ARIZONA COURT OF APPEALS
DIVISION I

The HOPI TRIBE, a federally recognized Indian Tribe, **Petitioner/Appellant**, v. THE CITY OF FLAGSTAFF, ARIZONA, and ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP **Respondents/Appellees**.	Case No. 1 CA-CV-6-0521 Coconino County Superior Court No. S0300CV201100701 **APPELLANT'S REPLY BRIEF**

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I. The Tribe Has Suffered Special Injury

Appellees contend that cultural and religious destruction of an area cannot, as a matter of law, ever cause "special injury" unless it obstructs access to a person's own property or causes pecuniary loss or physical harm. Appellees are wrong. Public nuisance law recognizes that interference with access to a place of special importance can cause special injury to those personally affected. There is no question here that the Tribe and its members have used the Peaks, including the area in and around Snowbowl, and the natural resources from that area since time immemorial and have special rights of access. As such, the Tribe has suffered special injury sufficient to support standing. In addition, even if the Court concludes that the Tribe has not suffered special injury sufficient to support its damages claim the Court should allow the Tribe's injunctive relief claim to proceed.

A. The Importance of the Snowbowl Area to the Hopi Tribe Is Relevant to the Tribe's Standing

As a preliminary matter, Appellees misconstrue the nature of the Tribe's injury. The Superior Court stated that this case is about the Tribe's "rights and concerns about preserving our environment, and keeping it free of pollution or being desecrated." Snowbowl Br. at 20 (quoting IR#149 at 9). But Appellees fail to acknowledge that, for standing purposes, the injury to the Hopi Tribe involves religious destruction resulting from the contamination of the pristine areas around

Snowbowl that result in the Tribe's inability to access sacred places or to collect ceremonial resources. To characterize the Hopi Tribe's interest as merely co-extensive with the public's interest in a clean environment misconstrues the harm suffered by the Tribe and its members.

Members of the Hopi Tribe have been uniquely damaged by the environmental contamination caused by Appellees by interruption of religious pilgrimages and thwarting of religious activities that are dependent on maintenance of the clean environment around Snowbowl. The contamination of the area around Snowbowl has prevented Tribe members from making pilgrimages to sacred sites. *See, e.g.*, APP.3[1] ¶¶ 115-16, 121-24, 126, 135, 138; IR#198, Exh. 1, at Nutumya Affidavit ¶¶ 5-7; Kuwanwiswima Affidavit ¶¶ 6-11. The Tribe has used natural resources collected from the Snowbowl area for important ceremonies since time immemorial, *see* APP.3 ¶¶ 115, 117, 125, 127-29, 144, but the contamination has rendered them unusable and unsuitable for religious use, *id.* ¶ 131. *See also* IR#198, Exh. 1 at Nutumya Affidavit ¶¶ 5-6, 10, Tenakhonva Affidavit ¶¶ 3-6, 8, Kuwanwisiwma Affidavit ¶¶ 2-6, Lomakuyvaya Affidavit ¶¶ 2-4, 9, Wadsworth Affidavit ¶¶ 3, 6. The inability to gather ceremonial and sacred resources from the Peaks has resulted, at times, in a shortage of ceremonial materials for religious

[1] The Tribe cites the initial Complaint because the Superior Court never ruled on the Tribe's Motion to File an Amended Complaint, IR#132; *see also* Snowbowl Br. at 7. *See also infra* § 3 at 13-15 (discussing pleadings).

practices. *See* Nutumya Affidavit ¶ 8, Tenakhonva Affidavit ¶ 7, Lomakuyvaya ¶ 10.[2] The contamination of the Peaks has harmed the Hopi Tribe members in profound and specific ways not shared by the general public.

These are not the same type, kind, or quality of injury suffered by the public. Appellees have attempted to confuse the issue by arguing that because the harm to the Tribe and the harm to the public are both caused by the presence of reclaimed wastewater, the injury is the same. But a common source of harm does not dictate equal injury. Moreover, Appellees' use of the Tribe's allegations of public nuisance instead of the allegations of special injury, *see* Flagstaff Br. at 10-11, 13; Snowbowl Br. at 19, is misleading and cannot be credited.

Rather than address the injury suffered by the Tribe, Appellees' argument rests precariously on the premise that the reason why a person seeks access to an area can never be relevant to considering whether he has been specially injured. Snowbowl Br. at 13, 23; Flagstaff Br. at 9-10. Appellees wrongly claim that "[n]o court has ever held that a plaintiff has suffered harm that is different in kind merely because the plaintiff's reason or motivation for exercising the public right is

[2] The City's contrary assertion that Hopi ceremonies have not stopped, Flagstaff Br. at 7, is incorrect and inconsistent with the pleadings, *see, e.g.*, APP.3 ¶¶ 131, 138, and record below, IR#198, Exh.1. *See also* Snowbowl Br. at 22 (acknowledging the allegations of changed religious practices).

different." Snowbowl Br. at 24. A review of applicable caselaw reveals Appellees' error.

