

IN THE  
**COURT OF APPEALS OF THE YAVAPAI-APACHE NATION**

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**La Posta Band of Diegueno Mission Indians,**  
*Appellant*

v.

**Yavapai-Apache Nation,**  
*Appellee*

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No. YAAP-22-02

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**Judgment Vacated,  
Complaint Dismissed with Prejudice**

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**Opinion of the Court**

**Background**

The parties are well acquainted with the facts giving rise to this litigation and this appeal and those facts have been set forth in detail in two unpublished California Court of Appeal decisions. See *Yavapai-Apache Nation v. La Posta Band of Diegueno Mission Indians*, No. D069556, 2017 WL 2791617 (Calif. CA 2017) (cited herein as *La Posta I*) and *Yavapai-Apache Nation v. La Posta Band of Diegueno Mission Indians*, No. C091801, 2022 WL 1025893 (Calif. CA 2022) (cited herein as *La Posta II*). The following excerpt from the first of those two opinions sets forth a broad outline of the litigation:

This appeal arises from a contract dispute between two Indian tribes: Yavapai–Apache Nation (YAN) and La Posta Band of Diegueno Mission Indians (La Posta). YAN is an Arizona-based tribe with about 2,400 members, and La Posta is a California-based tribe with about 15 adult members. In the parties' contract, La Posta promised to repay more than \$23 million to YAN for funds borrowed to develop a casino that later proved unsuccessful. The parties waived sovereign immunity in their contract.

After La Posta defaulted on the loan, YAN sued La Posta seeking repayment of the principal plus interest. La Posta filed a cross-complaint seeking declaratory relief in the form of an order that YAN was prohibited from enforcing any judgment against La Posta's Revenue-Sharing Trust Fund (RSTF) payments, which are funds distributed by the California Gambling Control Commission to certain California tribes that operate fewer than 350 gaming devices.

Although YAN's breach of contract claim was straightforward (the claimed debt was largely undisputed), the proceedings became procedurally complicated because the parties' litigation energies were not focused on the debt, but instead on the issue with substantial practical monetary implications—whether YAN could attach the RSTF funds to enforce payment of La Posta's debt. This issue was directly raised only in the cross-complaint, but it also implicated the manner in which the complaint was litigated. As discussed in more detail below, the proceedings were also complicated by YAN's filing a parallel action in its own tribal court (the Yavapai-Apache Nation Tribal Court (Tribal Court)).

In the final judgment, the superior court awarded YAN \$48,893,407.97 on its contract claim, and entered judgment against La Posta on its declaratory relief claim based on the court's finding this claim was not ripe. Both parties filed appeals from this judgment. For the reasons explained, we find no reversible error and affirm the judgment in its entirety.

*La Posta I*, at p. \*1.

In its defense to La Posta's cross-complaint, YAN claimed that La Posta committed an act of fraud in obtaining an extension for repayment of the loan. That extension was memorialized in a document titled the Second Amended Restated Loan Agreement (SARLA). The loan for \$23 million was a non-recourse loan meaning that upon any default by La Posta, YAN was limited to collecting from the casino assets and its fixtures thus insulating La Posta, its members, and the tribe's assets from liability for the debt. However, the SARLA contained a provision that if La Posta committed "any act of fraud in connection with" YAN, the non-recourse provision was nullified. See, SARLA, Section 13.03(a)(iii). The "act of fraud" had to be determined either "by a court of competent jurisdiction," or "pursuant to an arbitration proceeding." *Id.* The SARLA provided, and both parties have agreed throughout this litigation, that California law applies to the construction and enforcement of the SARLA, including litigation disputes. See, SARLA, Section, 13.01. YAN's fraud claim proceeded to trial in the California Superior Court.

The jury in that trial found against YAN and in favor of La Posta on YAN's claim that La Posta committed fraud (intentional misrepresentation) to obtain the SARLA. A special verdict form was submitted to and answered by the jury:

1. Did the La Posta Band of Diegueno Mission Indians ("La Posta") make a false representation to the Yavapai-Apache Nation ("YAN")?

