In the Court Of Appeals
State of Arizona
Division Two

RAUL BELTRAN, Sr. and ANN BELTRAN, husband and wife, Plaintiffs/Appellants vs. HARRAH'S ARIZONA CORPORATION; HARRAH'S ENTERTAINMENT, INC.; HARRAH'S AK-CHIN; AK-CHIN INDIAN COMMUNITY; HARRAH'S PHOENIX AK-CHIN CASINO; HARRAH'S AK-CHIN CASINO; HARRAH'S PHOENIX AK-CHIN CASINO RESORT; HARRAH'S OPERATING COMPANY, INC., and JANE DOE, Defendants/Appellees	2 CA-CV 2007-0169 Pinal County Superior Court No. CV 2007-01600

APPELLEES' ANSWERING BRIEF

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STATEMENT OF THE CASE

This is a premises liability action filed by plaintiff Raul Beltran, Sr. and his wife, Anne Beltran ("plaintiffs") for injuries sustained by Mr. Beltran when he slipped and fell at the Harrah's Ak-Chin Casino (the "Casino") on August 6, 2005. Item 1.[1] The Casino is wholly-owned and operated by the Ak-Chin Indian Community (the "Community"), a federally-recognized Native American tribe. Item 20, Ex. 2 (Gaming Compact).

Plaintiffs initially filed suit in the Ak-Chin Indian Community Court (the "Tribal Court") on July 25, 2006. Item 11, Ex. 1 (Tribal Court Order). Plaintiffs' Tribal Court complaint named various Harrah's entities and trade names, which have nothing to do with the casino, but did not name the Community, which actually owns and operates the casino. Item 11 at 2. On October 13, 2006, the defense filed a motion to dismiss on the principal basis that the Community was an indispensable party. *Id.* In a detailed 12-page order, the Tribal Court granted the motion, dismissing the case with prejudice. *Id.* at Ex. 1. Plaintiffs appealed the tribal court dismissal to the Southwestern Inter-tribal Court of Appeals. That appeal was also dismissed. Item 22, Ex. 1.

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[1] References to "Item" are to the documents as itemized in the Clerk's Index of Record on Appeal.

While their tribal court appeal was pending, plaintiffs filed a nearly identical complaint in the Pinal County Superior Court. Item 1. This time the plaintiffs chose to name the Community as a defendant, in addition to the various Harrah's entities and non-jural trade names previously named in the dismissed Tribal Court action. *Id.* The defense again filed a Rule 12(b)(6) motion to dismiss arguing, *inter alia,* that the Tribal Court dismissal collaterally estopped plaintiffs from re-litigating the identical case and dispositive issues in state court. Item 11. On November 9, 2007, the Honorable William J. O'Neil granted the motion on collateral estoppel grounds. Item 19.

Plaintiffs then filed a "motion for reconsideration," which was purportedly brought pursuant to Rule 59 governing new trial motions. Item 21. Defendants sought clarification regarding whether a response was required, which would depend on whether it was a Motion for Reconsideration or a Motion for New Trial. See Ariz. R. Civ. P. 7.1(e) and 59(a). Item 23. Plaintiffs specified that it was a rule 59(a) motion, which would have also tolled the deadline to appeal, but they nevertheless filed a notice of appeal from the original order of dismissal. Items 24, 25. The Trial Court declined to rule on the "motion for reconsideration," noting that it was divested of jurisdiction once the notice of appeal had been filed. Item 28.

STATEMENT OF FACTS

◆ Introduction

Plaintiffs' opening brief misrepresents the record and cites to items outside the record in a continued campaign to demonize the Ak-Chin Indian Community, defense counsel, and the Tribal Court. Plaintiffs' accusations of "bias" and "deception" are an apparent attempt to excuse or distract from the legal and procedural blunders that prompted the dismissal of the tribal court action and the dismissal of the state court action from which this appeal is taken. The dismissal of the state court action should be affirmed because the record is clear that the plaintiffs sued the wrong parties, in the wrong court, well after the statute of limitations expired.

◆ The Casino

The Community is the owner of the Casino, which is located entirely on tribal land. Item 11 at 4. As a matter of tribal and federal law, the Community is the only entity that may own and operate a Class III gaming facility on tribal lands. *Id.*, Item 20, Ex. 1 (Gaming Compact Excerpts) at 21 ("The Community shall have the sole proprietary interest in the Gaming Facilities and Gaming Activities.). Although named as a defendant in both actions, Harrah's Arizona Corporation[2] is merely the

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[2] Actually, plaintiffs failed to name the correct "Harrah's" entity in the original Tribal Community Court complaint, but amended the complaint to substitute Harrah's

manager of the day-to-day operations of the Casino pursuant to a management agreement with the Community, with the approval of the National Indian Gaming Commission under the Indian Gaming Regulatory Act. *See* 25 U.S.C. § 2711(g). Item 11 at 4.

The Casino is operated in accordance with the terms of Ak-Chin and State of Arizona Gaming Compact (the "Gaming Compact" or the "Compact"). Item 20, Ex. 1. The Gaming Compact defines the Casino's "gaming facility operator," as "the Community." Item 20, Ex. 2 (Gaming Compact) at 3. The Compact also leaves in place existing rules which grant the Community exclusive jurisdiction to adjudicate all claims arising within the Ak-Chin territory, including the Casino. "Nothing in this Compact is intended to change, revise or modify the civil and criminal jurisdiction of the Community or of the State." *Id.* at 37.[3] Finally, the Compact addresses the treatment of civil tort claims asserted by Casino patrons. Under the Compact, the Community agreed to establish procedures for the disposition of Casino-related tort

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Arizona Corporation while the Motion to Dismiss was pending. Item 11 at 4, n. 2.