In *Scruggs v. Beason*, for example, the Alabama Supreme Court considered whether plaintiffs had suffered special injury from the obstruction of a road leading to a cemetery where plaintiffs were "members of the community and have members of their families buried in a cemetery used for burial purposes by the community[.]" 246 Ala. 405, 408 (1945). The court explained that "[a] cemetery is a place not only for the burial of the dead, but for an expression of love and respect by the living for the dead," conferring special standing on individuals with friends or families buried there. *Id*. Although the general public also had used the road and cared for the cemetery, *id.*, plaintiffs' injury was different in kind because of the unique interest they held is caring for the place their family members were buried. The long-established rule from *Scruggs* has been recently reaffirmed:

> An individual who cannot reach his home (***or any other destination, such as a family cemetery, that holds a significance that society is prepared to recognize as compelling***) without having to take a circuitous alternate route in order to avoid a public nuisance has established special injury different in kind as well as degree from the injury suffered by the public at large.

Hall v. N. Montgomery Materials, LLC, 39 So.3d 159, 178-79 (Ala. App. 2008) (emphasis added).

The special interests of persons in burial grounds of their ancestors is widely recognized in other areas of the law as well. For example, in *German Evangelical*

St. Marcus Congregation of St. Louis v. Archambault, individuals who owned lots or "have friends or relatives interred in the cemetery" were found to have "special interests" in "defending against appellant's effort to invade and destroy it." 404 S.W.2d 705, 707 (Mo. 1966). Similarly, in *Burnside v. Gilliam Cemetery Assoc. of Gilliam*, plaintiff had standing to maintain a suit "alleging mismanagement or misuse of public charitable funds by a charitable corporation," by virtue of his "special interest in the charity" in part because he "owns a burial plot in Gilliam and his father is buried there." 96 S.W.3d 155, 158-59 (Mo. Ct. App. 2003). *See also Connolly v. Frobenius*, 574 P.2d 971, 979 (Kan. App. 1978) (holding that people owning lots in a cemetery or with relatives buried there "are possessed of sufficient special interests to entitle them to seek relief from any unauthorized use to be made of the cemetery by means of injunction."). Thus, courts have recognized the special interest in ensuring places of particular personal significance are protected.

Because the Tribe's interest in the affected area around Snowbowl is not simply recreational, the City's reliance on *Oppen v. Aetna Insurance Co.* and *U.S. Steel Corp. v. Save San Key, Inc.*, Flagstaff Br. at 8-9, is misplaced. In *Oppen*, the Ninth Circuit found that individuals who were obstructed from using a waterway for occasional recreational enjoyment did not suffer special injury. 485 F.2d 252, 260 (9th Cir. 1973) (finding no special injury to plaintiffs who were "deprived of no more than their occasional Sunday piscatorial pleasure."). Likewise, in *Save San*

Key, the plaintiffs alleged no injury different in degree or kind than that suffered by the general public. 303 So.2d 9, 10 (Fla. 1974) (closely rejecting wholesale abandonment of the special injury requirement in 4-3 decision where no special injury was alleged). *But see Akau v. Olohaua Corp.*, 65 Haw. 383, 386-89 (1982).

While the desecration of a sacred site has not been directly addressed under Arizona public nuisance law,[3] finding special injury standing does not exist here is inconsistent with Arizona common law and the Restatement. In *Arizona Copper Co. v. Gillespie*, for example, the Court articulated that public nuisance is actionable by one who has suffered special injury due to "personal inconvenience or annoyance." 12 Ariz. 190, 202, 100 P. 465, 469 (1909). In that case, plaintiff had standing because his land was irrigated by the stream defendant had alleged to pollute, causing "a direct individual injury" that was different from the more generalized

[3] Cases involving interference with sacred sites like cemeteries are rare "[b]ecause of the respect entertained for the final resting place of the dead, and so little temptation to disturb their repose[.]" *Anderson v. Acheson*, 110 N.W. 335, 339, ¶ 3 (Iowa 1907). Appellees' argument that dismissal is appropriate if the Tribe does not identify a case where "an individual's religious and cultural motivations for exercising a public right was found to satisfy the special harm requirement for a public nuisance claim," Snowbowl Br. at 30-31, impermissibly would turn the motion-to-dismiss standard on its head. The Court should apply Arizona public nuisance law to the particular facts of this case, while acknowledging that nuisance is "incapable of precise definition, because the controlling facts are seldom alike, and each case stands upon its own footing," *Engle v. State*, 53 Ariz. 458, 464, 90 P.2d 988, 991 (1939), and assuming "the truth of all well-pled factual allegations and indulg[ing] all reasonable inferences therefrom," *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008) (en banc). *See also* Ariz. R. Civ. P. 8.

injury suffered by the community at large from "decreas[ing] the general prosperity of the community[.]" *Id.*

In addition, Arizona follows more relaxed standing requirements than many other states and the federal government, imposing only "prudential or judicial restraint" in order to "insure that our courts do not issue mere advisory opinions, that the case is not moot and that the issues will be fully developed by true adversaries." *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Svs. in Ariz.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985) (in banc). There is no suggestion that such requirements have not been met.

