavez's cases were raised against Plaintiff Gallegos's workers' compensation claim: sovereign immunity and lack of subject matter jurisdiction.

WCJ Rachel Bayless is assigned to Plaintiff Gallegos's claim and, unlike WCJ Woodard, ordered a stay of Plaintiff Gallegos's workers' compensation case pending the New Mexico Supreme Court's decision in *Mendoza*.

All three Plaintiffs have undergone surgical repair for the work injuries suffered. Plaintiffs have utilized private health insurance, rather than workers' compensation insurance, to obtain medical treatment for the work injuries and are subject to subrogation/reimbursement liens for payment of their medical costs to date. Plaintiff Mendoza continues to work for Isleta Resort & Casino on her midnight shift as a custodial porter. Plaintiff Chavez no longer works for Isleta and is currently employed as a security guard for another employer. Plaintiff Gallegos is currently seventy years old and is unable to work as a custodian due to the rotator cuff tear injury suffered. To date, Hudson/Tribal First have never paid any of Plaintiffs' medical bills or lost wages related to the work injuries suffered during the course and scope of their employment with Isleta Resort & Casino.

2. Factual and Legal Basis of Complaint Filed in the Second Judicial District Court

The First Amended Complaint filed in state court is premised on purely state law claims. There are no federal claims in Plaintiffs' First Amended Complaint. The Pueblo of Isleta, a federally recognized tribe, was not named as a party. The First Amended Complaint never cites to the United States Constitution, a federal claim or any federal law. More specifically, none of the claims asserted are based on any action arising under the Constitution, laws or treaties of the United States as required for federal court jurisdiction based on 28 U.S.C. Section 1331.

Plaintiffs' state court action is premised on negligent and/or intentional misrepresentations,

breach of the workers' compensation insurance contract which applies to Plaintiffs as third party beneficiaries, breach of the covenant of good faith and fair dealing and civil conspiracy. Most importantly, the harms complained of in the First Amended Complaint did not "arise out of events on the Pueblo of Isleta" as claimed by Defendants in the *Notice of Removal*. [Doc. 1, p. 3] The damages sought are for acts by non-tribal entities, which did not arise out of or in the course of employment with Isleta and were committed after Plaintiffs were injured at work. The state law claims asserted also do not arise "out of the contract" of workers' compensation insurance–*but in spite of the insurance*–entered into between the Pueblo of Isleta and Hudson/Tribal First or First Santa Fe Insurance Services, Inc.

Rather, the claims are extra-contractual in nature, arising independent of and outside of the contract. The claims are based on the tortious false and/or misleading representations of fact and/or law, including omissions of material information to Plaintiffs by Hudson/Tribal First and First Santa Fe Insurance Services, Inc. Extra-contractual claims sounding in tort, such as violations of the Unfair Practices Act as alleged in Count I of Plaintiffs' First Amended Complaint, against insurers are well-established under New Mexico law. *See Kreischer v. Armijo*, 1994-NMCA-118, 118 N.M. 671, 673-675, 884 P.2d 827, 829-830 (difference between a tort and contract action is that a breach of contract is a failure of performance of a duty arising or imposed by agreement; whereas a tort is a violation of a duty imposed by law). The claims arise out of unfair or deceptive trade practices and false or misleading oral or written statements or other representations made by Hudson/Tribal First and First Santa Fe Insurance Services, Inc. to Plaintiffs, torts which occurred independent of the insurance contract. The allegations contained in the First Amended Complaint, if proven, support

a cause of action for unfair, deceptive trade practices against Defendants not Iselta Pueblo. *Kreischer*, 118 N.M. at 673, 884 P.2d at 829 ("an agent may be held individually liable for his own tortious act, whether or not he [or she] was acting for a disclosed principal"). Plaintiffs' state law claims seek to hold Defendants individually liable for violating duties imposed by law.

Plaintiffs' state-law claims are not based on a material dispute over terms of the insurance contract, but are based on the actions/inactions which occurred only after claims were made by them as third-party beneficiaries of the insurance policy. Plaintiffs, not the Pueblo of Isleta, are the third party beneficiaries of the contract of insurance issued/brokered by Defendants and are the parties who have absolute rights to enforce the contract. *See Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶¶ 16, 20 135 N.M. 397, 89 P.3d 69 (reaffirming that workers are the "intended beneficiaries" of workers' compensation insurance policies). Defendants cannot argue that the contract is void or invalid as to Plaintiffs such that Plaintiffs have no basis to enforce rights arising pursuant to the contract of insurance.

Defendants also omit the entirety of paragraph 18 of the First Amended Complaint which states: "Plaintiffs have intentionally not named their employer as a party herein based on the exclusivity provisions in the Workers' Compensation Act." [Doc. 1, p. 5] The basis for not naming Isleta Resort & Casino as a party is two-fold: (1) the Workers' Compensation Act provides Plaintiffs with the exclusive remedy against their *employer* for workers' compensation benefits; and (2) Isleta did not commit the negligent and/or intentional acts complained of by Plaintiffs. The basis for not naming Isleta was not because it has "sovereign immunity" as claimed by Defendants. [Doc. 1, p. 5]

It is well-established that plaintiffs are the masters of their claims and that they may avoid federal jurisdiction by exclusive reliance on state law. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Defendants do not get to create a federal question in order to avoid this well-established principle so that this Court may entertain jurisdiction. There are no federal claims in the pleadings filed by Plaintiffs and therefore this Court should decline jurisdiction based on lack of subject matter jurisdiction.

ARGUMENT

1. Standard

Federal courts are courts of limited jurisdiction, so there is a presumption against removal jurisdiction which must be overcome by Defendants. *See Martin v. Franklin*, 251 F.3d 1284, 1289-1290 (10th Cir. 2001) (abrogated on other grounds by *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S.Ct. 547 (2014). It is well-established that the removal statute is to be narrowly construed in light of this Court's constitutional role as a limited tribunal. *Pritchett v. Office Depot, Inc.*, 404 F.3d 1232, 1235 (10th Cir. 2005). "All doubts are to be resolved against removal." *Fajen v. Found. Reserve Ins. Co.*, 683 F.2d 331, 333 (10th Cir. 1982). The party asserting jurisdiction has the burden of proving that jurisdiction is proper. *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002).

2. The First Amended Complaint Does Not State Implicate Any Federal Claims or Federal Laws.

Plaintiffs' rights to relief requested in the First Amended Complaint do not depend on resolution of a substantial question of federal law because section 52-1-4(C) of the Workers'

Compensation Act requires Defendants to be primarily and directly liable to Plaintiffs irrespective of whether Isleta Pueblo may be entitled to claim sovereign immunity to the underlying workers' compensation claim. *Mendoza*, ¶ 45. Put simply, sovereign immunity as to Isleta Pueblo is irrelevant and a red herring argument purposely injected by Defendants in every proceeding to date to avoid legal responsibilities and to artificially create the need for federal court jurisdiction.

Similarly, the harm complained of by Plaintiffs did not occur on the Pueblo of Isleta or a federal enclave as suggested by Defendants. [Doc. 1, p. 4] The harm complained of occurred outside the Isleta Resort & Casino, well-past the dates of injuries, outside the course and scope of employment by Isleta Resort & Casino, and at the hands of non-tribal Defendants. Plaintiffs' claims arose solely from subsequent, additional harms caused by Defendants' malfeasance and do not involve any federal question, let alone a substantial federal or preemption issue.

Defendants argue that section 1331 is invoked based solely on the workers' compensation insurance contract entered into by Isleta Resort & Casino. [Doc. 1, p. 3] Pursuant to *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005), federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. *Gunn v. Minton*, 568 U.S. 251, 258, 133 S.Ct. 1059, 185 L.Ed.2d 72 (2013). Plaintiffs' First Amended Complaint does not raise any federal issue–substantial or inconsequential–that has been actually disputed or is substantial and no issue is involved that would require resolution by this Court.

