IN THE SUPREME COURT OF THE MUSCOGEE (CREEK) NATION

KAE L. LANGE,

Plaintiff-Appellant,

v.

MUSCOGEE (CREEK) NATION d/b/a RIVER SPIRIT CASINO,

Defendant-Respondent.

Case No. **SC 14-02**
(District Court Case No. CV 2011-206)

Appeal from District Court, Okmulgee District, Muscogee (Creek) Nation.

Darell R. Matlock, Jr.; Matlock & Associates; Tulsa, Oklahoma; for Plaintiff-Appellant.

Keith B. Bartsch; Atkinson, Haskins, Nellis, Brittingham, Gladd & Fiasco, PC; Tulsa, Oklahoma; for Defendant-Respondent.

OPINION AND ORDER

MVSKOKVLKE FVTCECKV CUKO HVLWAT VKERRICKV HVYAKAT OKETV YVNKE VHAKV HAKATEN ACAKKAYEN MOMEN ENTENFVTCETV, HVTVM MVSKOKE ETVLWVKE ETEHVLVTKE VHAKV EMPVTAKV.[1]

Before: ADAMS, *C.J.*; THOMPSON, *V.C.J.*; HARJO-WARE, SUPERNAW, DEER, and LERBLANCE, *JJ.*

PER CURIAM.

Order and judgment of the District Court affirmed.

[1] "The Muscogee (Creek) Nation Supreme Court, after due deliberation, makes known the following decision based on traditional and modern Mvskoke law."

PER CURIAM.

Plaintiff-Appellant Kae Lange appeals the District Court's grant of summary judgment for Defendant-Respondent Muscogee (Creek) Nation doing business as River Spirit Casino in Appellant's personal injury action. Appellant asserts she was injured after she tripped and fell at Respondent's gaming facility. On the record presented and for the reasons set forth herein, we affirm the order and judgment of the District Court.

BACKGROUND

On February 20, 2011, Plaintiff-Appellant (Appellant) tripped and fell while patronizing Defendant-Respondent's (Respondent or Muscogee Nation) gaming facility. Appellant filed a tort claim notice with Respondent on June 23, 2011, that sought compensation for injuries, medical expenses and loss of income allegedly suffered as a result of her fall.[2] Respondent subsequently denied Appellant's tort claim and Appellant initiated a personal injury action in the Muscogee Nation District Court on December 9, 2011.[3] Appellant asserted "the carpet and floor" caused her fall and Respondent was liable under premises liability theory because Respondent "knew or should have known the condition of the carpet and flooring" and "failed to warn the Appellant of the condition of the carpet and floor."[4] Respondent denied liability for Appellant's injuries, asserted multiple defenses and requested jury trial.[5]

After a year of pre-trial discovery, Respondent moved for summary judgment. Respondent contended that judgment as a matter of law was proper because (1) Appellant lacked evidence of the existence of a hazard or Respondent's knowledge of any dangerous condition caused by the

[2] *Petition* 2 (December 9, 2011).
[3] *Id.*
[4] *Id.* at 1.
[5] *Defendant's Answer and Defenses* 1-4 (January 19, 2012).

installation or maintenance of the carpet or floor where Appellant fell;[6] (2) Appellant's deposition testimony and surveillance video of her fall created a reasonable inference that Appellant's fall was caused by her own negligence;[7] and (3) comparative negligence, if adopted by the District Court as an available affirmative defense, barred Appellant's claim.[8]

One week later, Appellant moved for partial summary judgment on the question of Respondent's liability and posited the only issue remaining for trial was a determination of damages. Appellant argued that partial summary judgment was proper because (1) the Muscogee Nation's Tribal-State Gaming Compact adopted a duty of care "above that of ordinary care or negligence[,] if not an absolute duty to prevent [injury to patrons]", essentially making Respondent strictly liable for Appellant's injury;[9] (2) direct evidence of Respondent's negligence was unnecessary under the doctrine of *res ipsa loquitur*;[10] (3) deposition testimony by Appellant's husband, affidavit evidence and surveillance video raised a presumption of Respondent's negligence;[11] and (4) judicial adoption of any comparative negligence defense would contradict the terms of the Tribal-State Gaming Compact and encroach on legislative authority constitutionally vested in the Muscogee Nation National Council.[12]