Appellees' simplistic application of *Exxon Valdez* to this case also must be rejected. The Hopi Tribe does not assert "the precise claim of special injury," Flagstaff Br. at 5; Snowbowl Br. at 24, as in *Exxon Valdez*. Harm to the plaintiffs' subsistence lifestyle in *Exxon Valdez* may not have been different enough from that suffered by other individuals to support standing. Here, however, the obstruction and thwarting of religious activities that are specific to the individuals seeking redress from the Court for the public nuisance is not shared by the public at large, and thus constitutes a special injury.

B. The Compelling Importance of the Snowbowl Area to the Tribe Has Been Publicly Recognized

Here, there is clear recognition of the compelling importance of the Peaks to the Hopi Tribe with the naming the wilderness area after the Kachinas—the Hopi

deities who live there. APP.3 ¶¶ 103-04. The U.S. Forest Service also has recognized the Peaks as a "Traditional Cultural Property" eligible for inclusion on the National Register of Historic Places because it contains shrines and other ceremonial places and resources, and holds a significant importance in Hopi culture and religion. *See* APP.3 ¶ 119. Because of the importance of the Snowbowl area to the Hopi Tribe, the Forest Service has constructed pull-offs along Snowbowl road to facilitate Hopi pilgrimages, some of which have been damaged by the reclaimed wastewater pipeline to Snowbowl. *Id.* ¶ 130. *See also* IR#198, Exh. 1, Kuwanwisiwma Affidavit ¶¶ 7-11.

Moreover, the unique interest of the Tribe in the area and resources at issue here is recognized through numerous policies and laws that endow the Hopi Tribe with special rights of access.[4] *See* U.S. Forest Service Policy *at* https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5338017.pdf (allowing collection of wildlife and medicinal, ceremonial, and food plants without a permit and larger amounts of forest products with a free permit available to members of Native American churches or federally recognized tribes).[5] The Forest Service

[4] The fact that the Tribe does not own the area at issue does not negate its interest or standing. *See Armory Park*, 148 Ariz. at 4, 712 P.2d at 917 ("A public nuisance, to the contrary, is not limited to an interference with the use and enjoyment of the plaintiff's land. It encompasses any unreasonable interference with a right common to the general public.").

[5] That other tribes also view the Peaks as sacred does not change the result here, contrary to Appellees' suggestion, Snowbowl Br. at 26 n.5. *See* William Prosser,

provides such access to the Snowbowl area under various laws and executive orders, including the Food, Conservation, and Energy Act of 2008 § 8105 (allowing for provision, "free of charge to Indian tribes any trees, portions of trees, or forest products from National Forest System land for traditional and cultural purposes"); the American Indian Religious Freedom Act (stating the policy of the United States to preserve access to sacred sites and the use of sacred objects); the Religious Freedom Restoration Act; and the Forest Service Manual 1563.03 (requiring National Forests to assist tribal members in securing ceremonial and medicinal plants and the use of specific geographic places). *Id.* Thus, the Superior Court and Appellees err in asserting that "other members of the public share the same rights" as the Tribe. Snowbowl Br. at 20 (quoting IR#149 at 9).

Access to the areas around Snowbowl and the availability of the natural resources there for ceremonies thus is recognized as particularly important. Like a family cemetery, the area around Snowbowl is irreplaceable and of compelling importance as a place to perform actions and ceremonies in an "expression of love and respect by the living for the dead." *Scruggs*, 246 Ala. at 408. The Hopi deities, the Kachinas, are the spirits of the Hopi ancestors and reside in the Peaks. *See*

Private Action for Public Nuisance, 52 Va. L. Rev. 997, 1008 (1966) ("particular damage certainly does not mean damage peculiar, exclusive or unique to the plaintiff"). Here, there are well-pled allegations that the Hopi Tribe has been prevented from carrying out religious activities due to the contamination.

Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1099 (9th Cir. 2008) (Fletcher, J., dissenting) (discussing the Kachinas). The Hopi Tribe used the Peaks for sacred ceremonies and activities since time immemorial APP.3 ¶ 116. When Europeans first came to what is now Arizona, the Hopi people were already well established in that place. APP.3 ¶ 114. The Hopi Tribe clearly has a special interest in the Snowbowl area that few others can claim. But use of sacred sites on the Peaks is now restricted due to contamination by reclaimed wastewater. APP.3 ¶¶ 131, 138. Appellees do not—and could not—contest that the Peaks are well recognized as a singularly sacred place to the Hopi Tribe. The Court should find the Tribe has a special injury from desecration of the Peaks that is different in kind from the general public.