Before addressing the complete lack of any federal issue in the case at bar, cases interpreting

Grable and seminal decisions analyzing jurisdiction under section 1331 are worthy of review. Supreme Court decisions since *Grable* suggest that *Grable's* recognition of federal jurisdiction absent a federal cause of action is of limited scope, noting that only a "slim category" of cases satisfy the four-prong test. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701, 126 S.Ct. 2121, 165 L.Ed.2d 131 (2006). Mere allegations of a "federal issue" are not passwords which open the federal courts to any state action embracing a point of federal law. The "mere presence" of a federal issue in a state cause of action and the "mere assertion of a federal interest" are not enough to confer federal court jurisdiction. *Merrill Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 813, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986). Conversely, a plaintiff cannot avoid federal jurisdiction by declining to plead "necessary federal questions." *Rivet v. Regions Bank*, 522 U.S. 470, 475, 118 S.Ct. 921, 139 L.Ed2d 912 (1998). Plaintiffs contend that Defendants are injecting a federal issue by inserting Isleta Pueblo/sovereign immunity into the case and thereby attempting to create a federal issue which does not exist. This "mere assertion of a federal interest" is not enough to confer jurisdiction to this Court. Plaintiffs need not rely on any federal law to prove the damages sought against the non-tribal entity Defendants named in the state case filed.

To put this case in context, compare it with the following seminal cases which held that removal was improper. In *Merrill Dow*, plaintiffs alleged that defendants misbranded a drug in violation of the Federal Food, Drug, and Cosmetic Act. In addition to the state law negligence claim, a federal issue about the interpretation and application of the FCA existed. The Supreme Court held removal improper because the case did not arise under federal law within the meaning of section 1331. The plaintiffs' right to relief did not necessarily depend on resolution of a federal law. *Merrill*

Dow, 478 U.S. at 807, 106 S.Ct. 3229.

In *Gunn*, a state law negligence action turned on an issue of federal patent law. The plaintiff sued for patent infringement in Federal District Court, lost, and then sued his lawyer for legal malpractice in state court for mishandling the federal patent case. Because the legal malpractice case was predicated on federal patent law, plaintiff argued that the state court lacked jurisdiction over a claim arising under federal patent law pursuant to 28 U.S.C. Section 1338(a). The Supreme Court disagreed in an unanimous opinion. The plaintiff's legal malpractice claim–although it would necessarily require the state court to examine federal patent law–was not substantial to the federal patent law system as a whole. *Gunn*, 568 U.S. at 263-264, 133 S.Ct. 1059.

In contrast to *Merrill Dow* and *Gunn*, the Supreme Court's analysis in *Grable* fell within the "slim category" of cases where the Court upheld removal jurisdiction over a state law claim that incorporated the federal tax code. *Grable*, 545 U.S. at 315, 125 S.Ct. 2363.

Plaintiffs' First Amended Complaint simply does not raise a federal question and does not state any claim for relief based on federal law. To raise a federal question, a well-pleaded complaint must specifically say that a federal question exists. This is called the "well-pleaded complaint rule." *Caterpillar v. Williams*, 482 U.S. 386, 392 (1987) (well-pleaded complaint rule provides that federal jurisdiction exists only when a federal question is presented on the face of plaintiff's properly pleaded complaint). A federal question raised in the counterclaim, answer or petition for removal is not sufficient: "The required federal right or immunity must be an essential element of the plaintiff's cause of action, and the federal controversy must be disclosed upon the face of the complaint, unaided by the answer or the by the petition for removal." *Gully v. First National Bank*,

299 U.S. 109, 113, 57 S.Ct. 96, 98, 81 L.Ed. 70, 97-98 (1936). "[G]iven the limited scope of federal jurisdiction, there is a presumption against removal, and courts must deny such jurisdiction if not affirmatively apparent on the record." *Bonadeal v. Lujan, et al.*, 2009 U.S. Dist. LEXIS 45672 at 14 (D.N.M. 2009); quoting *Oklahoma Farm Bureau Mutual Ins. Co. v. JSSJ Corp.* 149 F. App'x 775, 778 (10th Cir. 2005) (unpublished).

Defendants have failed to articulate any essential element of Plaintiffs' causes of action as stated in Counts I through V which involve a federal question. The applicable jury instructions outlining the proof required for each count do not require any scintilla of evidence involving federal laws. Plaintiffs' state law case is rife with legal and factual issues that simply do not involve federal laws. Plaintiffs' right to relief do not depend on resolution of a substantial question of federal law or any law for that matter. There is no dispute that Plaintiffs are the intended third party beneficiaries of the applicable workers' compensation insurance policy. "It does not suffice to show that a federal question lurks somewhere inside the parties' controversy, or that a defense or counterclaim *would* arise under federal law." *See Vaden v. Discover Bank*, 129 S.Ct. 1262, 1268, 1270-1278, 173 L.Ed. 206, 214-224 (2009) (emphasis added) *citing Louisiville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 53 L.Ed. 126 (1908). It is not for this Court to consider all possible permutations and expansions of the state litigation or whether a federal question may be creatively raised at some point by the non-tribal entity Defendants as suggested. Defendants have failed to establish that the controversy at hand deals with a substantial question of federal law and remand to state court is warranted.

3. The Notice of Removal is Defective for Lack of Unanimous Consent by All Served Defendants, Namely First Santa Fe Insurance Services, Inc. n/k/a Hub International Insurance Services, Inc.

Defendants admit to not having obtained the consent of First Santa Fe Insurance Services, Inc. n/k/a Hub International Services, Inc. ("First Santa Fe" hereafter) to this removal action and suggest that they are without knowledge of whether First Santa Fe has been served with the First Amended Complaint. [Doc. 1, p. 2-3] First Santa Fe was served on October 18, 2019 via Hub International Services, Inc. which acquired First Santa Fe. *See* **Exhibit #4**, U.S. Mail Certified return receipt dated October 18, 2019. Rule 1-006 NMRA applies here since this Court did not yet have jurisdiction on October 18, 2019 when First Santa Fe was served by mail which was four days before the *Notice of Removal* was filed herein. Rule 1-004 NMRA states that service of process by mail is considered complete upon the date of receipt. Defendants are accurate in stating that "There is no indication in the docket that Defendant First Santa Fe Insurance Services, Inc. ... has been served" because the undersigned was waiting for the New Mexico Superintendent of Insurance to issue its Notice of Acceptance of Service on Hudson regarding the First Amended Complaint (which was received on November 6, 2019) and intended to electronically file all of the returns of service for every Defendant in one packet with the Second Judicial District Court to save costs and fees.

Because not all served Defendants were not joined, the *Notice of Removal* is defective pursuant to 28 U.S.C. Section 1446(b)(2). All served defendants must join in the removal. *See Harlow Aircraft Mfg. v. Dayton Mach. Tool Co.*, 2005 U.S. Dist. LEXIS 10180 at 6 (D. Kan. 2005) *citing McShares, Inc. v. Barry* 979 F. Supp. 1338, 1342 (D. Kan. 1997). "The failure of one defendant to join in the notice renders the removal notice procedurally defective, which requires that

the district court remand the case." *Brady v. Lovelace Health Plan*, 504 F. Supp. 2d at 1172-1173 (*citing Cornwall v. Robinson*, 654 F.2d 685, at 686 (10th Cir. 1981)). Defendants are not excused from the consent requirement merely because they do not know whether a co-defendant has been served; they must exercise due diligence to determine whether consent of a co-defendant is necessary. *Brady*, 504 F.Supp. 2d at 473. If Defendants had exercised due diligence they would have discovered that First Santa Fe had been served and consent of same was required. Failure to abide by the "unanimity rule" renders the removal notice procedurally defective. *Harlow* at 6; *citing McShares* at 6.