\_\_\_\_ Yes X No

2. Did La Posta Know that the representation was false, or did it make the representation recklessly and without regard for its truth?

\_\_\_\_ Yes X No

3. Did La Posta intend that YAN rely on the representation?

X Yes \_\_\_\_ No

4. Did YAN reasonably rely on the representation?

X Yes \_\_\_\_ No

5. Was YAN's reliance on La Posta's representation a substantial factor in causing harm to YAN?

\_\_\_\_ Yes X No

Verdict dated May 7, 2015 (San Diego Trial).

YAN appealed the jury's verdict. The Court of Appeal wrote:

YAN's sole appellate challenge to the jury verdict is that the court prejudicially erred by refusing to instruct the jury on concealment and negligent misrepresentation theories (in addition to intentional misrepresentation). The argument is without merit. YAN's offer of proof did not support the proposed instructions, and there was no prejudicial error because it is not reasonably probable YAN would have obtained a more favorable judgment if the court had given these additional instructions. There was no substantive difference between YAN's asserted concealment and intentional misrepresentation claims, and the jury's finding that La Posta did not make any false statements necessarily resolves the negligent misrepresentation claim based on the same alleged facts.

*La Posta I*, at p. \*2.

In rejecting YAN's claim that Superior Court Judge Joan M. Lewis committed error in not instructing the jury on concealment and negligent misrepresentation, the Court of Appeal added:

This is the *same* evidence YAN relied on at trial to argue that La Posta made an *intentional misrepresentation* when it said in the October 2009 letter that it intended to consider implementing SDW's recommendations and it later represented it would implement the recommendations. YAN's argument that La Posta made a false representation when it indicated it intended to consider and implement SDW's recommendations is not substantively different from the claim that La Posta concealed information that it did not intend to seriously consider and implement SDW's recommendation. The jury's verdict shows it rejected YAN's evidence, and found credible La Posta's contrary evidence that La Posta intended to implement SDW's suggestions and took steps to do so. Given that the evidence and factual theories are conceptually the same, it is not reasonably probable the jury would have found La Posta liable for a concealment, but not an intentional misrepresentation.

We reach a similar conclusion on the negligent misrepresentation theory. YAN argues that if it had “been allowed to try negligent misrepresentation, with its lower standard of scienter, YAN could have asked the jury to give more consideration to the fact that La Posta's Tribal Council represented to YAN what La Posta's casino manager (Mr. Hill) was going to do—consider implementing SDW's recommendations—without having a reasonable ground for believing that Mr. Hill truly intended to consider implementing the recommendations.

The jury answered “No” to the first question whether La Posta made a false statement, *and* “No” to the second question whether La Posta made a representation with knowing falsity or conscious disregard for the truth. The only reasonable conclusion from the first answer is that the jury found that YAN did not meet its burden of proof to show that that La Posta made a false statement. Because a false statement is also a predicate to a negligent misrepresentation claim (see *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792), and YAN's negligent misrepresentation claim was based on the same factual assertions as the intentional misrepresentation claim, the court's refusal to instruct on this negligence theory was not prejudicial. Based on the jury's finding, it

necessarily would have found La Posta was not liable for negligent misrepresentation. [Emphasis in original.]

*La Posta I*, at p. \*8 – 9.

A week prior to the beginning of the jury trial in San Diego, YAN filed its Complaint in the YAN Tribal Court. YAN's Complaint dated May 1, 2015, against La Posta alleged claims for negligent misrepresentation, concealment, and declaratory judgment. After being rebuffed by the California courts and the jury, YAN turned its focus to the Tribal Court action in a second attempt to prove an act of fraud so that YAN could attach the money La Posta receives from the RSTF. The negligent misrepresentation and concealment claims were "based on the same facts alleged in [the California action] (misrepresentation of facts in the October 2009 letter) ...." *La Posta I*, at p. \*6. As characterized by the Tribal Court, YAN's "third cause of action sought a declaration that upon a finding of any act of fraud, the plaintiff may collect the entirety of any judgement based on either an act of negligent misrepresentation or fraudulent concealment as a basis for breach of the" SARLA. See "Status Hearing/ Final Judgement and Order", p. 1.<sup>1</sup> The lawsuit in the Yavapai-Apache Tribal Court was summarized by the California Court of Appeal in a second unpublished opinion:

In the second suit, YAN sued La Posta in YAN Tribal Court. As in the San Diego action, YAN sought to show that La Posta committed an act of fraud in connection with the parties' agreement. But in this case, as relevant here, YAN alleged that La Posta negligently, not intentionally, misrepresented a material fact – a claim it based on largely the same set of facts as its earlier intentional misrepresentation claim. The tribal court ultimately accepted the argument. Without acknowledging the San Diego jury's finding that La Posta did not make any false representation to YAN, the tribal court reached the opposite conclusion after considering the very same testimony that had been presented to the San Diego jury.

*La Posta II*, at p. \*1.

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<sup>1</sup> "Judgment" is the predominant spelling in America and in English legal contexts. We use the original spelling so there is no confusion about which document we are referring to.

On May 21, 2015, La Posta filed a motion to dismiss the second lawsuit filed in the YAN Tribal Court asserting *res judicata* and collateral estoppel. The motion was denied by the YAN Tribal Court on July 30, 2015, finding that negligent representation and concealment were distinct claims that were not foreclosed. Somehow, a second bite at the same legal apple was allowed.

YAN's Tribal Court action proceeded to trial. Judge Anthony Little conducted a two-day bench trial on November 15 and 16, 2016, and heard the same evidence that had been presented to the California jury, supplemented with some testimony from several YAN tribal council members who testified primarily about interactions between YAN and La Posta's tribal council members and employees leading up to reaching agreement on the repayment extension. Over La Posta's objections, YAN presented a crucial piece of testimony from the trial testimony in the San Diego trial of the casino consultant, Mr. Zillioux, by reading his prior testimony into the record.<sup>2</sup> The last post-trial memorandum was due by December 30, 2016. Fourteen months passed with no ruling from Judge Little. On March 1, 2018, YAN's tribal council passed Resolution 21-28 deeming Judge Little "de facto disqualified" from the case.<sup>3</sup> Seven days later, Judge Little issued his decision finding in YAN's favor on the negligent misrepresentation claim and against YAN on the concealment claim. The California Court of Appeal noted in *La Posta II*, at p. \*5, that:

In reaching its decision, the tribal court offered no mention of the court of appeal's decision in *Yavapai-Apache Nation*, even though that court believed the jury's verdict in the San Diego action effectively foreclosed the very same negligent misrepresentation claim that the tribal court ultimately

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<sup>2</sup> La Posta argued that YAN failed to present sufficient facts to show that the witness was not available, and that YAN had made a good faith effort to obtain his attendance as required by Rule 804, Federal Rules of Evidence. In essence, Mr. Zillioux testified that La Posta did little to turn the casino around and made only superficial changes.

<sup>3</sup> We have chosen not to address in detail Resolution 21-28 passed by the Yavapai-Apache tribal council on March 1, 2018, even though the California Court of Appeal has discussed it. See *La Posta II*, at p. \*4. While the resolution was ill-advised, impossible to implement, violative of the YAN Constitution, Article VI, Sec. 11(b), and ignored this Court's ruling in *Datsi v. Yavapai-Apache Tribal Council, et al.*, AP 2016-004 (App. Sept. 8, 2016), there is no evidence in the record whether it had any influence on Judge Little. Therefore, we choose not to speculate about what effect, if any, the resolution had on the ultimate decision of Judge Little.

sanctioned.

Judge Little did not decide YAN's declaratory judgment claim alleged in its Complaint, which led the California court to conclude that Judge Little's decision was not a final judgment thus preventing YAN from attempting to collect its damages from the RSTF. *See La Posta II*, at p. \* 10. ("In sum, no matter our approach for resolving the issue before us, we cannot say that the tribal court's decision is a 'final determination ... by a court of competent jurisdiction.' ")

YAN returned to the YAN Tribal Court and moved for a final order on the declaratory judgment count based on Judge Little's finding that La Posta committed negligent misrepresentation. A hearing on YAN's request was held on January 26, 2023, by Chief Judge Ida Wilber. La Posta's counsel failed to appear for that hearing despite having been given adequate notice of the hearing. Chief Judge Wilber granted the declaratory relief based on Judge Little's finding that La Posta committed negligent misrepresentation. She signed the document titled "Status Hearing/Final Judgement" (hereafter referred to as "Final Judgement") on February 2, 2023. La Posta filed a timely "Notice of Appeal" on February 17, 2023.