C. The Extent of the Tribe's Injury Is Relevant to the Special Injury Determination

Snowbowl argues that the extent of the Tribe's injury is wholly irrelevant. *See* Snowbowl Br. at 26-30. As a preliminary matter, Snowbowl is wrong to assert that the Tribe's special injury contention is premised only on the Tribe's "frequency and regularity" of use. Snowbowl Br. at 27-29. As shown above, the Tribe's special injury emanates from the significant harm it has suffered due to interference with "specific shrines and springs associated with particular annual ceremonies," the prevention of "collection of specific natural resources including water, greens, herbs, plants, tobacco, and food." Opening Br. at 30, 32; *supra* § 1.A at 2-3. Snowbowl's

mischaracterization of the damage to the Tribe from Appellees' actions betrays the weakness of its position in this appeal. The Tribe's special injury clearly is not based on quantity of use but rather the importance and kind of injury.

Nevertheless, the degree of harm to the Tribe is entirely relevant to the special injury inquiry. The Restatement and other authorities make clear that the degree of harm should be considered in the assessment. A difference in degree of harm "may be considered in determining whether there has been a difference in kind." Restatement § 821C, cmt. c; *see also* Snowbowl Br. at 28. Prosser advises that "the degree can ***never*** be ignored when it bears legitimately upon the issue of kind." Prosser, 52 Va. L. Rev. at 1011 (emphasis added) (citing *Kaje v. Chicago, St. P., M&O Ry. Co.*, 59 N.W. 493, 493 (Minn. 1894) (discussing the "difficult task" of where to draw the line and acknowledging that it is often a mere matter of degree between more immediate obstruction, which is ground for special damage, and the more remote obstruction or interference, which is not.))[6]; *id.* at 1022. Acknowledging that the Tribe's visits to the Peaks have been made regularly and frequently since time immemorial reveals the "special reason to do so," *see supra*

[6] Snowbowl criticizes the Tribe's use of *Arizona Cooper*, including the portion of the Court's discussion that quotes *Kaje v. Chicago, St. P., M&O Ry. Co.*, *see* Snowbowl Br. at 27-28. But, *Kaje* has been widely cited for that same proposition, including by Prosser in the article that Snowbowl argues is "particularly persuasive," Snowbowl Br. at 17 n.3. *Arizona Copper* and *Kaje* show that difference in degree has not been (and cannot be) disregarded in determining special injury standing where it informs the "different-in-kind" analysis.

§ 1.A at 2-3 (citing Complaint and affidavits), which Prosser recognized "will almost invariably be based upon some special interest of his own not common to the community." Prosser, 52 Va. L. Rev. at 1011.

II. The Superior Court Erred in Concluding the Tribe Lacks Standing to Pursue Injunctive Relief

Appellees do not contest that the injury to the Tribe is significant. In fact, Snowbowl appears to acknowledge that the Tribe has met the pleading requirements of public nuisance. *See* Snowbowl Br. at 19, 22; Flagstaff Br. at 10-11; Opening Br. at 18-26. Any further "weighing and balancing of conflicting interests or principles," as is required for determining the merits of a claim to enjoin a public nuisance, *Armory Park*, 148 Ariz. at 8, 712 P.2d at 921, is inappropriate on a motion to dismiss.

Rather than attack the sufficiency of the Tribe's nuisance allegations, Appellees contest that the special injury test applies to injunctive relief, and rely on the Restatement and Prosser's 1966 law review article. The Restatement, however, recognizes that actions for damages are distinguishable from actions for injunction, and "precedents for the two are by no means interchangeable." Restatement § 821B, cmt. i. *See also* Restatement § 821C, cmt. j ("Since standing to sue is primarily a procedural matter, not fully appropriate for a Restatement of the substantive law of Torts, it has been regarded as outside this scope of this Section to set forth the rules for determining when there is standing to sue for abatement or injunction.").

Indeed, the rationales for the special injury requirement, Restatement § 821C, cmt. j, are significantly lessened in this instance, where the Tribe seeks abatement on behalf of all members of the public who are negatively impacted. *See also Armory Park*, 148 Ariz. at 6, 712 P.2d at 919 (reasoning that because the plaintiff sought "an injunction rather than damages," principles of judicial economy were advanced by allowing the association to maintain the claim). Even if the Court does not reverse the Superior Court's dismissal of the Tribe's damages claim based on special injury, it should overturn the Superior Court's dismissal of the request for injunctive relief to abate the nuisance given the Tribe's complaint clearly states a claim for injunctive relief and special injury standing under Arizona pleading requirements.

III. The Superior Court Should Not Have Used a Heightened Pleading Standard, or Should Have Allowed Amendment of the Complaint.