Defendants admit to only checking the court docket to ascertain whether First Santa Fe had been served. [Doc. 1, p. 2-3] However, a telephone call to the undersigned attorney or Hub International, which acquired the assets of First Sante Fe, would have revealed that service had been accomplished on First Santa Fe as of October 18, 2019– four days before filing of the *Notice of Removal* on October 22, 2019.

Jurisdictions are divided on what constitutes reasonable diligence in ascertaining which parties have been served. Several jurisdictions have held that checking the docket and/or telephoning the court clerk are sufficient to establish due diligence. *See Milstead Supply Co. v. Casualty Ins. Co.*, 797 F. Supp. 569, 573 (W.D. Tex. 1992); *Laurie v. National Railroad Passenger Corp.*, 2001 WL 34377958 (E.D. Pa. March 13, 2001). Other jurisdictions have held that where a removing party did not attempt to contact other defendants by telephone or electronic mail, but instead relied only on the court docket, diligence was not sufficient for purposes of the unanimous consent requirement. *See Pianovski v. Laurel Motors, Inc.*, 924 F.Supp. 86 (N.D. Ill. 1996); *Harlow*

Aircraft Mfg. v. Dayton Mach. Tool Co., 2005 U.S. Dist. LEXIS 10180 at 7-11 (D. Kan. 2005).

In a recent decision by Magistrate Judge Wormuth, it was noted that the remanding party (Volvo) had not met its burden of demonstrating the exhaustion of all reasonable efforts to contact the non-consenting, served defendant (JSR Trucking) in *Swanson v. JSR Trucking Inc.*, Civ. No. 19-65-MV-GBW (D.N.M. May 15, 2019). Specifically, Volvo never attempted to contact or communicate with JSR Trucking in an effort to obtain its consent prior to removing the action and Volvo did not allege in its petition for removal that it had exhausted all reasonable efforts to locate JSR Trucking and obtain its consent. Magistrate Judge Wormuth found that Volvo had not met its burden of demonstrating the exhaustion of all reasonable efforts to contact JSR Trucking prior to removing the case and recommended that the Court grant the motion to remand. Here, Defendants never attempted to contact or communicate with First Santa Fe via Hub International in an effort to obtain its consent to removal and did not allege in the *Notice of Removal* that it had exhausted all reasonable efforts to locate First Santa Fe because it mistakenly assumed that First Santa Fe had not been served yet. "If fewer than all defendants consent to removal....removal is not appropriate, regardless of the fact that the removing defendant tried its best to obtain consent." *See Romero v. Knee*, 2018 WL 3966275, at 3 (D.N.M. Aug. 17, 2018).

This Court follows the "last-served rule" in determining whether the time of removal and unanimous consent of all served defendants. *Sawyer v. USAA Ins. Co.*, 839 F. Supp. 2d 1189, 1208 (D.N.M. 2012). Pursuant to the "last-served rule" adopted by this Court, Defendant First Santa Fe was required to file written consent to the removal by Defendants in this action by November 18, 2019 which is thirty days from the date that Defendant First Santa Fe was served on October 18,

2019. Because the Defendants failed to obtain unanimous consent by all served Defendants within thirty days after the last-served Defendant, the removal is incurably flawed. Defendants failed to adhere to the unanimity rule which is enshrined in 28 U.S.C. section 1446(b)(2) because First Santa Fe did not consent to removal. Because Defendants' removal of this case is procedurally defective, remand to state court is required.

WHEREFORE Plaintiffs respectfully request that this Court grant the *Motion to Remand* and order the case to be remanded to the Second Judicial District Court of the State of New Mexico for all of the reasons stated and consider awarding costs and fees herein.

Respectfully submitted,

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I hereby certify that on November 20, 2019, I filed this document electronically and thereby caused all counsel of record to be served through the CM/ECF system.

/s/ LeeAnn Ortiz
LeeAnn Ortiz
Attorney for Plaintiffs

Gloria MENDOZA, Worker-Appellant,
v.
ISLETA RESORT and Casino and Hudson Insurance, Employer/Insurer-Appellees,
and
Tribal First, Appellee,
and
State of New Mexico Uninsured Employers' Fund, Statutory Third Party.

NO. A-1-CA-35520

Court of Appeals of New Mexico.

Filing Date: April 9, 2018
Certiorari Granted, May 25, 2018, No. S-1-SC-37034

LeeAnn Ortiz, Albuquerque, NM, for Appellant.

Barnhouse Keegan Solimon & West LLP, Christina S. West, Los Ranchos de Albuquerque, NM, for Appellees.

VIGIL, Judge.

[419 P.3d 1258]

{1} Gloria Mendoza (Worker), an employee at Isleta Pueblo Resort and Casino (Isleta Casino), appeals orders of the Workers' Compensation Judge (WCJ) dismissing her workers' compensation complaint and denying her motion to reconsider a prior order to name the proper parties to the case. Worker contends that the WCJ erred in dismissing her complaint on grounds of tribal sovereign immunity based on an express and unequivocal waiver contained in the 2015 Indian Gaming Compact; that even assuming Isleta Casino enjoys sovereign immunity in this case, the defense does not extend to Isleta Casino's non-tribal entity insurer and third-party administrator; and that the WCJ erred in denying Worker's motion to reconsider its order granting leave to file a second amended workers' compensation complaint naming Isleta Casino's insurer and third-party administrator as parties to the case. For the reasons that follow, we reverse and remand for further proceedings.

BACKGROUND

A. The New Mexico Indian Gaming Compacts and Workers' Compensation

{2} In 1988, the United States Congress enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701 - 2721 (2012)), which provides a statutory basis for Indian tribes to establish gaming enterprises in Indian Country conducted pursuant to state-tribal compacts. *See* 25 U.S.C. § 2702 ; 25 U.S.C. § 2710(d)(1), *invalidated in part by Seminole Tribe of Fla. v. Florida* , 517 U.S. 44, 47, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

{3} In 1995 and pursuant to IGRA, the Governor of the State of New Mexico, Gary Johnson, unilaterally entered into state-tribal gaming compacts with certain tribes. *See State ex rel. Clark v. Johnson* , 1995-NMSC-048, ¶ 8, 120 N.M. 562, 904 P.2d 11. Concluding that it violated separation of powers under the New Mexico Constitution for Governor Johnson to enter into the state-tribal gaming compacts without legislative approval, our Supreme Court held in *Johnson* that the 1995 Indian Gaming Compacts were without legal effect. *Id.* ¶¶ 46-50.

{4} Based on the decision in *Johnson* , Chapter 190, Section 1 of New Mexico laws of 1997 established the first legally effective state-tribal gaming compact in New Mexico. Section 4(B)(6) of the 1997 Indian Gaming Compact addressed workers' compensation for tribal gaming enterprise employees by stating that:

Exhibit #1

> [T]he Tribe shall adopt laws ... providing to all employees of a gaming establishment employment benefits, including, at a minimum, sick leave, life insurance, paid annual leave and medical and dental insurance as well as providing unemployment insurance and workers' compensation insurance through participation in programs offering benefits at least as favorable as those provided by comparable state programs[.]

{5} In 2001 a new and revised Indian Gaming Compact was adopted. S.J. Res. 37, 45th Leg., 1st Sess. (N.M. 2001). The 2001 Indian Gaming Compact included a version of Section 4(B)(6), which was identical to the 1997 Compact.