[3] Tribal courts retain exclusive jurisdiction to adjudicate civil claims arising within the tribe's territory. *Williams v. Lee*, 358 U.S. 217, 222 (1959) ("There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.").

claims in its courts. *Id.* at 43.

The Community expressly reserved its sovereign immunity. *Id.* The Community agreed, however, "not to invoke sovereign immunity" up to the limits of the Casino's $2 million dollar insurance policy so long as casino patrons' claims are "disposed of in accordance with the Community's tort claims procedures." *Id.* Thus, the Community's agreement not to invoke its sovereign immunity applies only to those claims filed in tribal courts in accordance with the tribal tort claim procedures.

Pursuant to the Gaming Compact, the Community developed procedures for the disposition of tort claims arising at the Casino, which are covered by Title 5, Chapter 1, article 2 of the Ak-Chin Civil Code. Item 20, Ex. 3. The purpose of the tort claims ordinance is to provide for "the disposition of tort claims arising from alleged injuries to patrons of the Community's Gaming Facilities." *Id.* This section provides the exclusive remedy for patrons of the Gaming Facility and includes a 180-day notice of claim provision, a one year statute of limitations, a limited waiver of tribal sovereign immunity, and a cap on recovery of the coverage limits set forth in the insurance policy obtained by the Community. Item 20, Ex. 3 (Ak-Chin Civil Code) at § § 1.2.5; 1.2.4; and 1.2.6.[4]

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[4] The Community's tort claim procedures are similar to the procedures for filing suit against municipalities in Arizona. *See* A.R.S. § 12-820 *et seq.*

◆ **Plaintiffs' Notice of Claim**

The Community's tort claim procedures were requested and provided to plaintiffs' first attorney, Kim R. Brown. Item 14, Ex. 1. Notably, Ms. Brown only requested a copy of the Community's tort claim procedures. *Id.* She did not request the "name, address, and telephone number of the Gaming Facility Operator," nor does this information have any real bearing on the dispositive issues in this case. *Id.* Ms. Brown then timely served the Community with a notice of claim in compliance with Title 5 of the Ak-Chin Civil Code, Item 11, Ex. 1 (Tribal Court Order) at 2.[5]

◆ **Plaintiffs' Tribal Court Complaint**

Some time after Ms. Brown served the Notice of Claim on the Community, plaintiffs retained current counsel who later filed suit on July 25, 2006. Item 11, Ex. 1 (Tribal Court Order) at 1. Inexplicably, the Community was not named as a

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[5] While the Opening Brief (at 4) asserts that plaintiffs were denied access to the name and contact information for the Gaming Facility Operator by reference to Ms. Brown's letter alone, the letter does not support this accusation. If anything, the letter shows that plaintiffs did not request the identity or contact information for the gaming facility operator. No other record evidence appears demonstrating that plaintiffs further requested and were denied access to this information other than current counsel's statements in the opening brief and in memoranda submitted to the lower court. As recognized in *Cimino v. Alway*, 18 Ariz. 271, 273, 501 P.2d 447, 449 (App. 1972), "[m]ere assertions of fact made by counsel in his memoranda or brief are not entitled to consideration." *Accord Woerth v. City of Flagstaff*, 167 Ariz. 412, 420, 808 P.2d 297, 305 (App. 1990) ("Unsworn and unproven assertions of counsel in memoranda are not facts admissible in evidence.").

defendant in the Tribal court complaint. *Id.* at 2. Rather, plaintiffs filed suit against a number of Harrah's entities, some non-jural Harrah's trade names, and the "Ak-Chin Indian Development Corporation," which is a non-profit tribal entity that has nothing to do with casino operations. *Id.* at 3.

Upon receipt of the Tribal court complaint, defense counsel obtained a stipulated extension to "file an Answer *or responsive pleading*." Item 14, Ex. 2 (emphasis added). Considering that plaintiffs had sued a number of "Harrah's" entities and trade names, defense counsel also expressed hope that he would soon receive "confirmation on the correct legal entity that has the partnership or operating agreement with the Ak-Chin Community." *Id.* Defense counsel later confirmed the correct name of the "Harrah's" entity, namely Harrah's Arizona Corporation, and thereafter filed a responsive pleading in the form of a motion to dismiss. While the motion pointed out that the plaintiffs had failed to name the correct Harrah's entity in the first instance; the critical mistake and the basis of the motion to dismiss was that the plaintiffs never sued the Ak-Chin Indian Community, which was an indispensable party.

◆ **The Tribal Court Dismissal and the Tribal Court Appeal**

Long after the motion to dismiss had been fully briefed and argued, and while the parties were awaiting a ruling, the plaintiffs filed a second motion to amend their

tribal court complaint seeking to finally add the Community as a defendant.[6] Item 11, Ex. 1 (Tribal Court Order); Item 14, Ex. 3. Plaintiffs' second motion to amend the tribal court complaint was filed on April 25, 2007, nine months after the one year statute of limitations expired[7] and seven months after the motion to dismiss was filed. Item 14, Ex. 3. The defense opposed plaintiffs' second motion to amend the tribal court complaint because the statute of limitations had expired and no relation back could be permitted under the circumstances. Item 14, Ex. 4.

In a detailed twelve-page written Order, Judge Terrazas granted the Motion to Dismiss and denied Plaintiffs' second motion to amend the tribal court complaint, concluding (1) that the Ak-Chin Indian Community was an indispensable party, (2) that there was no excuse for the plaintiffs' failure to name the Community, and (3) that the expiration of the one-year statute of limitations barred plaintiffs from amending the complaint. Item 11, Ex. 1 (Tribal Court Order) at 12, lns. 11-18. In so doing, the tribal court considered and rejected plaintiffs' alleged excuses for failing to name the Community as a defendant. The court emphasized that plaintiffs' former

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[6] The first request for leave to amend, which was not opposed, was to add Harrah's Arizona Corporation. Item 20, Exhibit 6.