Appellees misconstrue the Tribe's argument concerning leave to file an amended complaint to satisfy the heightened pleading standard articulated by the Superior Court. The Tribe initially filed its complaint in this matter only against the City for its role in providing the reclaimed wastewater for use on the Peaks. After the City joined Snowbowl as a third-party defendant, it became apparent that the City would argue that the nuisance resulted solely from the actions of Snowbowl, *see* IR#79 at 43-45. In addition, the deadline for amending the pleadings as a matter of right was set by the Superior Court for June 7, 2017. IR#119 ¶ 10. The Tribe

accordingly amended its complaint on that day only to add Snowbowl as a defendant to the public nuisance claim, not to amend any of the underlying nuisance allegations, so as not to upset the then-in-process briefing on the motion to dismiss. IR#132.[7]

In its order dismissing the case, the Superior Court applied an inappropriate heightened pleading standard in error. *See* Opening Br. at 29.[8] In its motion for reconsideration after the Superior Court's under advisement ruling dismissing the case, the Tribe sought to clarify that the court would allow the Tribe leave to amend its complaint to add allegations that would satisfy the court's heightened standard. The Superior Court construed the Tribe's request as a Rule 15 motion, *see* IR#175 at 1-2, and erroneously denied the request as futile and stated the finality of judgment, *id.* at 5.

It was error for the Superior Court to conclude that amendment would be futile. The Tribe should have been afforded the opportunity to add allegations to its complaint to further detail its unique interest in and use of the area and resources at issue as well as the negative impacts from Appellees' actions. The allegations in the

[7] Although it never granted the Tribe's motion to amend, the Superior Court used the June 7, 2017 amended complaint in its consideration of the motion to dismiss, which was not inappropriate because the substance of the allegations was identical to the original complaint.

[8] Appellees do not contest that the Superior Court applied a heightened pleading standard.

Complaint, APP.3 & IR#132, summarize more detailed facts that could be added to meet the unusual standards articulated by the Superior Court. It was wrong to conclude that there are "no set of facts" under which the Tribe could meet the court's test for standing, and so amendment should have been allowed. This alone is grounds for reversal. *Folk v. City of Phoenix*, 27 Ariz. App. 146, 151, 551 P.2d 595, 600 (1976).

IV. The Superior Court Erred in Granting Attorneys' Fees to the City and Snowbowl

A. Fees under A.R.S. § 12-341.01 Are Inappropriate Where the Claim Alleges a Duty that Does Not Arise Out of Contract

This Court should reject application of A.R.S. § 12-341.01 to this case as it would widely depart from established Arizona law and erroneously expand the application of the statute. As shown in the Tribe's opening brief, fee-shifting under § 12-341.01 is appropriate only where an action is based on the breach of a promise—express or implied—in or arising from a contract. The duties owed by Appellees arise from nuisance law—not from the contract. Appellees' argument rests on the erroneous assertion that the presence of a contract in the factual background of a case (that does not give rise to any duties at issue in the case) somehow converts the tort claim to one "arising under contract." A.R.S. § 12-341.01, however, does not apply where there is ***no*** contractual relationship, duties, or rights (express or implied) between Appellees and the Tribe. Moreover, Arizona

courts have consistently and unanimously rejected Appellees' contention that the presence of a contract in the factual background of a case transforms it into a claim arising out of contract.

1. A.R.S. § 12-341.01 Does Not Apply To Claims Made By a Bystander to the Contract

The error of Appellees' argument is easily recognized by a review of Arizona Supreme Court precedence, including *Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 747 P.2d 1218 (1987) (in banc)[9], and other decisions from this Court such as *Ramsey Air Meds, LLC v. Cutter Aviation, Inc.*, 198 Ariz. 10, 6 P.3d 315 (Ct. App. 2000), and *Dooley v. O'Brien*, 226 Ariz. 149, 244 P.3d 586 (Ct. App. 2010). The Supreme Court in *Barmat* explained that courts are required to examine the claim in order to determine whether it arises under tort or arises under contract. Where a claim is properly characterized as arising under tort law, § 12-341.01 does not apply. Only where the claim arises out of contract, can a court apply § 12-341.01. The analysis is straightforward: "contract law consists of enforcing the intention of the parties manifested through promises expressly made or implied from conduct" whereas tort law "is a matter of imposing duties to be recognized or not depending on" the nature of the defendant's activity, the relationship of the parties,

[9] Snowbowl argues that *Barmat* is inapplicable because the facts of that case involved the breach of an implied contractual duty. Snowbowl Br. at 40-41. *Barmat*, however, clearly sets out the steps of proper analysis for application of § 12-341.01, which is prescriptive and applicable.

and the type of injury. *Barmat*, 155 Ariz. at 523, 747 P.2d at 1222. Tort duties are "owed to all those within the range of harm" which "can include parties to a contract." *Id.* A.R.S. § 12-341.01 applies only to the former set of claims.