{6} The Indian Gaming Compact was revised again in 2007. S.J. Res. 21, 48th Leg., 1st Sess. (N.M. 2007). Under the 2007 Indian Gaming Compact, Section 4(B)(6) was modified to add additional basic rights that tribal gaming enterprise employees must be afforded in the context of workers' compensation and how signatory tribes may elect to participate in the State of New Mexico's workers' compensation program. Section 4(B)(6) of the 2007 Indian Gaming Compact provided that:

> [T]he Tribe shall adopt laws ... providing to all employees of a gaming establishment employment benefits, including, at a minimum, sick leave, life insurance, paid annual leave and medical and dental insurance as well as providing unemployment insurance and workers' compensation insurance through participation in programs offering benefits at least as favorable as those provided by comparable state programs, *and which programs shall afford the employees due process of law and shall include an effective means for an employee to appeal an adverse determination by the*

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> *insurer to an impartial forum, such as (but not limited to) the Tribe's tribal court, which appeal shall be decided in a timely manner and in an administrative or judicial proceeding and as to which no defense of tribal sovereign immunity would be available; and provided that to fulfill this requirement the Tribe may elect to participate in the State's program upon execution of an appropriate agreement with the State* [.]

(Emphasis added.)

{7} In 2015 the current version of the Indian Gaming Compact was adopted. S.J. Res. 19, 52nd Leg., 1st Sess. (N.M. 2015). With revisions emphasized below, the 2015 Indian Gaming Compact re-adopted in its entirety the 2007 amendment to Section 4(B)(6). Section 4(B)(6) of the 2015 Indian Gaming Compact provides:

> [T]he Tribe shall adopt laws ... *requiring the Tribe, through its Gaming Enterprise or through a third-party entity, to provide to* all employees of the Gaming Enterprise employment benefits, including, at a minimum, sick leave, life insurance, *paid annual leave or paid time off* and medical and dental insurance as well as providing unemployment insurance and workers' compensation

> insurance through participation in programs offering benefits at least as favorable as those provided by comparable State programs, and which programs shall afford the employees due process of law and shall include an effective means for an employee to appeal an adverse determination by the insurer to an impartial forum, such as (but not limited to) the Tribe's Tribal Court, which appeal shall be decided in a timely manner and in an administrative or judicial proceeding and as to which no defense of tribal sovereign immunity would be available; and provided that to fulfill this requirement the Tribe may elect to participate in the State's program upon execution of an appropriate agreement with the State[.]

(Emphases added.) The Pueblo of Isleta has been a signatory to the 2015 Indian Gaming Compact since July 28, 2015. *See* Indian Gaming, 80 Fed. Reg. 44,992 -01 (July 28, 2015).

B. Parties in Interest

{8} Worker, the injured worker and complainant seeking work injury benefits from her employer in this case, is employed by and works as a custodial porter for Isleta Casino. Isleta Casino is a Class III tribal gaming enterprise located in the State of New Mexico that is wholly owned and operated by the Pueblo of Isleta. At the time of Worker's work injury, Isleta Casino maintained workers' compensation insurance issued by Hudson Insurance Company (Hudson), a Delaware corporation. Tribal First, which functioned as the third-party administrator of Isleta Casino's workers' compensation insurance policy at the time of Worker's injury, is a program administered by the California corporation, Alliant Specialty Insurance Services, Inc. Finally, First Nations Compensation Plan, was a company that provided Indian tribes with workers' compensation coverage until 2009. In 2009, First Nations Compensation Plan ceased paying claims after being pulled into bankruptcy proceedings involving a related company whose principals were investigated for operating a "Ponzi scheme" and were convicted on charges of mail fraud.

C. Worker's Work Injury and Claim for Work Injury Benefits

{9} On August 24, 2015, Worker was injured at work while pushing chairs during her midnight shift at Isleta Casino. Worker suffered a torn meniscus in her right knee. Worker filed a notice of accident form with Isleta Casino, was sent to an urgent care clinic by Isleta Casino, and saw a doctor all within twenty-four hours of her accident.

{10} On September 11, 2015, Worker received a letter signed by Erica Brown, an insurance adjuster for Tribal First (the Tribal First adjuster), which stated that Tribal First would be handling her claim for work injury benefits on behalf of Isleta Casino. The letter continued that "[p]er Isleta Resort & Casino work injury program, claims are to be reported within 24 hours." The letter incorrectly asserted, "Since you did not report your claim timely per Isleta Resort & Casino['s] work injury program, your claim is

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denied." The letter concluded that if Worker disagreed with Tribal First's decision, she was required to submit a written request for appeal with Tribal First no later than thirty days after the date of the letter denying her work injury benefits.

{11} Worker responded by filing a workers' compensation complaint with the Workers' Compensation Administration (WCA),

naming Isleta Casino and the Food Industry Self Insurance Fund of New Mexico (FISIF) as parties to the case. Worker then amended her complaint to add as parties Tribal First and the Uninsured Employers Fund of New Mexico (UEF). While the case was pending, a certificate of workers' compensation insurance was filed with the WCA, identifying Hudson as the workers' compensation liability insurance carrier for Isleta Casino at the time of Worker's accident.

{12} A mediation conference was then held, but the parties were not able to resolve the matter. Included in the mediator's observations and recommendations were that the WCA had jurisdiction to adjudicate Worker's case because Isleta Pueblo waived tribal sovereign immunity, pursuant to Section 4(B)(6) of the 2015 Indian Gaming Compact, and that "[t]he behavior of the Tribal First adjuster raises a question of whether there is an enterprise to take tribes' money but pay no claims. ... Such a course of behavior, even if true, is beyond the scope of the WCA. It would not be beyond the scope of appellate courts, were the case to go that far."

{13} Counsel then entered an appearance on behalf of Isleta Casino and Tribal First in the case for the limited purpose of contesting the subject matter jurisdiction of the WCA to adjudicate Worker's claim and filed a Rule 1-012(B)(1) NMRA motion to dismiss on March 2, 2016, asserting tribal sovereign immunity. Attached to the motion were selected pages from an insurance policy produced by First Nations Compensation Plan purported by counsel for Isleta Casino, Hudson, and Tribal First to be the Pueblo's workers' compensation ordinance, and which counsel argued conferred on Isleta Pueblo exclusive jurisdiction over claims made under its workers' compensation insurance policy with Hudson. Subsequent proceedings brought to light that the purported workers' compensation ordinance was not in fact tribal law in force or effect for the Pueblo at the time of Worker's work injury.

{14} The WCJ then entered an order granting an unopposed motion filed by Worker requesting leave to file a second amended complaint adding Hudson as a party and dismissing FISIF. However, without explanation, the order also dismissed Tribal First. Worker moved for reconsideration of the WCJ's order, requesting that Tribal First remain a party in the case.

{15} The WCJ later issued orders, granting the motion to dismiss on grounds of sovereign immunity, relying on *Antonio v. Inn of the Mountain Gods Resort & Casino* , 2010-NMCA-077, 148 N.M. 858, 242 P.3d 425, and summarily denying the motion for reconsideration as moot. As a result, Worker's workers' compensation case was dismissed with prejudice. This appeal followed.

DISCUSSION

{16} Worker raises three issues on appeal: (1) that the WCJ erred in granting Isleta Casino's motion to dismiss for lack of subject matter jurisdiction on grounds of tribal sovereign immunity; (2) that the defense of tribal sovereign immunity does not extend to Isleta Casino's non-tribal workers' compensation insurer, Hudson, or third-party administrator, Tribal First; and (3) that the WCJ erred in denying her motion to reconsider its order granting her leave to file a second amended workers' compensation complaint naming Hudson and Tribal First as parties to the case.