After hearing oral argument on the cross motions, the District Court granted Respondent's motion for summary judgment in an order entered December 30, 2013. The District Court (1) rejected Appellant's assertion that the Tribal-State Gaming Compact incorporated strict liability for casino patron injuries;[13] (2) held casino patron tort claims were subject to the principles of premises

---

[6] *Defendant's Motion for Summary Judgment* 3-6 (January 31, 2013).
[7] *Id.* at 8.
[8] *Id.* at 6-8.
[9] *Plaintiff's Motion for Summary Judgment and Plaintiff's Response to Defendant's Motion for Summary Judgment* 5 (February 8, 2013).
[10] *Id.*
[11] *Id.*
[12] *Id.* at 6.
[13] *Order* 2 (December 30, 2013).

liability and modified comparative negligence based on the plain language of the Tribal-State Gaming Compact and persuasive authority from other tribal jurisdictions and the majority of states;[14] and (3) held Respondent was entitled to judgment as a matter of law because Appellant presented no evidence that created a genuine issue of material fact regarding the existence of a hazard that caused Appellant's fall.[15] Appellant filed notice of appeal with this Court on January 20, 2014, and oral argument was heard on July 31, 2014.

On appeal, Appellant raises multiple assignments of error. Appellant asserts the District Court erred as a matter of law (1) by adopting Federal Rule of Civil Procedure 56(a); (2) by adopting the doctrine of contributory negligence; (3) by failing to find contributory negligence is a fact determination for a jury; (4) by relying on persuasive authority from tribes not party to the Muscogee Nation's Tribal-State Gaming Compact; (5) by failing to consider Appellant's motion for partial summary judgment on the question of strict liability; (6) by finding Respondent did not intend to insure all casino patron injuries; and (7) by granting Respondent's motion for summary judgment. Appellant requests this Court vacate the underlying order and judgment, grant Appellant's motion for partial summary judgment on the question of Respondent's strict liability and remand to the District Court with instructions to proceed with a determination of damages.

JURISDICTION, SCOPE AND STANDARD OF REVIEW

Jurisdiction is proper under M(C)NCA Title 27, § 1-101.C.[16] Appeal from a grant of summary judgment, as well as statutory interpretation of the Nation's Tribal-State Gaming Compact and Code provisions, present questions of law we review *de novo*.[17]

---

[14] *Id* at 2.
[15] *Id.* at 3.
[16] M(C)NCA Title 27, § 1-101.C., vests this Court with exclusive jurisdiction to review final orders of the Muscogee (Creek) Nation District Court.

ISSUES PRESENTED

Part I. Where Muscogee law is silent, does judicial consideration of persuasive non-Muscogee authority violate either M(C)NCA Title 27, §1-103, or constitutional separation of legislative and judicial authority?

Part II. Under the Muscogee Nation's Tribal-State Gaming Compact with the State of Oklahoma, is the Nation strictly liable for injuries incurred by patrons of the Nation's gaming facilities?

Part III. Under Muscogee law, what is the burden of proof in summary-judgment proceedings?

DISCUSSION AND ANALYSIS

Part I – Judicial Use of Persuasive Non-Muscogee Authority

Appellant asserts the District Court unlawfully considered or adopted non-Muscogee authority in four assignments of error. We address each in turn *de novo*. Appellant first contends the District Court violated statutory limits on Muscogee judicial authority by expressly "following" Federal Rule of Civil Procedure (FRCP) 56(a). M(C)NCA Title 27, §1-103.B., requires Muscogee Nation courts to apply the Indian Civil Rights Act and limits further applicability of federal law unless expressly made applicable by duly enacted tribal statute, compact, agreement or duly enacted federal statute.[18] It is clear that §1-103.B. restricts direct application of federal law by Muscogee

---

[17] *See generally* SC 10-01, *Ellis v. Checotah Muscogee Creek Indian Community, et al.* 3 (May 22, 2013); *Fife v. M(C)N Health Systems Board*, et al., 4 Mvs. L. R. 149 (July 21, 1995); *In the Matter of Adoption of R.A.W.*, 4 Mvs. L. R. 194 (October 5, 1999); *Preferred Management Corporation v. National Council of the Muscogee (Creek) Nation*, 4 Mvs. L. R. 55 (May 2, 1990). *See also Oliver v. M(C)N National Council,* 4 Mvs. L. R. 281 (September 22, 2006); *Alexander v. Gouge & Hufft*, 4 Mvs. L. R. 225 (January 16, 2003).