[7] The Complaint (Item 1) at paragraph 7, asserts that Mr. Beltran's slip and fall occurred on August 6, 2005. Therefore, the one year statute of limitations expired on August 6, 2006.

attorney served the Community with a valid notice of claim, negating the argument that the plaintiff was unaware that the Community was a necessary party. "It is puzzling that Plaintiffs served the Community with their administrative claim, but then did not name the Community as a defendant in the subsequent court action. No explanation was given for this inconsistency." *Id.* at 6, ln. 19-21. The tribal court also rejected plaintiffs' accusations that their failure to follow the Community's tort claim procedures was occasioned by defense counsel's alleged "deception." "More apparent than defense counsel's 'deception' are [sic] plaintiffs' own failure to act, given that it [sic] had identified the Community as a party to be served in filing the administrative claim." *Id.* at 11, ln. 7-8.

Plaintiffs thereafter appealed the tribal court dismissal to the Southwestern Inter-tribal Court of Appeals. Item 22, Ex. 1 (Order Dismissing Appeal). The tribal appellate court dismissed the appeal on jurisdictional grounds citing plaintiffs' failure to meet the minimum requirements for the filing of a tribal court notice of appeal:

> Counsel for Appellants makes a feeble attempt to apologize for the gross error made in the interpretations of the SWITCA Rules of Appeal. Counsel is ethically obligated to make legal representations for each client by being thoroughly versed in the laws and jurisdictions which they are barred in. Such practice is essential and critical in providing each and every client with sound and effective counsel. SWITCARA Rule 11(a) is very clear in that an appeal shall be taken within 15 days of judgment of that same court and must meet the minimum requirements as found under Rule 11(e). This gross error begs

> the question of whether there is an issue of ineffective counsel or whether the bar requirements must be revisited by the lower court to ensure mandatory knowledge of the rules of appeal and assure sound representation.

Id. at 2.[8]

◆ **The State Court Complaint**

Undeterred by the tribal court dismissal, and while their tribal appeal was still pending, plaintiffs filed a separate, but substantially identical, lawsuit in Pinal County Superior Court. Item 1. Now savvy to their error, this time the plaintiffs named the Community as a defendant, along with the various other Harrah's entities and trade names they identified previously. *Id.* The defense moved to dismiss the superior court complaint arguing that the doctrine of collateral estoppel barred the plaintiffs from relitigating the same issues they had already litigated and lost in the tribal court. Item 11. In the alternative, the defense argued that the state court action should be dismissed for (1) lack of subject matter jurisdiction/sovereign immunity, (2) the bar of the statute of limitations, and (3) because the Community is an indispensable party that cannot be joined in the state court action.

The Honorable William J. O'Neil granted the motion to dismiss on collateral

[8] The procedural posture of the tribal court appeal after this dismissal is not in this appellate record although the opening brief references some post-dismissal motions they filed. *Cf.* Op. Brief. at 6.

estoppel grounds. Item 19. Although plaintiffs filed a "motion for reconsideration," perhaps intending it to be a Rule 59 motion for new trial, the plaintiffs abandoned this course by filing a notice of appeal. Items 23, 24, 25. The court declined to rule on the "motion for reconsideration" concluding that it lacked jurisdiction to adjudicate the matter after plaintiffs noticed their appeal. Item 28.

ISSUES PRESENTED ON APPEAL

1. Did the trial court properly rule that plaintiffs are collaterally estopped from relitigating case dispositive legal issues adjudicated by the tribal court?

2. In the alternative, is the Community an indispensable party to this lawsuit, which cannot be joined due to its sovereign immunity and plaintiffs' failure to file suit against the Community within the one year limitations period?

STANDARD OF REVIEW

A trial court's order granting a motion to dismiss is reviewed for an abuse of discretion, but issues of law are reviewed *de novo*. *Airfreight Exp. Ltd v. Evergreen Air Center, Inc.*, 215 Ariz. 103, 107, 158 P.3d 232, 236 (App. 2007). Questions of collateral estoppel, sovereign immunity, subject matter jurisdiction, and personal jurisdiction are "issues of law," which are subject to *de novo* review. *E.g.*, *Garcia v. General Motors Corp.*, 195 Ariz. 510, 513, 990 P.2d 1069, 1072 (App. 1999); *Goddard v. Fields*, 214 Ariz. 175, 177, 150 P.3d 262, 264 (App. 2007); *Filer v.*

Tohono O'Odham Nation Gaming Enterprise, 212 Ariz. 167, 169, 129 P.2d 78, 80 (App. 2006); *Mitchell v. Gamble*, 207 Ariz. 364, 367, 86 P.3d 944, 947 (App. 2004); *Morgan Bank (Delaware) v. Wilson*, 164 Ariz. 535, 536, 794 P.2d 959, 960 (App. 1990).

ARGUMENT

I. PLAINTIFFS' STATE COURT SUIT IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

The doctrine of collateral estoppel or "issue preclusion" means that when an ultimate fact or issue has been determined in a prior lawsuit, the issue cannot be re-litigated between the same parties in any future lawsuit. *Lemke v. Rayes*, 213 Ariz. 232, 141 P.3d 407 (App. 2006). Collateral estoppel or issue preclusion applies when (1) the issue or fact to be litigated was actually litigated in the previous suit; (2) a final judgment was entered; (3) the party against whom collateral estoppel is to be invoked had a full and fair opportunity to litigate the matter; and (4) the issue or fact was essential to the prior judgment. *State v. One Single Family Residence at 1810 East Second Avenue*, 193 Ariz. 1, 969 P.2d 166 (App. 1997). "When an issue is properly raised by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated." *Hibbs v. Calcot, Ltd.*, 166 Ariz. 210, 214, 801 P.2d 445, 449 (App. 1990). A judgment or order of dismissal with prejudice

may be "on the merits" and have preclusive effect, and an involuntary dismissal other than for lack of jurisdiction or improper venue operates as an adjudication on the merits, unless the court directs otherwise. *Fovargue v. Singer*, 77 Ariz. 305, 270 P.2d 1090 (1954).