I. The WCJ Erred in Granting Isleta Casino's Motion to Dismiss for Lack of Subject Matter Jurisdiction

{17} Worker first contends that Section 4(B)(6) of the 2015 Indian Gaming Compact contains an express and unequivocal waiver of sovereign immunity. Worker urges us to focus our attention to the language of Section 4(B)(6) added in 2007 and re-adopted in the 2015 Indian Gaming Compact providing that employees of Isleta Pueblo's gaming enterprises "shall [be] afford[ed] ... an

impartial forum, such as (but not limited to) the Tribe's

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tribal court," and a judicial or administrative proceeding for appeals from adverse workers' compensation determinations in "which no defense of tribal sovereign immunity would be available[.]" (Emphasis omitted.) This language, Worker argues, demonstrates Isleta Pueblo's intent and agreement that either it or its gaming enterprise(s) waive tribal sovereign immunity in cases like hers—which challenge an adverse workers' compensation determination by Isleta Casino's workers' compensation insurer/third-party administrator.

{18} Isleta Casino in turn relies on this Court's opinions in *Antonio* , 2010-NMCA-077, 148 N.M. 858, 242 P.3d 425 ; *Martinez v. Cities of Gold Casino* , 2009-NMCA-087, 146 N.M. 735, 215 P.3d 44 ; and our non-precedential opinion in *Pena v. Inn of the Mountain Gods Resort & Casino* , No. A-1-CA-29799, mem. op. (N.M. Ct. App. Jan. 31, 2011) (non-precedential), to argue that "New Mexico courts have consistently applied the doctrine of tribal sovereign immunity to dismiss workers' compensation claims from the jurisdiction of state courts." Isleta Casino also contends that the language of Section 4(B)(6) of the 2015 Indian Gaming Compact does not constitute an express and unequivocal waiver of sovereign immunity. Rather, Isleta Casino argues that Section 4(B)(6) describes a contractual obligation, enforceable only by the parties to the compact, requiring that Isleta Pueblo shall adopt laws that establish a process for resolving its gaming enterprise employees' workers' compensation claims.

A. Standard of Review

{19} In reviewing an appeal from an order granting or denying a motion to dismiss for lack of jurisdiction based on tribal sovereign immunity, review is de novo. *Gallegos v. Pueblo of Tesuque* , 2002-NMSC-012, ¶ 6, 132 N.M. 207, 46 P.3d 668 ; *see Sanchez v. Santa Ana Golf Club, Inc.* , 2005-NMCA-003, ¶ 4, 136 N.M. 682, 104 P.3d 548.

B. Section 4(B)(6) of the 2015 Indian Gaming Compact Contains an Express and Unequivocal Waiver of Sovereign Immunity

{20} "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Gallegos* , 2002-NMSC-012, ¶ 7, 132 N.M. 207, 46 P.3d 668 (internal quotation marks and citation omitted). These domestic dependent nations "have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez* , 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) ; *see Michigan v. Bay Mills Indian Cmty.*, ---U.S. ----, 134 S.Ct. 2024, 2030, 188 L.Ed.2d 1071 (2014) ("Among the core aspects of sovereignty that [Indian] tribes possess ... is the common-law immunity from suit[.]" (internal quotation marks and citation omitted)); *Hoffman v. Sandia Resort & Casino* , 2010-NMCA-034, ¶ 6, 148 N.M. 222, 232 P.3d 901 (stating that our Supreme Court has long "recognize[d] tribal sovereign immunity as a legitimate legal doctrine of significant historical pedigree").

{21} But tribal sovereign immunity is not absolute. *See Gallegos* , 2002-NMSC-012, ¶ 7, 132 N.M. 207, 46 P.3d 668. Article I, Section 8 of the United States Constitution confers on Congress "the ultimate authority over Indian affairs," which includes the ability to "expressly authorize suits against Indian tribes through legislation." *Gallegos* , 2002-NMSC-012, ¶ 7, 132 N.M. 207, 46 P.3d 668 ; *see Antonio* , 2010-NMCA-077, ¶ 10, 148 N.M. 858, 242 P.3d 425 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.* , 523 U.S. 751, 756, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) for the

proposition that "[t]ribal immunity is a matter of federal law and is not subject to diminution by the states" (alteration omitted)). Moreover, a tribe is also free to waive its sovereign immunity; however, such a waiver must be "express and unequivocal." *R & R Deli, Inc. v. Santa Ana Star Casino* , 2006-NMCA-020, ¶ 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 on which it consents to be sued, and the manner in which the suit shall be conducted." *Id.* (internal quotation marks and citation omitted). Entities under tribal control are also extended sovereign immunity to the same extent as the tribe itself.

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Sanchez , 2005-NMCA-003, ¶ 6, 136 N.M. 682, 104 P.3d 548.

{22} State-tribal compacts are contracts, subject to the rules of contract interpretation. *See Gallegos* , 2002-NMSC-012, ¶ 30, 132 N.M. 207, 46 P.3d 668. As a result, a court's duty in interpreting and construing a state-tribal gaming compact is to ascertain the compacting parties' intent, and absent ambiguity, apply the plain meaning of the language employed in the compact. *See id.* We have therefore consistently declined to hold that a tribe waives sovereign immunity by implication. *See Antonio* , 2010-NMCA-077, 148 N.M. 858, 242 P.3d 425 ; *Martinez* , 2009-NMCA-087, 146 N.M. 735, 215 P.3d 44 ; *Sanchez* , 2005-NMCA-003, 136 N.M. 682, 104 P.3d 548 ; *see also Pena* , No. A-1-CA-29799, mem. op. at *1.

{23} In *Sanchez* , an employee of Santa Ana Golf Club, Inc., an entity wholly owned and operated by Santa Ana Pueblo, sued the golf club for wrongful discharge and defamation after being fired upon informing her employer that she had been tested for Hepatitis C—for which she tested negative. 2005-NMCA-003, ¶¶ 1-2, 136 N.M. 682, 104 P.3d 548. The golf club raised tribal sovereign immunity in a motion to dismiss for lack of subject matter jurisdiction under Rule 1-012(B)(1), which the district court granted. *Sanchez* , 2005-NMCA-003, ¶ 2, 136 N.M. 682, 104 P.3d 548. On appeal, the employee argued that Santa Ana Pueblo's "voluntary participation in New Mexico's workers' compensation program" served as a waiver of sovereign immunity. *Id.* ¶ 17. Reasoning that the employee's claim relied on a theory of waiver by implication, this Court held that mere "activities such as participation in the state's workers' compensation program" do not establish a clear and unequivocal waiver of tribal sovereign immunity. *See id.* ¶¶ 7, 18.

{24} This Court's holding in *Sanchez* was extended in our decision in *Martinez* , in which an injured employee of the Cities of Gold Casino, an entity wholly owned and operated by Pojoaque Pueblo, was allegedly terminated in retaliation for filing a workers' compensation claim. *Martinez* , 2009-NMCA-087, ¶ 1, 3, 146 N.M. 735, 215 P.3d 44. In response to the employee's filing of a workers' compensation claim, the casino filed a motion to dismiss, which included the defense of tribal sovereign immunity. *Id.* ¶¶ 10 -11. The WCJ denied the casino's motion. *Id.* ¶¶ 15-16. On appeal, the employee argued that the defense of sovereign immunity was unavailable to the tribe because it had purchased a workers' compensation insurance policy. *Id.* ¶ 27. Following our logic in *Sanchez* , we reversed the WCJ, holding that by merely purchasing workers' compensation insurance, the casino did not "implicitly" waive sovereign immunity requiring it "to surrender to state court jurisdiction." *Martinez* , 2009-NMCA-087, ¶ 27, 146 N.M. 735, 215 P.3d 44.