[18] M(C)NCA Title 27, §1-103.B. Likewise, under M(C)NCA Title 27, §1-103.C., Muscogee judicial authority to apply Oklahoma law is generally limited unless expressly made applicable by enumerated exception or duly enacted tribal statute, compact, or agreement.

courts; however, direct application of federal law is distinguishable from judicial consideration of persuasive non-Muscogee authority where Muscogee law is silent. As the sole branch of Muscogee government constitutionally vested with the Nation's judicial power,[19] Muscogee courts resolve justiciable disputes through application of the Nation's Constitution, treaties, duly enacted statutes, judicial precedent and other available Muscogee law.[20] Where direct, controlling Muscogee authority is silent regarding a justiciable claim or issue, our Nation's Constitution inherently obligates Muscogee courts to establish judicial precedent not inconsistent with existing Muscogee law.[21]

Muscogee law lacked practicable standards for summary judgment when both parties sought summary disposition in the underlying dispute.[22] In the absence of controlling Muscogee authority and after both parties cited FRCP 56(a) as persuasive, the District Court properly sought to establish a precedential rule by which to assess the cross-motions for summary disposition. The lower court's characterization of its consideration of FRCP 56(a) as "following" the federal rule is arguably suspect under §1-103.B's general restriction on direct application of federal law; however, we hold any error resulting from the lower court's use of the term "follow" to be harmless because it did not alter the outcome of the underlying proceeding.[23] Rather than permit Muscogee courts to "follow" persuasive non-Muscogee authority in the absence of controlling Muscogee law, we interpret §1-103 to require our Nation's courts to establish Muscogee judicial precedent. Whether

[19] M(C)NCA Const. Art. VII, §1.
[20] M(C)NCA Title 27, §1-103.A. "[O]ther available Muscogee law" includes the traditional, unwritten common law of the Muscogee people.
[21] M(C)NCA Const. Art. VII, § 1 ("The judicial power of the Muscogee (Creek) Nation shall be vested in one Supreme Court limited to matters of the Muscogee (Creek) Nation's jurisdiction and in such inferior courts as the National Council may from time to time ordain."). Article III, Sect. 1, of the 1867 Muscogee (Creek) Nation Constitution referred to this authority as the "supreme law defining power." *Constitution and Laws of the Muscogee (Creek) Nation* 5 (Scholarly Resources, Inc. 1975).
[22] *Britton v. Muscogee (Creek) Nation*, 4 Mvs. L. R. 213, 215 (September 21, 2001) (stating in dicta that summary disposition is available if a motion is "supported by appropriate materials, affidavits and exhibits." *See also Ade v. Muscogee (Creek) Nation Division of Health Administration*, 4 Mvs. L. R. 204, 206 (March 21, 2001).
[23] M(C)NCA Title 27, App. 2, Rule 25.A. Under Rule 25.A, harmless errors generally will not result in reversal or a new trial unless the outcome of the lower court proceeding would have been different if not for the error.

legal principles and reasoning from non-Muscogee jurisdictions are considered persuasive in the development of Muscogee judicial precedent is ultimately a matter of Muscogee Supreme Court discretion.[24] Regarding the instant appeal, we hold that under Muscogee law, summary judgment is appropriate where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law.