In this case, the dispositive issues raised in the motion to dismiss were "actually litigated" and decided by the tribal court in the original action, meaning that the plaintiffs are bound by this ruling because they had a full and fair opportunity to litigate the issues.

A. The Tribal Court's Rulings on Indispensable Party and Statute of Limitations Issues are Binding.

As noted above, the Community owns the Casino, which is located entirely on tribal land. Indeed, the Community is the only entity that may own and operate the Casino. *See* Ak-Chin and State of Arizona Gaming Compact, Section 3(o) ("The Community shall have the sole proprietary interest in the Gaming Facilities and Gaming Activities."). Despite the clear language of the Gaming Compact defining the term "gaming facility operator" as "the Community," the plaintiffs have always been under the mistaken belief that a Harrah's entity, rather than the Ak-Chin Community, was the "Gaming Facility Operator" under the gaming compact. This issue has been fully litigated, and **the tribal court's determination that the Ak-**

Chin Community is the "Gaming Facility Operator" is binding.[9] This is important because the exclusive remedy for personal injury claims at the casino requires compliance with the Community's tort claims ordinance, making the Community itself an indispensable party.

As noted, claims for injuries arising at the Community's gaming facility are governed by the procedures set forth in Title 5, Chapter 1, article 2 of the Ak-Chin Civil Code. The procedures clearly indicate that casino tort claims must be brought against the Community in the time and manner provided for therein. Despite being provided with these procedures (via former counsel), plaintiffs vigorously argued to the tribal court that the Community was not a necessary party. The tribal court rejected plaintiffs' first argument that the named Harrah's entities and trade names served as the "gaming facility operator" and could therefore take the Community's place in defending against plaintiffs' claims. Item 11, Ex. 1 (Tribal Court Order) at 6, ln. 3-9. The court also rejected plaintiffs' arguments that the Community's interests were "fully represented by Defendant Ak-Chin Indian Development

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[9] The tribal court stated: "The language in Sec. 2(o) and the language in the Code and other portions of the Gaming Compact give every indication that the Gaming Facility Operator is the Community. It is puzzling that Plaintiffs served the Community with their administrative claim, but then did not name the Community as a defendant in the subsequent court action. No explanation was given for this inconsistency." Item 11, Ex. 1 (Tribal Court Order) at p. 6, ll.17-22.

Corporation." Id. at ln. 23-26. The tribal court considered and rejected the plaintiffs' arguments as follows: "The court concludes that the Community, as the entity having the 'sole proprietary interest' in the casino, as the entity identified throughout the Compact as principal, and being identified in Section (o) as the Gaming Facility Operator, is an 'indispensable party' under Rule 19(B) of the Ak-Chin Indian Community Rules of Civil Procedure. *See* Item 11, Ex. 1 (Tribal Court Order) at p. 8, ll.21-26. **The tribal court's determination that the Ak-Chin Community is an indispensable party is binding.**

Compliance with the Tort Claims Ordinance is an essential prerequisite for piercing tribal sovereign immunity and is the exclusive remedy for tort claims arising at the casino. The tort claims ordinance requires that the Community be served with a Notice of Claim within 180 days of accrual of the action, which the plaintiffs' arguably did, and that suit must be brought within one year, which the plaintiffs obviously did not do. The court again rejected the plaintiffs attempt to excuse or justify the failure to name the Community from the outset, or to belatedly amend the Complaint, noting that Title 5, Article II, Section 1.2.4 entitled "Actions Based on Injuries Arising at Gaming Facility" by its own language requires that all actions brought against the Community or Community employees shall be brought within one year. *See* Item 11, Ex. 1 (Tribal Court Order) at p.12, ll.1-9. This issue has also been

fully and fairly litigated. **The tribal court's ruling that the statute of limitations bars any claims against the Community is binding.**[10]

Although the doctrines of res judicata and collateral estoppel both serve to limit the number of times a defendant can be vexed by the same claim or issue, and to promote efficiency in the judicial system by putting an end to litigation, they are separate and distinct doctrines. *See Gilbert v. Ben-Asher*, 900 F.2d 1407 (9th Cir. 1990), *cert. denied* 498 U.S. 865. Even in *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986), a case the Opening Brief relies heavily upon, the distinction between these two doctrines is acknowledged. Nevertheless, the Opening Brief (at 18) attempts to overcome the application of collateral estoppel by conflating it with the separate doctrine of res judicata. In so doing, plaintiffs suggest that there is no preclusive effect for the Community because it was not a defendant in the original action. Op. Brief at 17. Of course, the only reason why the Community was not a named defendant in the original action was because the plaintiffs neglected to do so. In any event, collateral estoppel can be invoked "defensively," such that each of the findings of fact and rulings contained in the

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[10] As a practical matter, the state court action is barred no matter what because the one year statute of limitations expired on August 6, 2006 and the state court action was filed almost a year after the deadline on August 2, 2007. *See* Section II(B)(3), *infra*.

court's previous order are binding on the plaintiffs, who were parties, regardless of whether or not the Community was or could have been named in the first lawsuit. *See PFS v. Industrial Commission of Arizona*, 191 Ariz. 274, 955 P.2d 30 (App. 1997) (Issue preclusion can be defensively asserted by one not a party to the prior judgment.); *Manzanita Park, Inc. v. Insurance Co. of North America*, 857 F.2d 549 (9th Cir. 1988); *Campbell v. SZL Properties, Ltd.*, 204 Ariz. 221, 62 P.3d 966 (App. 2003).