The existence of a contract does not convert the nature of a claim from one sounding in tort to one arising out contract. Where the contract "does no more than place the parties in a relationship in which the law then imposes certain duties recognized by public policy," § 12-341.01 cannot be used because "the gravamen of . . . action is for breach of tort, not contract," *Id.* at 523, 747 P.2d at 1222. Indeed, even where there is a contract between the two parties, pre-existing tort duties are not subject to § 12-341.01:

> Generally speaking, there is a duty to exercise reasonable care in how one acts . . . . Entering into a contract with another pursuant to which one party promises to do something does not alter the fact that there was a preexisting obligation or duty to avoid harm when one acts.

Keaton, *Prosser and Keaton on Torts* (5th ed.) § 92 at 657.

Appellees' attempt to cast this case as one arising from contract must be rejected. An example set out by the Arizona Supreme Court makes this crystal clear:

> Consider, for example . . . the seller of a chattel that causes damage. If the chattel was defective and unreasonably dangerous . . . the injured buyer may maintain a tort action under the theory of strict liability. Here, too, although the relationship between buyer and seller arose out of a contract, the essential nature of the action sounds in tort: the liability of the seller would exist even without the contract. ***Even a "mere bystander" having no contractual relationship could recover from the seller. The duty breached was one imposed by law in***

> ***recognition of the foreseeability of harm if defendant's conduct fell below a particular standard. The action is a tort action.***

Barmat, 155 Ariz. at 523, 747 P.2d at 1222 n.1 (internal citations omitted) (emphasis added); *see also* Keaton, § 93 at 667 ("There is no problem about tort liability to third parties for the mismanagement of things such as driving a car or flying an airplane. The mere fact that the defendant may be engaged in performing a service pursuant to a contract and transaction is ***completely irrelevant*** on his duty toward those in the vicinity of danger of his activity.") (emphasis added)). An action by a bystander to the contract for breach of a duty arising from law (like nuisance) does not arise out of the contract and so § 12-341.01 cannot be used.

This Court has consistently followed the Supreme Court's rule in *Barmat*. For example, in *Ramsey Air Meds* the Court reversed a fee award because the contract between the parties for pilot services did not trigger application of § 12-341.01 because "[w]hile operating the aircraft, Cutter's pilot owed legal, not contractual, duties of due care . . . [the pilot's] negligence breached that legal duty" defendants were "liable for the damage caused by that negligence as a matter of tort law." 198 Ariz. at 16, ¶ 29, 6 P.3d at 321. Similarly, in *Dooley* plaintiff's claims for breach of fiduciary duty and misappropriation of corporate opportunity were not covered by § 12-341.01 because, while a contract created the relationship, the fiduciary duty at issue arose from law, not contract. 226 Ariz. at 154, ¶ 19, 244 P.3d at 591.

Finally, the City's contention that the Tribe has admitted that § 12-341.01 applies here because the Tribe's complaint includes a request for fees and costs, Flagstaff Br. at 13, is unpersuasive. The Tribe's complaint does not cite § 12-341.01, which is far from the only basis for an award of attorneys' fees. *See, e.g.*, *Arnold v. Ariz. Dep't of Health Svs.*, 160 Ariz. 593, 609, 775 P.2d 521, 537 (1989) (in banc).

2. Snowbowl's "But For" Argument Perverts Arizona Law

Snowbowl's argument that the "but for test announced in *Sparks*" should result in application of §12-341.01 to this case, Snowbowl Br. at 41, must be rejected as out-of-line with *Barmat* and *Sparks* and contrary to the Arizona's Supreme Court's explanation of those cases. The "but for" test announced in *Sparks* and consistently followed by Arizona courts provides that § 12-341.01 applies only where the duty breached would not "exist . . . but for the promises between the parties." *Barmat*, 155 Ariz. at 522, 747 P.2d at 1221. For example, fraudulent inducement of a contract ***cannot*** occur but for a contract, so § 12-341.01 applies. *Marcus v. Fox*, 150 Ariz. 333, 335, 723 P.2d 682, 684 (1986). But, a claim for negligence ***can*** arise without a contract, even where there is a contract between the parties, so A.R.S. § 12-341.01 does not apply. *Ramsey Air Meds*, 198 Ariz. at 16, ¶ 29, 6 P.3d at 321. Thus for claims like those in *Barmat* and here "the contract is the mere inducement creating the state of things [the relationship] that furnishes the occasion for the tort," and so the application of § 12-341.01 is wrong. *Barmat*, 155

Ariz. at 523, 747 P.2d at 1222 (internal quotation omitted) (modifications original to *Barmat*).