For the reasons set forth below, we vacate the "Final Judgement" in its entirety and dismiss YAN's Complaint with prejudice.

### **Final Judgment Issue**

Relying on the same argument rejected by the California Court of Appeal in *La Post II* (see *La Post II*, pp. \* 7 -- 9), YAN contended during oral argument that Judge Little's March 8, 2018, decision titled "Judgment and Order" was a final judgment and, therefore, not subject to review by this Court. Like the California Court of Appeal, we too reject that argument.

Rule 23, YAN's Rules of Civil Procedure, defines a judgment as "any final order of a trial judge made after a trial from which an appeal is available. No special form of judgment is required." Rule 32, Rules of Civil Procedure, titled "Appealable Orders",

provides that “[a]n appeal may be taken to the Yavapai Court of Appeals in accordance with the Appellate Rules of Court[.]” Neither the Rules of Civil Procedure nor the Appellate Rules of Court define the term “final judgment.” The Administrative Order, ¶ 2, adopting YAN’s Rules of Civil Procedure provides, in part, that “[w]here the Civil Code and the Rules of Procedure are silent, the Federal Rules of Civil Procedure shall guide advocates and un-represented parties.” We conclude that YAN’s court rules are silent as to the meaning of “final judgment.” As noted by the California Court of Appeal in *La Posta II*, at p. \* 7:

We also understand that a “judgment” is defined under tribal law as a post-trial order “from which an appeal is available,” as the YAN Tribal Court Rules of Civil Procedure (the Rules of Procedure), which is also part of the record, explain. But we have found nothing in the parties’ offered materials describing the types of orders “from which an appeal is available.” Nor have we found anything in the parties’ materials indicating whether a decision that resolves fewer than all claims in a case should be regarded as a “judgment” or as a final decision of any sort.

Rule 54(b), Federal Rules of Civil Procedure, addresses decisions that do not resolve all alleged claims.<sup>4</sup> We find that Rule 54(b) does not conflict with any YAN court rule and that its provisions complement YAN’s rules. Therefore, we conclude that Rule 54(b) applies to decisions in civil cases in the Tribal Court that (1) did not resolve all claims against all parties pled in the complaint, crossclaim, counterclaim or third-party complaint, and (2) did not end the action. Therefore, even if labeled a “judgment” or “final judgment,” the decision had to contain language from Rule 54(b), Federal Rules of Civil Procedure, showing that the judge expressly determined that “there is no just reason for delay,” for the decision to have constituted a final judgment that is appealable.

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<sup>4</sup> Rule 54 (b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.



Judge Little's decision resolved only two of three counts pled in YAN's Complaint, did not resolve the declaratory judgment claim, and did not end the action. Consequently, we hold that Judge Little's March 8, 2018 "Judgment and Order" was not a final judgment, was not appealable until entry of Judge Wilber's "Final Judgement", which incorporated Judge Little's decision and, therefore, is subject to appellate review by this Court. Judge Wilber's "Final Judgement" was a final judgment because it resolved all claims raised in YAN's Complaint and ended the action at the trial court level.<sup>5</sup>

### ***Res Judicata* (Claim Preclusion) and Collateral Estoppel (Issue Preclusion)**

Prior to the trial in the Tribal Court, La Posta filed a motion to dismiss based upon *res judicata* and collateral estoppel. YAN argued then - - as it does on appeal - - that the claims in the YAN Tribal Court and the San Diego Court are somehow different, despite the California Court of Appeal noting otherwise. As noted above, La Posta's motion was denied.

We conclude that La Posta's motion to dismiss was wrongly decided. We believe that we are bound to review the issues of preclusion under California law because YAN filed its action in California and the SARLA requires application of California law. YAN logically could have based its litigation strategy upon California law and is entitled to its unique application. To be sure, California law on collateral estoppel and *res judicata* is unique.