The Opening Brief (at 19) next argues that the tribal court dismissal was "procedural" rather than "substantive," meaning to say that the judgment was not "on the merits."[11] In making this argument, plaintiffs principally rely on *Vance v. Vance*, 124 Ariz. 1, 601 P.2d 605 (1979) for the proposition that "lack of joinder does not carry ***res judicata*** effects." Op. Brief at 17. As even the Opening Brief appears to acknowledge, *Vance* addressed only the application of res judicata in holding that the failure to join a necessary party does not bar a later suit. *Vance* did not address the

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[11] In so doing, plaintiffs assert that "only the procedural, indispensable party issue was heard by the tribal court." Op. Brief at 19. This is inaccurate. As demonstrated by its 12-page order, the tribal court disposed of three legal issues, which were collectively dispositive of the tribal court complaint: (1) it determined that the Community was the "gaming facility operator;" (2) it determined that the Community was, therefore, an indispensable party; and (3) it determined that the Community could not be joined because the one year statute of limitations had expired. *See* Item 11, Ex. 1 (Tribal Court Order) at 12.

collateral estoppel effect to be given to a prior determination that a party is indispensable. Moreover, in *Vance* the failure to join a necessary party resulted in a dismissal without prejudice as the Court determined that the missing, necessary party could be joined by amendment in that case. *Id.* at 4, 601 P.2d at 607. In this case, however, the tribal court determined both (1) that the Community was an indispensable party and (2) that it could not be joined because plaintiffs failed to comply with the Community's tort claim procedures. Both determinations were "actually litigated" by the parties' written motion practice and at oral argument. Their resolution in defendants' favor necessarily resulted in a dismissal with prejudice as these issues could not be remedied by amendment. Therefore, notwithstanding plaintiffs' misplaced reliance on *Vance*, collateral estoppel does bar the re-litigation of the case dispositive issues that were fully adjudicated in tribal court.

In challenging the application of collateral estoppel, the Opening Brief (at 19) also references *State v. One Single Family Residence at 1810 East Second Ave.*, 193 Ariz. 1, 969 P.2d 166 (App. 1967), for the proposition that "[w]hen no evidence is taken, the matter is not 'actually litigated.'" As with *Vance*, *supra*, the opinion in *One Single Family Residence* is inapposite. The *One Single Family Residence* opinion speaks to the litigation of fact issues, which do require that evidence be taken before collateral estoppel can attach. Collateral estoppel, however, bars the re-litigation of

fact issues as well as issues of law. *See* Restatement (Second) of Judgments § 27 (1982) ("When an issue of fact or law is actually litigated . . . the determination is conclusive.") (emphasis added) *cited with approval in State ex rel. Dept. of Economic Sec. v. Powers*, 184 Ariz. 235, 237, 908 P.2d 49, 51 (App. 1995). Where the issues "actually litigated" are pure questions of law, their resolution need not rest on "evidence taken." Rather, purely legal questions "may be submitted and determined on a motion to dismiss for failure to state a claim" and are still considered to have been "actually litigated." Restatement § 27, cmt. d. The dispositive issues addressed by the tribal court were questions of law and its rulings on those legal questions are binding on the plaintiffs.

The plaintiffs' litigated these same issues and lost in tribal court. They cannot relitigate these issues in state court, and are collaterally estopped from denying that (1) that the Community is the "Gaming Facility Operator," (2) that the Community is an indispensable party, and (3) that the Community cannot be joined because plaintiffs' failed to file suit against it within the one year limitations period. The Superior Court below properly granted defendants' motion to dismiss the Complaint.

B. The Rules of Procedure for Recognition of Tribal Court Civil Judgments are Inapplicable

In a final effort to avoid the application of collateral estoppel, the Opening Brief makes several arguments to suggest that the tribal court order should be ignored. First, by reference to non-authoritative statements from the "Nutshell" series on Indian law, plaintiffs argue that tribal court judgments are not entitled to "full faith and credit." Op. Brief at 11-12 (*citing* American Indian Law in a Nutshell, (4th ed. 1998). But neither the Nutshell treatise nor Arizona precedent on this issue support plaintiffs' argument that "full faith and credit" has any impact on collateral estoppel. Although Arizona does not apply the Full Faith and Credit Clause to tribal court judgments,[12] tribal court proceedings are nevertheless given "full faith and credit" as a matter of comity. *Id.* at 227; *Tracy v. Superior Court*,[13] 168 Ariz. 23, 34,

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12 The full faith and credit clause provides that "[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." U.S. Const. art. 4, § 1. While, by its terms, the Full Faith and Credit Clause applies only to the states, it has been extended to certain United States territories by Congress. *See* 28 U.S.C. § 1738. State and federal courts are divided about whether or not tribal courts are encompassed within the meaning of the term "territory" as used in the federal statute and the U.S. Supreme Court has not resolved the issue conclusively. *See Tracy*, *supra* (discussing the split). In any event, these courts uniformly agree that tribal court orders are binding as a matter of comity regardless of their stance on the application of the Full Faith and Credit Clause. *Id.* So the "full faith and credit" debate is largely academic and not of consequence here.