Snowbowl selectively and narrowly quotes from *Sparks* to argue that a claim "arises out of contract" any time the factual predicate for a tort claim includes something a party has done pursuant to a contract, and Snowbowl urges the Court to consider "the context and circumstances of the Hopi Tribe's specific public nuisance claim." Snowbowl Br. at 41. These arguments must be rejected. *See Barmat*, 155 Ariz. at 522, 747 P.2d at 1221; *Marcus*, 150 Ariz. at 335, 723 P.2d at 684 (explaining that in *Sparks* the Court "found that the tort of bad faith could not have been committed absent the existence of an insurance contract and a breach thereof. . . . Because the tort of bad faith was so intrinsically related to the contract, we held that the insured's action was one arising out of a contract within § 12-341.01." (internal quotations omitted)); *Dooley*, 226 Ariz. at 151, ¶ 1, 244 P.3d at 588 (concluding that claims did not arise out of contract because they were "based on duties imposed by law, not by express or implied promises" and so § 12-341.01 could not apply). Thus, *Sparks*, properly read, mandates that where a tort duty exists regardless of the promises between the parties, § 12-341.01 does not apply.

Marcus v. Fox likewise does not permit application of § 12-341.01 to this case. The underlying claim in *Marcus v. Fox* was for fraudulent inducement of a contract, *i.e.* whether the contract was valid and enforceable. 150 Ariz. at 334, 336,

723 P.2d at 638, 685. The Court concluded that "attorneys' fees are not appropriate based on the mere existence of a contract somewhere in the transaction," but that, in *Marcus*, "the requisite causal link between [plaintiff's fraudulent inducement] claim and the underlying contract is present." *Id.* at 335, 723 P.2d at 684. The Court cautioned that "the result may differ where the claim is one of fraud, in general, and not fraud in the inducement of a contract. A general claim of fraud may not depend upon the existence of a contract as is inherent in a claim for fraud in the inducement." *Id.* at 335 n.1, 723 P.2d at 684 n.1. In other words, where the claim at issue in the litigation cannot exist as a legal matter but for the contract (like where there is alleged fraud in the inducement of the contract), § 12-341.01 is relevant, but where the duty arises from tort separate and in addition to contractual duties (like a fraud claim), § 12-341.01 is not. *Marcus* applies the reasoning and instructions in *Barmat* that § 12-341.01 should not be applied to tort claim made by a bystander to the contract.

Indeed, this Court has previously rejected the same argument that Snowbowl makes here. In *Dooley v. O'Brien*, the Court admonished those defendants' reliance on *Marcus v. Fox* in a case involving underlying claims for breach of fiduciary duty, fraudulent conveyance, and an accounting: "Though it is true that the presence of a tort claim does not defeat the eligibility for fees, ***the absence of a dispute over promissory rights does so***." *Dooley*, 226 Ariz. at 154, n.6, 244 P.3d at 591 n.6

(emphasis added).[10] Because "Plaintiff did not sue for breach of any alleged . . . agreement, and the validity and terms of such an agreement were not necessary to the disposition of the claim," A.R.S. § 12-341.01 did not apply. *Id.* at 153, ¶ 16, 244 P.3d at 590. *See also id.* at 152, 244 P.3d at 589 (heading I: "A CLAIM DOES NOT 'ARISE OUT OF CONTRACT' WHEN THE RELEVANT DUTY IS NOT CREATED BY A PROMISE.")).

The outcome in *Schwab Sales Inc. v. GN Construction Co.* does not change this rule. That case involved three parties: the general contractor, GN, who had a contract with the subcontractor, Acme, who, in turn, leased equipment from Schwab. When Acme declared bankruptcy before paying Schwab for the equipment lease, Schwab sued GN, alleging unjust enrichment based on the contract between GN and Acme, and between Acme and Schwab. 196 Ariz. 33, 35, ¶ 2, & 37, ¶ 10, 992 P.2d 1128, 1130, 1132 (1998). *Schwab* follows the rule set out in *Sparks*—"but for

[10] Snowbowl's reliance on *Dooley* for the proposition that A.R.S. § 12-341.01 should be expanded to apply to this case is unfounded. The paragraph quoted by Snowbowl, *see* Snowbowl Br. at 38, goes not to advise that "as our supreme court held, 'the legislature clearly did not intend that every tort case would be eligible for an award of fees whenever the parties had some sort of contractual relationship or ingenious counsel could find authority for an implied-in-law contractual claim,'" *Dooley*, 226 Ariz. at 152, ¶ 10, 244 P.3d at 589 (quoting *Barmat*). Rather "'where the implied contract does no more than place the parties in a relationship in which the law then imposes certain duties recognized by public policy, the gravamen of the subsequent action for breach is tort, not contract.'" *Id.* (quoting *Barmat*).

Acme's contract with GN, Schwab would not have had an unjust enrichment claim against GN." *Id.* at 37, ¶ 13, 992 P.2d at 1132.

Like in *Dooley*, the Tribe did not sue for breach of any agreement, "the basis of the action is a duty imposed by law," "no enforcement of the contract was required," and "the validity and terms of such an agreement [are] not necessary to the disposition of the claim." *Id.* at 153-51, 244 P.3d at 590-91. Rather, the subject of this case and appeal is public nuisance. The complaint clearly focuses on Appellees' disruption of the Tribe's and the public's use and enjoyment of the Peaks. Thus, the Superior Court's award of fees to the City and Snowbowl under 12-341.01 must be reversed.