The California courts of review have addressed the principles of "*res judicata*" and "collateral estoppel" using the "primary right" theory. In *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 896–97, 904, 51 P.3d 297, 301–02, 306-307, 123 Cal.Rptr.2d 432, 437 – 438, 443 – 444 (S.Ct. 2002), the court summarized those concepts and the underlying reasons for them:

"Res judicata" describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same

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<sup>5</sup> Judge Wilber wrote in the "Status Hearing/Final Judgement" that "[t]his is a final judgement pursuant to §207 of the YAN Judicial Code." Judge Little did not include any language in his "Judgment and Order" indicating any degree of finality.

cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, “precludes relitigation of issues argued and decided in prior proceedings.” (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, 272 Cal.Rptr. 767, 795 P.2d 1223.) Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action.

A clear and predictable res judicata doctrine promotes judicial economy. Under this doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date. “ ‘Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief.’ ” (*Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1245, 65 Cal.Rptr.2d 25.) A predictable doctrine of res judicata benefits both the parties and the courts because it “seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration*.” (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 280, p. 820.)

\* \* \*

California's res judicata doctrine is based upon the primary right theory. As we explained in *Crowley v. Kattelman* (1994) 8 Cal.4th 666, 681–682, 34 Cal.Rptr.2d 386, 881 P.2d 1083:

“The primary right theory is a theory of code pleading that has long been followed in California. It provides that a ‘cause of action’ is comprised of a ‘primary right’ of the plaintiff, a corresponding ‘primary duty’ of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.] ...

“As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: ‘Even where there are multiple legal theories upon which

recovery might be predicated, one injury gives rise to only one claim for relief.’ [Citation.] The primary right must also be distinguished from the *remedy* sought: ‘The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.’ [Citation.]

“The primary right theory ... is invoked ... when a plaintiff attempts to divide a primary right and enforce it in two suits. The theory prevents this result by either of two means: (1) if the first suit is still pending when the second is filed, the defendant in the second suit may plead that fact in abatement [citations]; or (2) if the first suit has terminated in a judgment on the merits adverse to the plaintiff, the defendant in the second suit may set up that judgment as a bar under the principles of *res judicata*.”

Applying those concepts to this case, we conclude that YAN’s claims that La Posta made a false representation, either negligently or intentionally, or concealed information to induce YAN into granting the loan extension set forth in the SARLA, violated a single primary right and gave rise to a single cause of action. In *Boeken v. Philip Morris USA, Inc.*, 48 Cal. 4th 788, 813 - 814, 230 P.3d 342 (2010), the court wrote:

In California the phrase ‘cause of action’ is often used indiscriminately ... to mean *counts* which state [according to different legal theories] the same cause of action....” (*Eichler Homes of San Mateo, Inc. v. Superior Court* (1961) 55 Cal.2d 845, 847, 13 Cal.Rptr. 194, 361 P.2d 914.) But for purposes of applying the doctrine of *res judicata*, the phrase “cause of action” has a more precise meaning: **The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced.** (See *Bay Cities Paving & Grading, Inc. v. Lawyers’ Mutual Ins. Co.* (1993) 5 Cal.4th 854, 860, 21 Cal.Rptr.2d 691, 855 P.2d 1263.) As we explained in *Slater v. Blackwood, supra*, 15 Cal.3d at page 795, 126 Cal.Rptr. 225, 543 P.2d 593: “[T]he ‘cause of action’ is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. [Citation.] **Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.** ‘Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different *legal ground* for relief.’ [Citations.]” Thus, under

the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954, 160 Cal.Rptr. 141, 603 P.2d 58.) [Emphasis added.]