13 The citation for this case in the Opening Brief (at 12) is incorrect. A corrected

810 P.2d 1030, 1041 (1991) ("Arizona courts have consistently afforded full recognition to tribal court proceedings."); *Astorga v. Wing*, 211 Ariz. 139, 144, 118 P.3d 1103, 1108 (App. 2005) ("Once a tribal court appropriately reaches a decision on the merits, Arizona law also provides that the decision be given effect."). Because tribal court proceedings are recognized as valid, preclusive doctrines do bar the re-litigation of issues finally adjudicated in a prior tribal court action. *See Astorga*, 211 Ariz. at 144, 118 P.3d at 1108 (recognizing res judicata effect of tribal court proceedings); *Leon v. Numkena*, 142 Ariz. 307, 311, 689 P.2d 566, 570 (App. 1984) (prior Hopi tribal court dissolution and custody order treated as "conclusive" in subsequent state court divorce proceedings); *In re Lynch's Estate*, 92 Ariz. 354, 377 P.2d 199 (1962) (Navajo tribal court's divorce decree held binding in later state court proceedings). Plaintiffs simply misunderstand and therefore misrepresent the extent to which Arizona courts recognize the validity of tribal court rulings.

Next, in a twisted bit of logic, plaintiffs shift from arguing that tribal court judgments receive no "full faith and credit" to claiming that the Rules of Procedure for Recognition of Tribal Court Civil Judgments govern the effect to be given to the tribal court order in this case. *Compare* Op. Brief at 11 ("the Superior Court lacked the authority to give the ORDER full force and effect") *with* Op. Brief at 12-14

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citation is provided here.

(citing rules governing enforcement for tribal court orders as controlling). *See also* 17B, A.R.S. Tribal Ct. Civ. Judgment Rules. Plaintiffs' internal contradictions aside, these rules were intended to govern the recognition and enforcement by the Superior Courts of the State of Arizona of the civil judgments of federally recognized Indian tribes. *See Id.*, Rule 1. Other than to illustrate that Arizona courts must recognize the validity of tribal courts judgments, however, these procedural rules do not actually apply to the facts of this case. The trial court below aptly noted the plaintiffs fundamental "misapprehension" of how these rules are to be applied. For example, the defendants were not seeking to enforce a tribal court judgment, such as an award of money damages. The defendants did not need to "certify" the order of dismissal in order to "enforce" it, nor have they invoked the jurisdiction of the state court for such affirmative relief. To the contrary, the defendants were improperly sued in state court on a matter that has already been fully and fairly decided by the only court competent to adjudicate the matter in the first place.

C. Plaintiffs' Misplaced "Public Policy" Arguments

By reference to these inapplicable rules, plaintiffs then attempt to manufacture two "public policy" grounds upon which the tribal court order can supposedly be ignored. *See* Op. Brief at 13. First, plaintiffs claim that "public policy" requires that "non-Indian tort claimants should have access to the identity of those responsible to

their claims by being provided with the name, address and telephone number [of the Gaming Facility Operator.]" Op. Brief at 14. Providing contact information for the gaming facility operator is not a "public policy," nor is it even part of the tort claims ordinance for claims against the Community. It is a term of the gaming compact between the State and the Community. Plaintiffs' cite no authority for the argument that this is a recognized "public policy," and this Court cannot create a judicially fashioned "public policy" to suit plaintiffs needs in this particular case. *The Lofts At Fillmore Condominium Ass'' v. Reliance Commercial Constr., Inc.*, __P.3d __, 2007 WL 3287391, at *3 (App. 2007) (Courts can declare existence of public policy only if policy is "so thoroughly established as a state of public mind, so united and so definite and fixed that its existence is not subject to any substantial doubt.").

Aside from the constant refrain that they were "deceived" into believing that they could sue a non-tribal entity such as Harrah's, the truth is that plaintiff never asked for the identity and contact information for the "gaming facility operator" or bothered to confirm that the Community and the gaming facility operator are one in the same. In fact, plaintiffs' first attorney requested and received the Community's tort claim procedures and then served a valid notice of claim on the Community. She did not request or need any other contact information. Item 14, Ex. 1. The problem arose when the plaintiff's current attorney failed to follow through and actually name

the Community in the lawsuit. The tort claim ordinance provides the exclusive remedies for tort claims occurring at the casino. Plaintiff's counsel is deceiving himself if he believes that anyone else is to blame for the failure to name the Community as a defendant. Thus, the tribal court ruled that the Community is the gaming facility operator, but the dispositive issue is really that the Community is an indispensable party, which the plaintiffs failed to join and which could not be joined long after the statute of limitations expired.

In search of yet another supposed "public policy" argument to excuse their conduct, the plaintiffs next cite to Arizona Rule of Civ. P. 1, which states the basic premise that the rules of civil procedure are to "be construed to secure the just, speedy, and inexpensive determination of every action." Plaintiffs then criticize the tribal court for actually following the rules of civil procedure, namely Rule 15(a) (governing leave to amend) and Rule 19 (governing indispensable parties). *See* Op. Brief at 15. In actuality, the tribal court considered and soundly rejected plaintiffs' arguments, as detailed in the 12-page Order. It hardly violated public policy for both the tribal court and the superior court to faithfully follow the rules of procedure. Plaintiffs merely conjure up these purported "public policies" because they are unhappy that the "speedy and inexpensive determination" of both the tribal court and superior court actions did not result in a judgment favorable to them.

D. Plaintiff Misreads the Trial Court's Order As Invoking the "Election of Remedies" Doctrine.

Plaintiffs conclude their argument by reference to the doctrine of "election of remedies." *See* Op. Brief at 19-21. The "election of remedies" doctrine was not raised in the motion to dismiss. Plaintiffs apparently misread the trial court's statement that plaintiffs "elected to seek [their] remedy" in tribal court as an application of the "election of remedies" doctrine.[14] While the lower court's use of this phrase may invoke confusion, the trial court did not apply the "election of remedies" doctrine, but instead based its decision on the doctrine of collateral estoppel.

II. EVEN IF THE STATE COURT COMPLAINT IS NOT BARRED BY COLLATERAL ESTOPPEL, DISMISSAL SHOULD BE AFFIRMED ON OTHER GROUNDS.