Appellant's second assignment of error contends the underlying order should be reversed because the District Court encroached on the National Council's constitutionally vested legislative authority by adopting the doctrine of modified comparative negligence. As discussed *supra*, where Muscogee law is silent regarding a justiciable claim or issue, our Nation's Constitution inherently obligates Muscogee courts to establish judicial precedent not inconsistent with existing Muscogee law.[25] The underlying dispute required the District Court to determine Respondent's duty of care under the Tribal-State Gaming Compact (Compact)[26] and assess Appellant's theory of Compact-created strict liability discussed *infra* at Part II. Where modern Muscogee law external to the Compact was silent regarding duty of care, damages or available defenses in tort, the lower court's consideration of available persuasive authority was proper. The underlying order correctly emphasized that the lower court's measured recognition of modified comparative negligence as an available affirmative defense for future tort claims would be effective only "until directed otherwise by the Supreme Court or tribal legislature."[27] Constitutional authority to enact substantive statutory law controlling casino patron tort claims is unquestionably vested with the Muscogee Nation National Council;[28] however, development of judicial precedent where necessary is in accord with,

---

[24] *See generally Brown & Williamson v. Nation*, 4 Mvs. L. R. 164, 171 (1998).
[25] M(C)NCA Const. Art. VII, §1.
[26] Okla. Stat. tit. 3A, § 281.
[27] *Order* 2, (December 30, 2013).
[28] M(C)NCA Const. Art. VI, §2 ("All legislative power herein shall be vested in the Muscogee (Creek) Nation National Council. . .").

rather than volitional of, constitutional separation of Muscogee governmental powers. As a general rule, Muscogee judicial precedent necessarily also becomes part of the Muscogee Nation's body of direct, controlling laws and remains binding until superseding legislation is duly enacted.

Appellant's third assignment of error argues the underlying grant of summary judgment resulted in denial of due process because the lower court retroactively adopted comparative negligence to bar Appellant's claim and effectively prevented a jury from resolving the issue of Appellant's negligence a question of fact. The underlying order clearly indicates, however, that the District Court did not hold comparative negligence barred Appellant's claim. As discussed *infra* at Part III, the District Court determined Respondent was entitled to judgment as a matter of law because Appellant presented no evidence that created a genuine issue of material fact regarding the existence of a hazard that caused Appellant's fall. Appellant's contention that comparative negligence was retroactively adopted to the detriment of her claim is wholly unsupported by the record because the underlying order granted summary judgment for Respondent pursuant to Appellant's inability to provide more than speculation regarding what caused her fall.

Likewise, Appellant's fourth assignment of error is also meritless. Appellant asserts the District Court erred by relying on inapplicable judicial decisions from other tribes not subject to the same strict liability requirement assumed by Respondent in the Compact. As discussed *infra* at Part II, Appellant's strict liability argument squarely contradicts the plain language of the Compact that requires Respondent to "[t]ake reasonable measures to assure the physical safety of [casino] patrons . . . [.]"[29] In the absence of Muscogee law regarding premises liability, the District Court properly considered persuasive non-Muscogee tribal court decisions to inform its interpretation of the duty of care required under the Compact.

[29] Okla. Stat. tit. 3A, § 281, Part 7.A.2.

Part II – Tort Liability Under the Tribal-State Gaming Compact

In two fundamentally identical propositions of error, Appellant argues the District Court erroneously rejected Appellant's motion for partial summary judgment on the issue of Respondent's absolute liability for casino patron tort claims. Appellant asserts that Respondent is strictly liable because the Compact uses the terms "assure", "ensure", and "insure" synonymously.[30] According to Appellant's interpretation, Part 6.A. of the Compact demonstrates legislative intent to "insure all injuries incur[ed] at [the] facility",[31] and Part 7.A.2. "indicates the burden of care is above that of ordinary care or negligence[,] if not an absolute duty to prevent the type of incidents and injuries suffered by the Appellant."[32]

We review *de novo* the duty of care required under the Compact. When called upon to interpret the meaning of a statutory provision, we look first to whether the text of the provision has plain meaning. Where statutory text is determined to be ambiguous, this Court's constitutional mandate is to resolve the ambiguity.[33] If statutory language is unambiguous, however, we apply the statute according to the plain meaning of its terms.[34]

Because the terms "ensure", "insure" and "assure" are not expressly defined in the Compact, we first consider the plain meaning of each term. "Ensure" is commonly defined as a verb meaning

