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SUPREME COURT

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NAVAJO NATION

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8 **IN THE SUPREME COURT OF THE NAVAJO NATION**

9 NAVAJO NATION,

10 Plaintiff,

11 vs.

12 PIC-N-RUN, INC, et al.

13 Defendants.  
14

**SC-CV-0719**

No. CH-CV-166-13

No. CH-CV-359-07

No. CH-CV-333-09

**Defendants Felixes' Amended  
Response to Defendant Ohio  
Casualty's Petition for a Writ  
Dismissing Ohio Casualty**

15  
16 PIC-N-RUN, et al.,

17 Plaintiff,

18 vs.

19 MILAM BUILDING ASSOCIATES, INC.,  
20 et al.

21 Defendants.  
22

23 BALDWIN,

24 Plaintiff,  
25

26 vs.

1 AUTO OWNERS INSURANCE  
2 COMPANY, et al.

3 Defendants.

4 Pursuant to the Navajo Nation Supreme Court's Alternative Writ, dated March  
5 13, 2019, Defendants and Real-Parties-in-Interest Daniel and Dorothy Felix dba  
6 Shiprock Concrete (hereinafter, "Shiprock") amend their response to Co-Defendant  
7 Ohio Casualty Insurance Company's Petition for Writ of Prohibition ("Petition") to  
8 include the correct Supreme Court case number. The Felixes are Ohio Casualty's  
9 insureds. At a minimum, the Navajo Nation Supreme Court should uphold the trial  
10 court's finding in October 2011 that Ohio Casualty—on behalf of the Felixes—has paid  
11 at least \$928,111.48 toward remediation and clean-up costs.

12 **I. Background**

13 This litigation revolves around the occurrence of multiple gas spills at the Site—  
14 some of which date back at least to the 1970s. On or about July 12, 2004, Plaintiff Pic-  
15 N-Run entered into an agreement with Defendant Milam Building Associates  
16 (hereinafter, "Milam") to renovate the Site.<sup>1</sup> On or about December 24, 2004, Milam  
17 hired Shiprock as a subcontractor to pour concrete.<sup>2</sup> Shiprock purchased a \$1 million  
18 commercial general liability policy from Ohio Casualty.<sup>3</sup> It is alleged that on or about  
19 March 21, 2005, Shiprock drove a concrete stake through a fuel supply line causing a  
20 gas leak at the Pic-N-Run gas station in Chinle (the "Site").<sup>4</sup> Thereafter, this lawsuit  
21

22  
23 <sup>1</sup> See Order Denying Ohio Casualty's Motion for Summary Judgment; Order Denying  
24 Felixes' Motion for Summary Judgment, dated October 28, 2011 ("2011 Order"),  
attached as Exhibit A, at pp. 1-2.

25 <sup>2</sup> *Id.*

26 <sup>3</sup> See Ohio Casualty Group Declaration Page, attached as Exhibit B.

<sup>4</sup> See Exhibit A.

1 ensued. On October 28, 2011, the trial court entered an order denying Ohio Casualty's  
2 and the Felixes' motion for summary judgment but noted that "since it is not disputed  
3 that \$928,111.48 was spent on remediation and cleanup costs, Ohio has almost fulfilled  
4 their duty [to pay \$1,000,000 toward remediation] as claimed by the Plaintiff."<sup>5</sup> On  
5 September 10, 2018, the trial court—in response to what effectively amounted to a  
6 horizontal appeal—again considered the issue of Ohio Casualty's site remediation  
7 payments but this time ruled that a question of fact remained regarding whether Ohio  
8 Casualty's expenditures were strictly for indemnity.<sup>6</sup>

9  
10 **II. If this Court finds that Defendant Ohio Casualty has paid \$1 million**  
11 **toward site remediation, the Felixes' have done the same.**

12 Ohio Casualty alleges that it has committed its entire policy limits toward  
13 investigation and remediation of the Site. It has submitted an abundance of proof in  
14 support of this contention. If this Court agrees that Ohio Casualty has expended \$1  
15 million—its policy limits—toward remediation at the Site, the Felixes have by proxy also  
16 contributed \$1 million toward the remediation of the Site. But at a minimum, the 2011  
17 Order makes clear that Ohio Casualty and the Felixes have at least paid \$928,111.48 to  
18 remediate the Site.

19 *Nályééh* should apply to the Felixes for many of the same reasons as those  
20 asserted by Ohio Casualty. The Felixes purchase of the applicable insurance from Ohio  
21 Casualty, in part, assured that they would be able to comply with the principles of  
22 *nályééh*. By purchasing the insurance, the Felixes ensured that they would be able to  
23 "make right for an injury" allegedly caused by them or their company. *See Bennally v.*

24  
25 <sup>5</sup> See Exhibit A.