B. The Award of Attorneys' Fees Was Unjust

The Superior Court's fee award represents an impermissible denial of justice because it granted unreasonable fees. Appellees' argument relies wholly on the Superior Court's discretion, but that discretion is not absolute. In particular, a trial court court's discretion must be exercised "in accordance with what is fair, equitable, and wholesome, as determined by the particular circumstances of the case," *Bowman v. Hall*, 83 Ariz. 56, 59, 316 P.2d 484, 486 (1957) (internal quotation omitted), and it is this Court's "duty to interfere when a trial court exercised a discretion vested in it in such a manner that an injustice is done," *id.* at 60, 316 P.2d at 486 (internal quotation omitted)). Given the circumstances of the Tribe's case and the state of the

billing records presented, the Superior Court's award of fees leads to an unfair and unjust result and is therefore an abuse of discretion that must be reversed.

1. Snowbowl Misapplied the Attorney-Client Privilege to Redact Its Time Entries

The award of attorneys' fees is unreasonable where it is based on invoices that contain block billing and redactions that obscure the nature of the work conducted. Snowbowl does not dispute that its invoices include block billing and redaction, but simply asserts that the Superior Court was within its discretion to approve the fee award without analyzing the block billing or redactions.

Snowbowl claims that the redactions are necessary to preserve the attorney-client privilege. But Snowbowl's redactions exceed the contours of the attorney-client privilege. The privilege does not protect the subject of the conversation or the title of the document being reviewed but only the content of the advice dispensed. By redacting the subject matter of its time entries, Snowbowl has improperly obscured the subject of the time entries. *See, e.g.*, IR#151, Johnson Affidavit, Exh.1 at 1 ("Call to client regarding [redacted]"), 3 ("Review research re: [redacted]"), 7 ("review email from Sara Ransom and attached [redacted]"), 9 ("amend pleadings and discuss with [redacted]"). The Superior Court wrongly granted Snowbowl's fee request despite the impropriety of the redactions in its billing records.[11]

[11] The Court of Appeals has noted specifically in at least two memorandum decisions that awarding fees on redacted invoices improperly permits the use of the attorney-

2. The Fee Award Ignores the Circumstances of this Case

The Superior Court's award of fees to the City and Snowbowl is also unjust because it has exposed the Tribe to double billing and failed to consider the Tribe's position. Snowbowl sat on the sidelines while the Tribe litigated the City's first motion to dismiss, despite being aware of the case. *See* IR#118 at 2. Only when this Court overturned the Superior Court's dismissal of the case, did the City add the Snowbowl as a third party defendant. The result was that Appellees—who have been in privity at all relevant times—enjoyed two chances to dismiss the Tribe's public nuisance claim. The Superior Court's decision to award the City's fees on top of Snowbowl's fees only will encourage defendants to prolong litigation by refraining from joining parties or intentionally delaying intervening as part of a strategy to try multiple motions to dismiss. Having successfully overturned the first dismissal of this case, the Tribe should not be made to now bear the City's fees incurred in that unsuccessful motion. Additionally, the Tribe did not bring Snowbowl into this litigation, and should not be made to bear the cost of the City's decision. Permitting Snowbowl to recover fees from the Tribe on top of the City's

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client privilege as a both a sword and a shield. *See Archicon, L.C. v. TPI Properties, LLC*, No. 1 CA-CV 12-0232, ¶¶ 47-48 (Ariz. Ct. App. Mar. 21, 2013) (*available at* http://law.justia.com/cases/arizona/court-of-appeals-division-one-unpublished/2013/1-ca-cv-12-0232.html); *Salero Ranch, LLC v. Union Pac. R. Co.*, No. 2 CA-CV 2012-0165, ¶¶ 20-21 (Ariz. Ct. App. Aug. 28, 2013) (*available at* http://law.justia.com/cases/arizona/court-of-appeals-division-two-unpublished/2013/2-ca-cv-2012-0165.html).

fees is particularly egregious and amounts to a denial of justice. It should be reversed here.

V. Conclusion

Because the Tribe and its members have suffered particular injury, over and above that experienced by the general public from the presence of reclaimed wastewater on the Peaks, it has special injury standing. Even if the Court declines to reverse the Superior Court's dismissal of the Tribe's claims for damages, it should reverse and remand the injunction claim, as it is not subject to the special injury test. At a minimum, the Tribe should be permitted to amend its complaint so as to meet the heightened pleading standard set out by the Superior Court on the Tribe's standing to maintain the nuisance claim against Appellees.

The Court should also reverse the Superior Court's fee award because A.R.S. § 12-341.01 is inapplicable to the Tribe's public nuisance claim. No contractual duties or breaches are pertinent to the Tribe's claim, and the claim does not arise out of contract. Moreover, the award of attorneys' fees in this matter constitutes a denial of justice to the Tribe, and so should be reversed.

Respectfully submitted this 9th day of August, 2017,

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