---

[30] *Appellant's Brief-in-Chief* at 6 (internal citations omitted) (emphasis added) ("ASSURE. To make certain and put beyond doubt. . . . To declare solemnly; to assure to any one with design of inspiring belief or confidence; to declare, aver, avouch, assert, or asservate. . . . **Used interchangeably with insure in insurance law**; in real property documents it means a warranty; and in business documents, generally, it means a pledge or security."). Appellant cited *Blacks's Law Dictionary* as the source of her proffered definition of "assure"; however, Appellant's citation was incomplete. After noting that Appellant's proffered definition of "assure" differed from the definition that appears in the most recent 10th edition of Black's Law Dictionary, the source of Appellant's definition was determined to be the revised 4th edition of Black's Law Dictionary published in 1968.

[31] *Id.* at 8.

[32] *Plaintiff's Motion for Summary Judgment and Plaintiff's Response to Defendant's Motion for Summary Judgment* 5 (February 8, 2013).

[33] *See Cox v. Kamp*, 4 Mvs. L. R. at 79 (June 27, 1991); *Courtwright v. July, et al.*, 4 Mvs. L. R. 105, 112 (June 28, 1993); and SC 10-01, *Ellis v. Checotah Muscogee Creek Indian Community, et al.* 3 (May 22, 2013).

[34] *See Cox v. Kamp*, 4 Mvs. L. R. 75, 79 (June 27, 1991); and SC 10-01, *Ellis v. Checotah Muscogee Creek Indian Community, et al.* 4 (May 22, 2013).

"to make sure, certain, or safe[.]"[35] "Insure" is the verb form of the noun "insurance", which is commonly defined as "[a] contract by which one party (the *insurer*) undertakes to indemnify another party (the *insured*) against risk of loss, damage, or liability arising from the occurrence of some specified contingency[.]"[36] "Assure" is the verb form of the noun "assurance", which is commonly defined as "[s]omething that gives confidence; the quality, state, or condition of being confident or secure[.]"[37] Although the terms share similar spelling and pronunciation, the terms are not considered synonymous in modern legal usage.[38]

Appellant invites this Court to interpret use of the terms "ensure" and "assure" as indication of an implied acceptance of absolute liability by Respondent. Appellant's interpretation would require us to find both plain meaning and synonymy by reading Part 6.A. and Part 7.A.2. in isolation from all other Compact provisions. Rather than find plain meaning by excluding all other statutory text surrounding the terms at issue, we find Appellant's interpretation contradicts the plain meaning of Parts 6.A. and 7.A.2. Neither the plain meaning of the Compact provisions at issue, nor

---

[35] *Merriam-Webster's Collegiate Dictionary* 385 (Frederick C. Mish ed., 10th ed., Merriam-Webster, Inc., 2001).

[36] *Black's Law Dictionary* 921 (Bryan A. Garner ed., 10th ed., Thomson Reuters 2014) ("**Insurance: 1.** A contract by which one party (the *insurer*) undertakes to indemnify another party (the *insured*) against risk of loss, damage, or liability arising from the occurrence of some specified contingency . . . . **2.** The amount for which someone or something is covered by such an agreement . . . . – **insure**, *vb.*").

[37] *Black's Law Dictionary* 150 (Bryan A. Garner ed., 10th ed., Thomson Reuters 2014) ("**Assurance: 1.** Something that gives confidence; the quality, state, or condition of being confident or secure . . . . **2.** *English law.* Life Insurance . . . . **3.** The act of transferring real property; the instrument by which it is transferred . . . . **4.** A pledge or guarantee . . . . – **assure**, *vb.*")

[38] Bryan A. Garner, *A Dictionary of Modern Legal Usage* 85 (2d ed., Oxford University Press, 2001).