YAN claimed in both the California Superior Court case and the YAN Tribal Court case that it suffered both the same damages and same harm stemming from some type of fraud by La Posta. In fact, with very little difference, YAN presented the same evidence in both trials. The similarity in the facts that were presented by YAN at both trials was commented on by the California Court of Appeals as noted above. See, *La Posta II*, p. \* 1. YAN claimed that it would not have granted the loan repayment extension but for a false representation having been either intentionally or negligently made by La Posta, or because La Posta concealed information, regarding La Posta's intentions to consider and implement the recommendations of the casino consultant. YAN alleged that because of that fraud, YAN was damaged. As noted above, the primary cause of action under California law is "based upon the harm suffered," not the particular legal theory alleged by the plaintiff. We conclude that the cause of action raised by YAN in the YAN Tribal Court is identical to that raised in the California Superior Court. Therefore, because the California Superior Court action resulted in a final judgment on the merits in favor of La Posta and against YAN, we find that the Tribal Court action was barred by *res judicata* under California law.

The fact that YAN's theories of recovery for negligent misrepresentation and concealment theories did not go to the jury in the California Superior Court action does not matter for purposes of California's primary right theory as applied to *res judicata*. YAN sought to redress in the California Superior Court the harm it alleged it was caused by La Posta's alleged misrepresentation related to considering and carrying out the recommendations of the casino consultant using the theory of intentional misrepresentation. The court noted in *Villacres v. ABM Industries Inc., et al.*, 189 Cal.App.4th 562, 575 – 576, 117 Cal.Rptr.3d 398, 409 (App. 2011), that:

"Under the doctrine of *res judicata*, a valid, final judgment on the merits is a bar to a subsequent action by parties or their privies on the same cause of

action.... In California, a ‘cause of action’ is defined by the ‘primary right’ theory. ‘The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action.’ ... In particular, the primary right theory provides that a cause of action consists of (1) a primary right possessed by the plaintiff, (2) a corresponding duty devolving upon the defendant, and (3) a delict or wrong done by the defendant which consists of a breach of the primary right.... ‘ “If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it.... The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable....” ’ ” (*Amin v. Khazindar* (2003) 112 Cal.App.4th 582, 589–590, 5 Cal.Rptr.3d 224, citations omitted.)

Certainly, negligent misrepresentation and concealment were related to the subject matter of YAN’s complaint in the California Superior Court and relevant to the issues as shown by YAN’s attempts to have the jury instructed on those theories. Under California law, as noted above, it is not the legal theories that are considered in the *res judicata* analysis, but the harm done. YAN suffered one harm because of La Posta’s alleged misrepresentations or concealment of information. Therefore, all legal theories attempting to redress that harm were merged into the California Superior Court judgment and thereby barred from relitigation in the YAN Tribal Court. In other words, YAN’s cause of action could not be split into two actions – one case in California for intentional misrepresentation and one case in the Tribal Court for negligent misrepresentation and concealment, both of which cases were based on the same harm and both of which were based on the same set of facts. Calling tribal council members as witnesses at the second trial did not give YAN a second primary right to a second lawsuit because, as noted above, “[a] party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable.” Those witnesses acquired their knowledge about La Posta’s representations prior to the California trial and could have been called in that trial if YAN had exercised due diligence.

We also conclude that collateral estoppel applies. Under California law, both *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) may apply; in part,

because California has employed complex - - if not confusing - - rules for both doctrines. See, e.g., Heiser, *California's Unpredictable Res Judicata (Claim Preclusion) Doctrine*, Vol. 35 San Diego, Law Review 559 (1998), Heiser, *California's Confusing Collateral Estoppel (Issue Preclusion) Doctrine*, Vol. 35; San Diego Law Review, 509 (1998). "Under the collateral estoppel aspect of res judicata, a party is barred from raising an issue of fact or law if that issue was actually litigated and determined" in a prior proceeding involving a different cause of action. Heiser, *Issue Preclusion*, at p. 528, 543. As set forth in the California decision, the "issue" affirmatively decided with preclusive effect was the jury's finding that La Posta did not make any false statements, which necessarily resolved the negligent misrepresentation claim based on the same alleged facts. *La Posta I*, at p. \* 2, 4, 6-9. In other words, the specific factual finding by the jury that "no false statement" was made by La Posta precluded any possible claim for fraud because it was a required element for all claims of fraud.