{25} *Martinez* also addressed the issue of whether the 2001 Indian Gaming Compact contained a waiver of sovereign immunity. *Id.* ¶ 26. In support of his claim that Section 4(B)(6) of the 2001 Indian Gaming Compact effected a waiver of sovereign immunity in workers' compensation claims, the employee

referred to the language requiring tribal gaming enterprise employees be afforded workers' compensation benefits "at least as favorable as those provided by comparable state programs." *Id.* (internal quotation marks omitted). We reasoned that to find a waiver of sovereign immunity from this language would also require this Court to implicitly find that the casino agreed to submit to the jurisdiction of the WCA. *See id.* In support of our conclusion, we pointed out that the compact language cited by the employee did not indicate "where jurisdiction might lie when and if a workers' compensation claim is filed by an employee" of the casino. *Id.* Accordingly, we held that Section 4(B)(6) of the 2001 Indian Gaming Compact did not contain a waiver of tribal sovereign immunity. *See id.*

{26} Similarly, in *Antonio* , an employee of Ski Apache, an entity wholly owned and operated by the Mescalero Apache Tribe, was injured in the course of his employment as a snowmaker. 2010-NMCA-077, ¶ 2, 148 N.M. 858, 242 P.3d 425. After availing himself of the tribe's workers' compensation program, administered by Tribal First, the employee still believed "that he was entitled to additional compensation" and filed a complaint

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with the WCA. *Id.* ¶ 3. The WCJ dismissed the employee's complaint for lack of subject matter jurisdiction. *Id.* ¶ 4. On appeal, the employee raised the same argument as the employee in *Martinez* —that Section 4(B)(6) of the 2001 Indian Gaming Compact waived the tribe's sovereign immunity with respect to workers' compensation disputes through its language requiring that the tribe provide its employees with workers' compensation benefits "at least as favorable as those provided by comparable state programs[.]" *Antonio* , 2010-NMCA-077, ¶ 15, 148 N.M. 858, 242 P.3d 425. Relying on our reasoning in *Sanchez* and *Martinez* , we reaffirmed that Section 4(B)(6) of the 2001 Indian Gaming Compact does not effect a waiver of tribal sovereign immunity. *See Antonio* , 2010-NMCA-077, ¶¶ 15, 17, 20, 148 N.M. 858, 242 P.3d 425 ; *see also Pena* , No. A-1-CA-29799, mem. op. ¶ 4 (same).

{27} *Sanchez* , *Martinez* , and *Antonio* do not control. In those cases, the employees all relied upon theories of waiver of tribal sovereign immunity by implication—whether by voluntary participation in WCA proceedings, purchasing workers' compensation insurance, or under Section 4(B)(6) of the 2001 Indian Gaming Compact.

{28} In contrast, here Worker's argument relies on Section 4(B)(6) of the 2015 Indian Gaming Compact, which expressly provides that employees of Isleta Pueblo's gaming enterprises "shall [be] afford[ed] ... an impartial forum such as (but not limited to) the Tribe's tribal court" and a judicial or administrative proceeding for appeals from adverse workers' compensation determinations in "which no defense of tribal sovereign immunity would be available[.]" Worker asserts this is an express and unequivocal waiver of tribal sovereign immunity. This language materially changed the substance and operation of the compact and it was not in effect in *Martinez* or *Antonio* , which construed Section 4(B)(6) of the 2001 Indian Gaming Compact. Therefore, the question of whether Section 4(B)(6) of the 2015 Indian Gaming Compact contains an express and unequivocal waiver of tribal sovereign immunity is one of first impression. Thus, *Sanchez* , *Martinez* , and *Antonio* do not govern in this case, and we proceed to analyze the 2015 Compact language to determine whether it constitutes an express and unequivocal waiver of tribal sovereign immunity.

{29} There is no issue about whether Section 4(B)(6) of the 2015 Indian Gaming Compact is ambiguous on its face. We therefore proceed to construe the ordinary and usual

meaning of the language employed in the 2015 Compact. *See ConocoPhillips Co. v. Lyons* , 2013-NMSC-009, ¶ 23, 299 P.3d 844 (holding that where a contract is unambiguous, "the words of the contract are to be given their ordinary and usual meaning" (alteration, internal quotation marks, and citation omitted)). Section 4(B)(6) of the 2015 Indian Gaming Compact sets forth an express and unequivocal waiver of sovereign immunity. Section 4(B)(6) of the 2015 Compact expressly states that "appeal[s]" from "adverse [workers' compensation] determination[s]" by Isleta Casino's insurer "shall be decided ... in an administrative or judicial proceeding ... as to which no defense of tribal sovereign immunity would be available[.]"

{30} Isleta Casino denies that its workers' compensation program does not comply with Section 4(B)(6), and further, assuming Isleta Pueblo has failed to adopt laws as required by the compact, Isleta Casino argues that such a failure can only be remedied by the State of New Mexico, as a party to the contract. The WCJ failed to hear evidence or make any findings of fact on whether Isleta Pueblo has adopted laws requiring it to participate in a workers' compensation program as mandated by Section 4(B)(6). Therefore, notwithstanding that Section 4(B)(6) contains an express waiver of sovereign immunity, we are not able to determine, on the record before us, whether the waiver is operative. Under these circumstances, we would ordinarily remand the case directing the WCJ to hear and consider relevant evidence and make findings of fact on the question of immunity. *See South v. Lujan* , 2014-NMCA-109, ¶ 11, 336 P.3d 1000 (stating that where determination of jurisdiction depends on factual questions that are inadequately developed for appeal, we may remand the case to the district court to make findings of

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fact and conclusions of law). It is not necessary for us to do so in this case, because even if Isleta Casino has sovereign immunity, Worker has a right to pursue her workers' compensation claim directly against Hudson and its third-party administrator, Tribal First. However, if Worker still wishes to proceed against Isleta Casino in addition to the insurers, then the WCJ should hear evidence and make findings (and allow discovery, if he deems it advisable) on the immunity question.

II. Worker May Pursue Her Workers' Compensation Claim Against Hudson and Tribal First, Notwithstanding Isleta Casino's Entitlement To Tribal Sovereign Immunity

{31} Worker next argues that even if this Court "finds that Employer [Isleta Casino] may defend this workers' compensation claim on the basis of sovereign immunity, ... [then] such a defense does not extend to non-tribal entities Hudson Insurance and Tribal First." In support of her argument, Worker relies on the 2012 Oklahoma State Supreme Court case *Waltrip v. Osage Million Dollar Elm Casino* , 2012 OK 65, 290 P.3d 741.

{32} Although counsel for Isleta Casino, Hudson, and Tribal First concede that neither Hudson nor Tribal First are tribal entities entitled to claim sovereign immunity, counsel contends that Isleta Pueblo's sovereign immunity effectively extends to the insurers of its tribal gaming enterprises. This argument, relies on a statement in *Gallegos* , 2002-NMSC-012, ¶¶ 42-48, 132 N.M. 207, 46 P.3d 668, that "New Mexico courts have specifically found[, under Rule 1-019 NMRA,] that tribal enterprises are indispensable parties in suits brought against tribal insurers and that independent claims cannot be sustained against a tribal insurer." As a result, Isleta Casino and Hudson assert that adoption of Worker's argument under *Waltrip* "directly conflicts with New Mexico law."