> **Assure; ensure; insure.**
>
> **A. *Assure* for *ensure*.** One person *assures* (makes promises to, convinces) other persons, and *ensures* (makes certain) that things occur or that events take place. Any object beginning with *that* should be introduced by the verb *ensure*, if the verb is in the active voice. Here *assure*, which always takes a personal object, is properly used: . . . "Although the court's instruction did petitioner no harm, it was thought that petitioner was *assured* a new trial if counsel had complained."
>
> In the following sentence, *assure* is misused for *ensure*: "This course will be more likely to *assure* [read *ensure*] that the police officer will not be exposed to personal liability." . . .
>
> *Ensure* is properly used in the following sentence: . . . "The verdict *ensured* that he would spend a long time in jail." . . .
>
> **B. *Insure* and *ensure*.** *Insure* should be restricted to financial contexts involving indemnification; it should refer to what insurance companies do; *ensure* should be used in all other senses of the word. Following is a common-place peccadillo: "Care must be taken to *insure* [read *ensure*] that the return of the loser does not become the guideline of the judgment."

the text and structure of the Compact *in toto*, demonstrate Respondent adopted absolute liability for all patron tort claims.

The Compact states at Part 6.A.:

> The enterprise shall ***ensure*** that patrons of a facility are afforded due process in seeking and receiving just and reasonable compensation for a tort claim for personal injury or property damage against the enterprise arising out of incidents occurring at a facility . . . [.][39]

Under the plain meaning of "ensure" as used in Part 6.A., the enterprise is clearly required to "make sure" facility patrons are afforded due process in tort claims. Consistent with such plain meaning, we cannot interpret use of the term "ensure" in Part 6.A. as indication Respondent intended to "insure all injuries." Throughout the sixteen-part Compact, the verbs "ensure" or "ensuring" appear frequently across five separate subject-matter parts.[40] At each appearance, the verbs "ensure" or "ensuring" are unambiguously used and plainly mean "make sure" (e.g. "[T]ribe shall have the ultimate responsibility for *ensuring* that the TCA [Tribal Compliance Agency] fulfills its responsibilities . . . [.]";[41] "TCA shall *ensure* that an annual independent financial audit . . . is secured.").[42]

If the plain meaning of "ensure" included an inherent assumption of absolute liability as theorized by Appellant, such plain meaning would necessarily indicate the State of Oklahoma assumed absolute liability for any non-compliant conduct of games covered by the Compact ("SCA [State Compliance Agency] shall . . . have the authority to monitor the conduct of covered games to

---

[39] Okla. Stat. tit. 3A, § 281, Part 6.A. (emphasis added). The term "enterprise" is defined at Part 3 as "the tribe or the tribal agency or section of tribal management with direct responsibility for the conduct of covered games, the tribal business enterprise that conducts covered games, or a person, corporation or other entity that has entered into a management contract with the tribe to conduct covered games, in accordance with IGRA. . . . In any event, the tribe shall have the ultimate responsibility for ensuring that the tribe or enterprise fulfills the responsibilities under this Compact. For purposes of enforcement, the tribe is deemed to have made all promises for the enterprise . . . [.]"

[40] "Ensure" or "ensuring" appear in Part 3 (Definitions), Part 5 (Rules and Regulations; Minimum Requirements for Operation), Part 6 (Tort Claims, Prize Claims; Limited Consent to Suit), Part 7 (Enforcement of Compact Provisions), and Part 8 (State Monitoring of Compact).

[41] Okla. Stat. tit. 3A, § 281, Part 3 (Definitions) 26 ("Tribal Compliance Agency) (emphasis added).

[42] *Id.* at Part 5.F. (Rules and Regulations; Minimum Requirements for Operations – Audits) (emphasis added).

ensure that the covered games are conducted in compliance with the provisions of this Compact.").[43] Rather than accept Appellant's theory that "ensure", by definition, includes an inherent assumption of absolute liability, we hold the Compact plainly and consistently uses the term in accordance with its plain meaning to indicate a general responsibility assigned to either Respondent or the State of Oklahoma to "make sure", and in no instance indicates an assumption of absolute liability by Respondent.