Even if collateral estoppel does not bar the plaintiffs from relitigating some or all the issues determined in the tribal court action, this court may affirm on other grounds asserted in the motion to dismiss. *See Forszt v. Rodriguez*, 212 Ariz. 263, 265, 130 P.3d 538, 540 (App. 2006) (Appellate court may "affirm the trial court's

[14] In actuality, litigation in the tribal court is the exclusive remedy for claims against the Community.

ruling if it is correct for any reason apparent in the record.").[15] The Community is a necessary party to this lawsuit. The plaintiffs implicitly concede that the Community is a "necessary" party by naming it as a defendant, though it cannot be joined in the state court action by virtue of its sovereign immunity. Therefore, pursuant to Rule 19(a), the Community is an indispensable party that cannot be joined in this State court action. The 12(b)(6) dismissal should therefore be affirmed.

A. The Community Cannot Be Joined.

1. There Is No State Court Jurisdiction Over A Sovereign Indian Nation.

For more than one hundred and fifty years the United States Supreme Court has recognized that Indian Tribes are sovereign nations, which have "territorial boundaries, within which their authority is exclusive, and have a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." *See Worchester v. Georgia*, 31 U.S.(6 PET.) 515, 557 (1832). Each tribe exercises inherent authority over their members and territories, and jurisdiction

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15 Although raised in the motion to dismiss as alternative grounds supporting dismissal, plaintiffs did not address these other grounds in the trial court. *See* Item 14. Plaintiffs do not address these alternative grounds on appeal. *See* Op. Brief at 21. Plaintiffs are apparently laboring under the misapprehension that this Court is limited to addressing the collateral estoppel issue only notwithstanding the other equally dispositive issues raised.

over civil disputes arising on the reservation is specifically vested in tribal court and governed by tribal law. *See Williams v. Lee*, 358 U.S. 217 (1959); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978); *Oklahoma Tax Commissions v. Citizen Bank of Potowatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Navajo Nation v. McDonald*, 180 Ariz. 539, 885 P.2d 1104 (App. 1994). *See Tohono O'Odham Nation and Tohono O'Odham Housing Authority v. Schwartz*, 837 F. Supp. 1024, 1031 (D. Ariz. 1993).

State courts are precluded from exercising jurisdiction over Indians for causes of action arising in Indian country unless there is an express grant of authority to exercise jurisdiction from Congress. *Williams v. Lee*, 358 U.S. 217 (1959); *Bryan v. Itasca County*, 426 U.S. 373, 376 n. 2 (1976); *McClanahan v. Tax Commission of Arizona*, 411 U.S. 164, 170-171 (1973). The fundamental premise is that Indian tribes are unique groups with attributes of sovereignty over both their members and their territory is applicable to federal courts as well as state courts. *See U.S. v. Wheeler*, 435 U.S. 313, 323 (1978). Thus, state courts have no jurisdiction to hear claims against Indian Tribes or individuals for conduct occurring on the Reservation. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Navajo Nation v. McDonald*, 180 Ariz. 539, 885 P.2d 1104 (App. 1994). "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a

recognized Indian tribe." *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 172 (1977).

In the earlier litigation of this case, the tribal court addressed the fact that the Community is a sovereign nation. As such, it is immune from suit unless its sovereign immunity is abrogated by Congress or expressly waived by the tribe itself. *See* Item 11, Ex. 1 (Tribal Court Order) at pp 9-10; *accord Oklahoma Tax Commissions v. Citizen Bank of Potowatomi Indian Tribe*, 498 U.S. 505, 509 (1991) ("[s]uits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the Tribe or congressional abrogation."); *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979) ("sovereign immunity involves a right which the courts have no choice, in the absence of waiver, but to recognize.")

Thus, the only tort claim that can be made against the Community is in tribal court pursuant to the Tribal Tort Claims Ordinance. As the tribal court already ruled in this case, this is the exclusive remedy for any personal injury claims arising out of the operations of the casino. The new complaint filed in state court did not allege any basis for the Superior Court to be able to exercise subject matter jurisdiction over the Community itself, nor do plaintiffs contend that the Community waived its inherent immunity and consented to state court jurisdiction.

2. The One Year Statute of Limitations Expired.

Because Indian tribes are protected from suit by sovereign immunity, the only mechanism for suing the tribe is pursuant to the tribe's own Tort Claims Ordinance. The Tort Claims procedures in Title 5 of the Ak-Chin Civil Code provide that "all actions against the Community or any Community Employee shall be brought within one year after the cause of action accrues and not afterwards." Item 14, Ex. 3 (Ak-Chin Civil Code). The one year limitations expired on August 6, 2006. Item 1 at ¶¶ 6-7. The Superior Court complaint was not filed until August 2, 2007, nearly an entire year after the statute of limitations ran. *Id.* Therefore, even if plaintiffs were able to overcome the other legal barriers precluding their suit, the Complaint would still be subject to dismissal as having been filed outside the limitations period.[16] "The affirmative defense of statute of limitations is properly raised in a motion to dismiss where it appears from the face of the complaint that the claim is barred." *McCloud v.*

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16 Plaintiffs are no longer at liberty to argue that this action relates back in time to the filing of their original tribal court complaint. Ariz. R. Civ. P. 15(c) only applies to amendments within the same cause. It does not apply to new parties named in a new lawsuit pending before a new tribunal. Moreover, any "relation back" argument would directly contradict plaintiffs' arguments above that the tribal court order should have no effect whatsoever. If plaintiffs are correct and the tribal court proceedings should be treated as having never been filed, then so too would those proceedings be nullified for purposes of the limitations period. Plaintiffs' superior court complaint would still be untimely.

Dept. of Public Safety, 170 P.3d 691, 694 (App. 2007). *Accord Anson v. Am. Motors Corp.*, 155 Ariz. 420, 421, 747 P.2d 581, 582 (App. 1987).