A. *Gallegos* Does Not Apply to This Case

{33} In *Gallegos* , a visitor to the Camel Rock Gaming Center, an entity wholly owned and operated by the Pueblo of Tesuque (Tesuque), was injured when she was knocked down by a garbage container that blew into her because of a sudden gust of wind. 2002-NMSC-012, ¶ 3, 132 N.M. 207, 46 P.3d 668. At the time of the visitor's injury, the gaming center had an insurance policy in effect with Zurich American Insurance Company. *Id.* The visitor thereafter filed a common law tort action against Tesuque and other defendants seeking damages. *Id.* ¶ 4. The district court dismissed the case on the basis of tribal sovereign immunity. *Id.* The visitor proceeded to file a separate lawsuit against the gaming center's insurer, Zurich and other defendants, alleging, in pertinent part, breach of contract for failing to pay her medical expenses and insurance bad faith. *Id.* ¶ 5. Zurich responded by filing a Rule 1-019 motion to dismiss for failure to join an indispensable party—Tesuque, which enjoyed sovereign immunity. *Gallegos* , 2002-NMSC-012, ¶ 5, 132 N.M. 207, 46 P.3d 668. On appeal, our Supreme Court affirmed the district court, *id.* ¶ 37, citing federal precedent for the proposition that in actions involving contract disputes, the parties to the contract are indispensable parties. *Id.* ¶ 43.

{34} The Court in *Gallegos* reasoned that the visitor's contract claims "would require that the court interpret the provisions of the insurance contract, as well as determine the duties and responsibilities under the insurance policy" of Tesuque, Zurich, and the visitor "in relation to each other" and "as understood by the contracting parties." *Id.* ¶ 43. "The propriety or impropriety of Zurich's performance under the insurance policy [,]" the Court stated, was of "substantial interest" to Tesuque, which "paid for the insurance protection in question and on whose behalf Zurich acts." *Id.* Accordingly, the Court held that Tesuque was an indispensable party to the visitor's case against Zurich. *Id.* ¶ 47.

{35} *Gallegos* does not apply under the facts and circumstances of this case. In *Gallegos* , the visitor's claim against Zurich was a common law civil action, alleging breach of contract for failing to pay her medical expenses and insurance bad faith. *Id.* ¶ 38.

{36} Here, Worker's case was filed as a statutory workers' compensation claim. From

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these facts it follows that the procedural issues that warranted dismissal of the visitor's claim against Zurich in *Gallegos* on grounds of failure to join an indispensable party—Tesuque—are not presented in Worker's case. Specifically, in *Gallegos* , the visitor's breach of contract and insurance bad faith claims against Zurich would have required the Court to interpret and determine the duties created under the insurance policy executed between Zurich and the gaming center in relation to the visitor. Therefore, the Court held that based on the principle that in actions involving contract disputes, the parties to the contract at issue are indispensable parties, the gaming center, which the district court determined enjoyed tribal sovereign immunity in relation to the visitor's claim, was an indispensable party without which the visitor's case against Zurich could not go forward.

{37} Here, in contrast, interpretation of the duties created under the workers' compensation insurance policy executed between Isleta Casino and Hudson is not at issue. Rather, to succeed on the merits in her claim for workers' compensation benefits before the WCA, Worker need only establish that at the time of her accident: (1) Isleta Casino had complied with workers' compensation laws regarding obtaining insurance; (2) Worker was performing "service arising out of and in the course of

employment"; and (3) her injury was "proximately caused by accident arising out of and in the course of" her employment and was "not intentionally self-inflicted." NMSA 1978, § 52-1-9 (1973). Additionally, workers' compensation law, unlike the common law of contract, generally requires that both a worker's employer and his or her employer's insurer shall be directly and primarily liable to the worker to pay to him or her work injury benefits where the aforementioned elements of a workers' compensation claim are satisfied. *See* NMSA 1978, § 52-1-4(A), (C) (1990). As a result, even assuming Isleta Casino was determined to enjoy tribal sovereign immunity in the context of Worker's workers' compensation claim, Isleta Casino is not an indispensable party without which Worker's claim cannot go forward under *Gallegos* — as both Isleta Casino and Hudson may be directly and primarily liable to her for work injury under workers' compensation law.

{38} Concluding that *Gallegos* does not apply in this case, we proceed to consider Worker's claim that we should adopt the reasoning in the Oklahoma Supreme Court's decision in *Waltrip* and hold that she may pursue her workers' compensation claim against Hudson and Tribal First in the WCA notwithstanding that Isleta Casino may be immune.

B. *Waltrip* 's Rationale Is Persuasive and Worker May Pursue Her Claim for Workers' Compensation Benefits Against Hudson and Tribal First

{39} In *Waltrip* , an employee of the Osage Million Dollar Elm Casino, wholly owned and operated by the Osage Nation, fell on a patch of ice while on the job working as a surveillance supervisor at the casino. 2012 OK 65, ¶¶ 2-3, 290 P.3d 741. At the time of the accident, the casino carried an insurance policy issued by Hudson Insurance Company—administered by Tribal First. *Id.* ¶ 2. Although the casino's insurance policy with Hudson contemplated adjudication of workers' compensation claims in Tribal Court, the Osage Nation had not enacted an ordinance governing workers' compensation. *Id.* ¶ 9. The employee proceeded to file a claim in the Oklahoma Workers' Compensation Court, seeking workers' compensation benefits. *Id.* ¶ 4. The Workers' Compensation Court, however, dismissed the employee's claim based on the casino and Hudson's assertion of tribal sovereign immunity as a defense. *Id.* Relying on a section of the Oklahoma Workers' Compensation Act titled "Estoppel from denying employment"[1] and the

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common law rights in contract of third-party beneficiaries, the court determined that although the casino enjoyed tribal sovereign immunity based on its status as a tribal enterprise, Hudson Insurance—a non-tribal Delaware corporation—was not beyond the jurisdiction of the state's Workers' Compensation Court. *Id.* ¶ 19.

{40} The *Waltrip* court's reasoning was as follows. Per the estoppel statute, the employee had been conferred third-party beneficiary status under the insurance policy entered into by the casino and Hudson. *Id.* The purpose of the estoppel statute was to ensure "that an insurer who accepts premiums should not evade liability for benefits due under compensation law" notwithstanding an insured's status as a sovereign entitled to immunity from suit. *Id.* ¶ 7 (internal quotation marks and citation omitted). Hudson "knew or should have known" that the Osage Nation had put no workers' compensation ordinance in place, but still "[willfully] and intentionally collect[ed] premiums from the tribal enterprise[, the casino,] for providing workers' compensation ... believing that it w[ould] step into the shoes of the Tribe and receive the benefit of the Tribe's sovereign immunity." *Id.* ¶ 12. To permit an insurer to evade any liability because of the status of an employer that it insures would "render the

[insurance] policy provisions illusory and inane. Insurer would possess the ability to arbitrarily deny claims and yet evade any judicial review in any tribal, federal, or state court. It would leave no avenue for an injured worker of the tribal enterprise to compel [i]nsurer's performance under the policy in a judicial forum." *Id.* ¶ 15 (emphasis omitted). As a result, without a tribal ordinance governing workers' compensation and establishing the law and a forum for adjudication of employees' workers' compensation claims, the state Workers' Compensation Court could exercise jurisdiction over Hudson and Tribal First. *Id.* ¶ 19.

{41} The circumstances central to the court's decision in *Waltrip* are strikingly similar to those presented in this case. First, like the casino in *Waltrip* , Isleta Casino carried a workers' compensation insurance policy issued by Hudson and administered by Tribal First at the time of Worker's work injury. Like the arrangement between the Osage Nation and Hudson in *Waltrip* , the insurance policy in force between Isleta Casino and Hudson appeared to contemplate adjudication of Isleta Casino employees' workers' compensation claims in some forum. However, at the time that the *Waltrip* employee and Worker were injured, the Osage Nation and apparently Isleta Pueblo had not adopted tribal ordinances governing workers' compensation. Upon the filing of workers' compensation complaints with the New Mexico WCA and Oklahoma Workers' Compensation Court, respectively, both Worker and the *Waltrip* employee's claims were dismissed on grounds of tribal sovereign immunity. And as was the case in *Waltrip* , Hudson and Tribal First knew or should have known that no Isleta Pueblo ordinance governing workers' compensation was in place. Yet Hudson and Tribal First still collected premiums from Isleta Pueblo contending, once again, that it would benefit from the Pueblo's sovereign immunity.