In contrast to the Compact-wide use of "ensure", the verb "insure" appears nowhere in the Compact. The terms "insurance" or "insurer" appear only eight times and use of the term is limited to Part 6 of the Compact.[44] "Insurer" appears once ("*[I]nsurer* may not invoke tribal sovereign immunity . . . [.]").[45] "Insurance" appears four times as a noun (e.g. "[T]he enterprise shall maintain public liability *insurance* . . . [.]"),[46] and three times as an adjective (e.g. "Copies of all *insurance* policies shall be forwarded to the SCA.").[47] Based on the Compact's limited, consistent and unambiguous use of the term "insurance" to refer to an indemnification agreement, we reject Appellant's theory that the Compact synonymously uses "ensure" and "insure" to render Respondent strictly liable for Appellant's injury.

Part 7.A.2. of the Compact provides

> The tribe and TCA shall be responsible for regulating activities pursuant to this Compact. As part of its responsibilities, the tribe shall require the enterprise [to] . . . [t]ake reasonable measures to ***assure*** the physical safety of enterprise patrons and personnel . . . [.][48]

Under the plain meaning of "assure" as used in Part 7.A.2., the Nation agreed to require the enterprise to take reasonable measures to protect patrons' physical safety. Consistent with such

---

[43] *Id.* at Part 8.A. (State Monitoring of Compact) (emphasis added).
[44] *Id.* at Part 6 (Tort Claims; Prize Claims; Limited Consent to Suit).
[45] *Id.* at Part 6.A.3. (Tort Claims; Prize Claims; Limited Consent to Suit) (emphasis added).
[46] *Id.* at Part 6.A.1. (Tort Claims; Prize Claims; Limited Consent to Suit) (emphasis added).
[47] *Id.* at Part 6.A.3. (Tort Claims; Prize Claims; Limited Consent to Suit) (emphasis added).
[48] *Id.* at Part 7.A.2. (emphasis added).

plain meaning, we cannot interpret use of the term "assure" in Part 7.A.2. as a requirement for Respondent to "insure all injuries." The verb "assure" appears only twice more in the Compact. It appears once more in Part 7 ("[T]ribe shall require the enterprise [to] . . . *[a]ssure* that the construction and maintenance of the facility meets or exceeds federal and tribal standards for comparable buildings[.]");[49] and once in Part 8 ("A one-hour notice by SCA to the TCA may be required to *assure* that a TCA officer is available to accompany SCA agents at all times.").[50] The Compact may well demonstrate grammatical misuse of the term in all three provisions where it appears. None of the three provisions are rendered ambiguous by any grammatical misuse of "assure" for "ensure," however, as neither term is synonymous with "insure" in modern legal usage.[51]

Appellant's interpretation is clearly inapposite the plain language of the Compact that invokes premises liability principles. The Compact requires Respondent to "*[t]ake reasonable measures* to assure the physical safety of [casino] patrons . . . [,]"[52] and to adopt rules that require the enterprise to preserve and maintain "material that might be utilized in connection with a potential tort claim . . . [for] at least one (1) year beyond the time which a claim can be made . . . or, if a tort claim is made, beyond the final disposition of such claim."[53] These provisions and would be rendered superfluous if liability could be imposed without a showing of fault. Appellant's interpretation would exclude a tort claimant's burden to prove tortuous conduct and permit recovery based on damages alone; however, we find the plain language, text, and structure of the Compact

[49] *Id.* at Part 7.A.4. (emphasis added).
[50] *Id.* at Part 8.A.3. (emphasis added).
[51] *Supra* note 38, at 10.
[52] Okla. Stat. tit. 3A, § 281, Part 7.A.2. (emphasis added).
[53] *Id.* at Part 5.K.1.

unambiguously contemplate adjudication of contested tort claims before Muscogee courts according to principles of premises liability under Muscogee law.[54]

Part III –Burden of Proof in Summary-Judgment Proceedings

Summary judgment is appropriate where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law.[55] A dispute is genuine when there is sufficient evidence on each side so that a rational trier of fact could resolve the dispute in favor of either party. A material fact is one that can affect the outcome of the suit under the governing substantive law. A defendant moving for summary judgment carries the initial burden to demonstrate judgment as a matter of law is proper by either (1) submitting evidence that negates the existence of an essential element of the plaintiff's claim; or (2) showing that there is no evidence to support an essential element of the plaintiff's claim. If the defendant makes the required showing, the burden then shifts to the plaintiff to set forth specific, facially plausible factual evidence by reference to affidavits, deposition transcripts or specific exhibits that would be admissible at trial and from which a rational trier of fact could find for the plaintiff. The trial court's inquiry is whether the summary-judgment evidence identified by the parties, viewed in a light most favorable to the non-moving party, presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party necessarily must prevail as a matter of law.