B. <u>The Community Is An Indispensable Party</u>.

It is clear from the discussion above that the Community cannot be a named defendant in this action. The tribal court determined that it could not be joined in the first action. If the tribal court's determination that the Community was an indispensable party did not have preclusive effect in this case, then this Court must independently rule that dismissal was nevertheless appropriate because the Community is an indispensable party which cannot be joined.

Rule 19 highlights the general policies of avoiding multiple litigation, providing the parties with complete and effective relief in a single action, and protecting the absent persons from the possible prejudicial effect of deciding the case without them. *See* Wright, Miller, Kane *Federal Practice and Procedure* §1604 at 39 (2001); Ariz.R.Civ.P. 19. The standard also furthers the interest of the public in judicial economy by avoiding repeated lawsuits involving essentially the same subject matter. *Id.* at 47. If the necessary party cannot be joined in the action, the court must determine whether the action can proceed in the absence of that party. *See* Rule 19(b), Arizona Rules of Civil Procedure *and* Rule 19(B), Ak-Chin Rules of Civil Procedure; *See also Wilbur v. Locke*, 423 F.3d 1101, 1114 (9th Cir. 2005) (joinder of federally-

recognized Indian tribe pursuant to Rule 19 was not feasible because the tribe enjoys sovereign immunity from suit).

Because the Community cannot be sued in State court and cannot otherwise be joined because the statute of limitations has passed, the Court must determine whether, in equity and good conscience, the action should proceed against the remaining parties or if it should be dismissed. *See Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 867 n. 5 (9th Cir. 2004); *see also Dawavendewa v. Salt River Project Agricultural Improvement & Power District*, 276 F.3d 1150 (9th Cir. 2002) (Joinder not feasible due to tribal sovereign immunity).

The factors to be considered by the Court include: the extent to which a judgment may prejudice the absent party or those already before the Court; the extent to which such prejudice may be lessened or avoided by protective provisions in the judgment or shaping of the relief; whether a judgment rendered in the person's absence will be adequate; and whether the plaintiffs will have an adequate remedy if the action is dismissed for non-joinder. *See* Ariz. R. Civ. P. 19(b); *See also American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002) (Interest in tribal immunity overcomes lack of alternative forum or remedy for plaintiffs).

The Community is a real party in interest whose rights are affected by this litigation. *See Kickapoo Tribe of Oklahoma v. Lujan*, 728 F. Supp. 791 (D.C.D.C.

1990) (Texas Band of Kickapoo Indians was in indispensable party because the court could not fashion a remedy without the Band and dismissal was required because of the Band's immunity.); *See also Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489 (C.A.D.C. 1997); *See also Kescoli v. Babbit*, 101 F.3d 1304, 1307 (9th Cir. 1996) (Indian tribe's interest in maintaining sovereign immunity made it indispensable party mandating dismissal despite lack of alternative forum); *Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir. 1992) (Suit which affected tribe's legal entitlements must be dismissed because the tribe was an indispensable party that could not be joined due to its sovereign immunity).

There can be little doubt that the tribe and other parties to the litigation will be prejudiced by the danger of multiple or inconsistent obligations, particularly when the identical action has been litigated in tribal court and is on appeal in the Southwest Inter-Tribal Appeals court. *See Owens-Illinois, Inc. v. Meade*, 186 F.3d (4th Cir. 1999) (Suits in both State and Federal Courts would likely result in conflicting legal obligations). In such a case, there is no way for this court to fashion a judgment or remedy that would be adequate as to all the affected parties and non-parties alike. *See e.g. Acton Co. v. Bachman Foods, Inc., 668* F.2d 76 (1st Cir. 1982) (Action by subsidiary corporation could not go forward without joinder of parent company which would destroy diversity jurisdiction.) As such, this case was subject to dismissal in

its entirety because the Community is an indispensable party that cannot be joined as a defendant. The trial court's order should therefore be affirmed, either on the basis of collateral estoppel, or on these independently asserted grounds.

CONCLUSION

Plaintiffs cannot correct the mistake that resulted in the dismissal of the tribal court action by simply filing a new complaint in Superior Court. The same dispositive issues addressed in the tribal court action are binding on the plaintiffs in the State Court proceeding. Collateral estoppel bars the re-litigation of those issues.

In addition, dismissal would also have been proper on the substantive grounds raised in defendants' motion to dismiss. The Ak-Chin Indian Community is an indispensable party and cannot be joined in this state court action because it has sovereign immunity and the statute of limitations has expired. The trial court's order should therefore be affirmed.

RESPECTFULLY SUBMITTED this 24th day of March, 2008.

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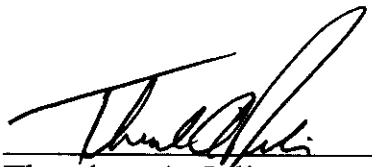
CERTIFICATE OF COMPLIANCE

I, Theodore A. Julian, Jr., do hereby certify that Appellant's Opening Brief is in compliance with Rule 14(a) of the Arizona Rules of Civil Appellate Procedure, in that it is double spaced with a proportionate spaced typeface of Times New Roman, 14 point, with a total of 8075 words.



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CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

I, THEODORE A. JULIAN, JR., do hereby certify that I am an attorney for the Appellees and that I caused to be mailed on this date to the Appellants, two (2) copies each of the foregoing Appellees' Answering Brief as follows:

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SUBSCRIBED AND SWORN to before me this 24th day of March, 2008, by Theodore A. Julian, Jr.

Notary Public

My Commission Expires:

Susan A. Morgan
NOTARY PUBLIC -- ARIZONA
MARICOPA COUNTY
My Commission Expires
June 20, 2011