{42} Second, Oklahoma's estoppel from denying employment statute, which is aimed at ensuring "that an insurer who accepts premiums should not evade liability for benefits due under compensation law" notwithstanding an insured's status as a sovereign entitled to immunity from suit, *Waltrip* , 2012 OK 65, ¶ 7, 290 P.3d 741 (internal quotation marks and citation omitted), is similar to Section 52-1-4(C). As referenced above, Section 52-1-4(C) requires that both an employer and the employer's workers' compensation insurer assume direct and primary liability to pay employees' "compensation and other workers' compensation benefits" where an employee's injuries are deemed compensable. Section 52-1-4 has also been construed by our Supreme Court as intended to notify a worker that their employer has complied with the insurance requirements of the Workers' Compensation Act, that the employer is subject to the provisions thereof, and that the worker has conclusively accepted the provisions of the Workers' Compensation Act. *See*

[419 P.3d 1267]

Shope v. Don Coe Constr. Co. , 1979-NMCA-013, ¶ 9, 92 N.M. 508, 590 P.2d 656.

{43} Finally, New Mexico common law expressly recognizes that workers are third-party beneficiaries of workers' compensation insurance policies. *See Hovet v. Allstate Ins. Co.* , 2004-NMSC-010, ¶¶ 16, 20, 135 N.M. 397, 89 P.3d 69 (reaffirming that workers are "intended beneficiaries" of workers' compensation insurance policies); *Russell v. Protective Ins. Co.* , 1988-NMSC-025, ¶¶ 15-16, 107 N.M. 9, 751 P.2d 693 (recognizing that workers are third-party beneficiaries under workers' compensation insurance policies), *abrogated on other grounds by Cruz v. Liberty Mut. Ins. Co.* , 1995-NMSC-006, ¶¶ 7-10, 119 N.M. 301, 889 P.2d 1223 ; *Points v. Wills* , 1939-NMSC-041, ¶¶ 47, 50, 44 N.M. 31, 97 P.2d 374 (recognizing that workers and dependents of the worker are third-party

beneficiaries of workers' compensation policies).

{44} Based on the foregoing factual and legal similarities, we find *Waltrip* persuasive and adopt its rationale. Applying the *Waltrip* reasoning, we conclude that Worker is a third-party beneficiary to the workers' compensation insurance policy between Isleta Casino and Hudson (evidenced by the December 1, 2015, certificate of workers' compensation insurance filed with the WCA). Specifically, Isleta Casino and Hudson intended for the employees of Isleta Casino, including Worker, to benefit from the rights and protections created under the policy in the event that they are injured on the job. Additionally, the filing of the certificate of workers' compensation insurance with the WCA rendered Hudson to being held directly and primarily liable to pay workers' compensation benefits as Isleta Casino's workers' compensation insurer, pursuant to Section 52-1-4(C). As a result, we likewise conclude, as the Oklahoma Supreme Court concluded in *Waltrip* , that allowing Hudson and Tribal First to deny Worker's claim in this case by hiding behind Isleta Pueblo's sovereign immunity renders the Pueblo's insurance policy illusory and inane and permits Hudson and Tribal First to arbitrarily evade judicial review of its determination in any forum.

{45} Accordingly, we hold that: (1) Hudson and Tribal First, as Isleta Casino's workers' compensation insurer and third-party administrator, are proper parties to Worker's workers' compensation case; and (2) assuming Isleta Casino enjoys tribal sovereign immunity in this case, Worker may pursue her claim for work injury benefits in the WCA against Hudson and Tribal First.

CONCLUSION

{46} For the foregoing reasons, we reverse and remand for further proceedings in Worker's workers' compensation case in the WCA in accordance with this opinion. Additionally, on remand, Worker shall be permitted to amend her complaint to name Tribal First, as Hudson's third-party administrator, as a party to the case.

{47} **IT IS SO ORDERED.**

WE CONCUR

LINDA M. VANZI, Chief Judge

EMIL J. KIEHNE, Judge

Notes:

[1] Okla. Stat. Ann. tit. 85A, § 117 (West 2014) (providing that "[e]very employer and insurance carrier who schedules any employee as a person employed by the employer for the purpose of paying or collecting insurance premiums on a workers' compensation insurance policy or who pays, receives or collects any premiums upon any insurance policy covering the liability of such employer under the workers' compensation law by reason of or upon the basis of the employment of any such employee shall be estopped to deny that such employee was employed by the employer").

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

April 17, 2019

NO. S-1-SC-37607

ISLETA RESORT & CASINO, HUDSON INSURANCE, and TRIBAL FIRST, Third Party Administrator,

Petitioners,

v.

REGINALD C. WOODARD, Workers' Compensation Judge,

Respondent,

and

ANTHONY CHAVEZ,

Real Party in Interest.

ORDER

WHEREAS, this matter came on for consideration by the Court upon verified petition for writ of prohibition or writ of superintending control and request for stay, responses thereto, and supplemental authority of the parties, and the Court having considered said pleadings and being sufficiently advised, Chief Justice Judith K. Nakamura, Justice Barbara J. Vigil, Justice Michael E. Vigil, Justice C. Shannon Bacon, and Justice David K. Thomson concurring;

Exhibit #2

NOW, THEREFORE, IT IS ORDERED that the petition and request for stay are DENIED.

IT IS SO ORDERED.

WITNESS, the Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 17th day of April, 2019.

Joey D. Moya, Chief Clerk of the Supreme Court
of the State of New Mexico

I CERTIFY AND ATTEST:
A true copy was served on all parties
or their counsel of record on date filed.
Joey D. Moya
Chief Clerk of the Supreme Court
of the State of New Mexico

UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

ISLETA RESORT & CASINO, HUDSON INSURANCE, TRIBAL FIRST, Plaintiffs, v. REGINALD WOODARD, a New Mexico Worker's Compensation Judge, ANTHONY CHAVEZ, Defendants.	No: 1:19-CV-00607-BRB-JFR

ORDER STAYING CASE

On July 1, 2019, Plaintiffs filed the complaint in this action seeking declaratory relief pursuant to 28 U.S.C. § 2201. Specifically, Plaintiffs seek an order declaring (1) the Indian Gaming Regulatory Act does not permit the shifting of jurisdiction from tribal courts or tribal administrative forums to state courts or state administrative forums over tribal workers' compensation claims brought against tribes or tribal entities; and (2) the New Mexico Workers' Compensation Administration lacks jurisdiction over Plaintiffs in the case captioned, *Anthony Chavez v. Isleta Resort & Casino, Hudson Insurance and Tribal First*, WCA No. 18-00520 (2018).

Exhibit #3

Thereafter, Defendants Anthony Chavez and Reginald Woodard filed separate motions to dismiss. Defendant Chavez moved the Court to exercise its discretion to decline jurisdiction over this declaratory judgment action. Defendant Woodard moved the Court to dismiss the complaint for failure to state a claim. In the alternative, Defendant Woodard also moved the Court to decline jurisdiction over the case.

Having reviewed the parties' briefs and being cognizant of the issues before the Supreme Court of New Mexico raised in *Mendoza v. Isleta Resort*, the Court hereby STAYS this matter pending the resolution of that appeal. *See Mendoza v. Isleta Resort and Casino*, 419 P.3d 1256 (N.M. Ct. App. 2018), *cert. granted*, 2018-NMCERT-___ (N.M. May 25, 2018) (No. S-1-SC-37034). The parties are DIRECTED to file a notice with this Court when the Supreme Court of New Mexico issues its decision in the *Mendoza* case.

Entered for the Court
this 4th day of October 2019

Bobby R. Baldock
United State Circuit Judge
Sitting By Designation

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