26 <sup>6</sup> See Order Granting Plaintiff Navajo Nation's Motion for Summary Judgment in Part,  
dated September 10, 2018, attached as Exhibit C.

1 *Big A Well Service Co.*, NO-SC-CV-27-99, slip op. at 5 (Nav. Sup. Ct. 2000) (internal  
2 citations omitted). Had the Felixes not purchased the requisite insurance, the  
3 remediation work performed at Ohio Casualty's expense would not have occurred.  
4 Indeed, one of the purposes of obtaining insurance is to ensure that the insured can  
5 "make right for an injury." Insurance proceeds can be used to fulfill a party's *nályééh*  
6 obligations. *See Benalli v. First National Insurance Co. of America*, 2 Nav.App.Rep.  
7 595 (Nav. Sup. Ct. 1998). By making payments toward remediation of the Site through  
8 payments made by their insurer, Ohio Casualty, the Felixes' have done the right thing  
9 and restored harmony with respect to their conduct within the meaning of Navajo law.  
10 All of the parties as well as the Navajo Nation have benefitted from the Felixes' payment  
11 of at least \$928,111.48 toward remediating the gas spills at the Site, including pre-2005  
12 gas spills for which the Felixes could not possibly be responsible.

14 **III. The Navajo Nation Department of Justice's improper horizontal  
15 appeal should be disregarded.**

16 As Ohio Casualty notes in its Petition, the Navajo Nation Supreme Court strongly  
17 discourages horizontal appeals. *See Lee v. 27 Tallman*, No. SC-CV-02-95, ¶ 43 (Navajo  
18 11/27/1996); *see also Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176  
19 Ariz. 275, 278-79, 860 P.2d 1328, 1331-32 (App. 1993) ("A party seeks a "horizontal  
20 appeal" when it requests a second trial judge to reconsider the decision of the first trial  
21 judge in the same matter, even though no new circumstances have arisen in the interim  
22 and no other reason justifies reconsideration."). Indeed, Navajo common law disfavors  
23 second-guessing a decision maker. *Id.* Other jurisdictions, like Arizona, also frown upon  
24 such second-guessing and wasting of judicial resources. *See Powell-Cerkoney* 176 Ariz.  
25 at 278-79, 860 P.2d at 1331-32 ("We criticize horizontal appeals because they waste  
26

1 judicial resources by asking two judges to consider identical motions and because they  
2 encourage ‘judge shopping.’”). However, a court may consider a horizontal appeal  
3 “when an error in the first decision renders it manifestly erroneous or unjust” or new  
4 overarching circumstances have developed. *Id.*

5 None of the factors that might permit a horizontal appeal is present here. First,  
6 there was no error in the first decision that renders it “manifestly erroneous or unjust.”  
7 In its October 2011 Order, the trial court found that Ohio Casualty—and thereby, the  
8 Felixes—had contributed \$928,111.48 toward remediation and clean-up costs as of  
9 2011.<sup>7</sup> Thus, the only potential expenditures at issue are the remaining funds of  
10 \$71,888.52 needed to be spent by Ohio Casualty—and thereby, the Felixes—toward  
11 remediation to get to \$1,000,000 in remediation payments.  
12

13 Moreover, there has been no other change in circumstances. The facts have not  
14 changed. The relevant law has not changed. Consequently, the trial court’s ruling in the  
15 2011 order that Ohio Casualty spent \$928,111.48 on remediation and cleanup costs  
16 should not be changed.

#### 17 **IV. Conclusion**

18 For all the foregoing reasons, the Navajo Nation Supreme Court should uphold  
19 the trial court’s finding in October 2011 that Ohio Casualty—on behalf of the Felixes—  
20 has paid at least \$928,111.48 toward remediation and clean-up costs.  
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26 <sup>7</sup> See Exhibit A.

1  
2  
3 DATED this 16<sup>th</sup> day of April, 2019.  
4

5 SHORALL McGOLDRICK BRINKMANN

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1 ORIGINAL and four (4) COPIES of the foregoing  
2 Filed/mailed this 16<sup>TH</sup> day of April, 2019, to:

3 Clerk of the Court  
4 Supreme Court of the Navajo Nation  
5 P.O. Box 520  
6 WindowRock, Navajo Nation, AZ 86515

7 COPIES of the foregoing mailed  
8 this 11<sup>th</sup> day of April, 2019, to:

9 Clerk of Court  
10 Navajo Nation District Court  
11 Chinle Judicial District  
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14 The Honorable Rudy Bedonie  
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18 Additional COPIES of the foregoing e-mailed  
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