Appellant first alleged that "the condition of the carpet and flooring" in Respondent's facility caused her to fall.[56] After Respondent moved for summary judgment based on the lack of evidence of a hazardous condition,[57] Appellant subsequently asserted that such evidence was unnecessary because Respondent was strictly liable under the terms of the Compact, or, in the

[54] *Id.* at Part 6.A.2.; Part 6.A.9.; and Part 9.
[55] *Supra* at 6-7.
[56] *Petition* 1 (December 9, 2011).
[57] *Defendant's Motion for Summary Judgment* 3-6 (January 31, 2013).

alternative, *res ipsa loquitur*.[58] Neither assertion is capable of sustaining Appellant's claim on a motion for summary judgment. "An owner of a commercial premises may not be held liable for a customer's injuries resulting from a fall allegedly caused by tripping over a floor covering, unless there is some evidence that the covering contained some defect, or created a dangerous condition, and that the owner had notice of such dangerous condition."[59] The mere fact that a person is injured on another's premises neither gives rise to a presumption of the landowner's negligence, nor renders *res ipsa* applicable where there is a reasonable explanation for the plaintiff's injury other than landowner negligence. Merely stating in deposition testimony or on an affidavit that a condition is dangerous, so as to expose a property owner to liability for injuries caused by the condition, does not constitute evidence that the condition is dangerous.

Appellant admitted in her deposition that she "truthfully [doesn't] know what happened,"[60] and was unable to identify any hazardous condition created by the carpet or floor in the area of the facility where she fell.[61] The surveillance video of Appellant's fall clearly reveals there was no obstruction in area and other patrons and facility staff freely traversing the same area without difficulty both before and after Appellant's fall. Appellant's injury is indeed unfortunate; however, based on the summary-judgment evidence present in the record, Appellant failed to meet her burden of proof to overcome summary disposition. The District Court properly determined Respondent was entitled to judgment as a matter of law because Appellant presented no evidence that created a genuine issue of material fact regarding the existence of a hazard that caused Appellant's fall.

---

[58] *Plaintiff's Motion for Summary Judgment and Plaintiff's Response to Defendant's Motion for Summary Judgment* 5 (February 8, 2013).
[59] 62A Am. Jur. 2d *Premises Liability* §513 (2nd ed. Nov. 2012) (footnotes omitted).
[60] *Defendant's Motion for Summary Judgment*, Ex. 1 at 9, 12-13 (January 31, 2013).
[61] *Defendant's Motion for Summary Judgment*, Ex. 1 at 23, 2-4 (January 31, 2013).

IT IS HEREBY ORDERED that the *Order* entered by the District Court on December 30, 2013, granting Respondent's motion for summary judgment, and *Judgment* entered by the District Court on January 13, 2014, are unanimously **AFFIRMED**.

FILED AND ENTERED: February 18, 2015

Andrew Adams III
Chief Justice

George Thompson Jr.
Vice-Chief Justice

Leah Harjo-Ware
Associate Justice

Kathleen R. Supernaw
Associate Justice

Montie R. Deer
Associate Justice

Richard C. Leblance
Associate Justice

CERTIFICATE OF MAILING

I hereby certify that on February 18, 2015, I mailed a true and correct copy of the foregoing Opinion and Order with proper postage prepaid to each of the following: Darell R. Matlock, Jr., Matlock & Associates, 4410 South 33rd West Avenue, Tulsa, OK 74107-6441; and Keith B. Bartsch, Atkinson, Haskins, Nellis, Brittingham, Gladd & Fiasco, PC, 1500 Park Centre, 525 South Main, Tulsa, OK 74103-4524. A true and correct copy was also hand-delivered to: Donna Beaver, Clerk of the Muscogee (Creek) Nation District Court.

Laura Marks, Deputy Court Clerk