The California Court of Appeal raised doubt about the legal validity of Judge Little's finding on the negligent misrepresentation claim. It wrote:

In reaching its decision, the tribal court offered no mention of the court of appeal's decision in *Yavapai-Apache Nation*, even though that court believed the jury's verdict in the San Diego action effectively foreclosed the very same negligent misrepresentation claim that the tribal court ultimately sanctioned. The court of appeal appeared to predict this potential result in its decision. It wrote: "Questions could arise[. . . as to whether any fraud judgment arising from the Tribal Court proceedings would or should be given effect in the face of the California jury's factual determination (embodied in the current final judgment) that La Posta did not commit fraud."

*La Posta II*, at p. \*17.

Despite the adverse verdict in the California action, YAN attempts to avoid the application of *res judicata* or collateral estoppel by arguing that La Posta waived the right to raise those defenses because La Posta allegedly blocked YAN from having its claims for negligent misrepresentation and concealment adjudicated in the California Superior Court action. Yes, La Posta did object to YAN's motion to instruct the jury on those two legal theories as well as intentional misrepresentation, and that objection was sustained. However, it was because YAN failed to plead sufficient facts to support either of those two

legal theories that the instructions were not given, not because of any action by La Posta. The court in *La Posta I*, at p. \* 8, described YAN's failure as follows:

First, as discussed above, YAN made a very specific offer of proof regarding the alleged fraud it sought to present at the jury trial. In its motion in limine, it identified the alleged fraud as La Posta's statement in its October 2009 letter that it was requesting the payment extension to “allow further time for Casino management to consider implementation of [SDW's findings]” and “at the time the aforementioned representation was made, La Posta did not intend to consider implementing SDW's findings ....” At the hearing on the motion, YAN's counsel confirmed that this was the only factual basis for its fraud claim. On this record, we agree with the court that YAN's claim encompassed only an intentional misrepresentation theory, and did not include concealment or negligent misrepresentation claims. There was nothing in YAN's offer of proof suggesting an alleged concealment or that La Posta negligently (as opposed to intentionally) misrepresented the facts.

The Court finds YAN's reliance on *United Bank & Trust Co. of Calif. V. Hunt*, 1 Cal.2d 340, 34 P.2d 1001 (S.Ct. 1934) to be misplaced. The parties in that case were involved in two lawsuits, one in Butte County and one in Yuba County. The California Supreme Court recognized that “[t]he rule against splitting a cause of action is for the benefit of the defendant and he may waive it or renounce it by agreement with plaintiff.” 34 Cor. Jur. 829.” The Court found that the Butte County case that went to trial “was limited to a single issue of the damages sustained by the Hunts through the loss of the rice crop on the home place.” 1 Cal.2d, p. 345. The Court, at 1 Cal.2d, p. 345, wrote:

We are of the opinion that the bank waived its right to raise the question of res judicata in the Yuba county case by its opposition to the motion to amend the Butte county case to include therein the various causes of action set forth in the Yuba county case, and by opposing a motion to try the two cases together.

The Bank's objections to specific procedural matters requested by the Hunts that, if not objected to by the Bank, would have resulted in all the issues raised in the two lawsuits being tried together, is far different than La Posta's opposition to two sets of jury instructions based on YAN's failure to provide sufficient facts to support the two legal theories. As noted above, it was not La Posta's actions that caused the court not to instruct on the theories of negligent misrepresentation and concealment, but YAN's failure

to set forth sufficient facts to justify those instructions. It was YAN's conduct that caused those theories not to be resolved by the jury and, therefore, we conclude that La Posta did not waive its right to raise the bars of *res judicata* and collateral estoppel in the Tribal Court case.

We have decided to follow the judgments and decisions of the California courts by applying California law with respect to *res judicata* and collateral estoppel. YAN chose the California trial court to bring its suit against La Posta. The SARLA states that California law applies, and the California trial and appellate courts undoubtedly had jurisdiction over the parties and the entirety of their disputes. Applying California law regarding *res judicata* and collateral estoppel is appropriate.

We also vacate the judgment on YAN's concealment claim. We recognize that the judgment on that claim was in favor of La Posta. However, that claim was part and parcel of YAN's one cause of action as defined under California law. Dismissal of the entire Complaint is required, including the concealment claim.

### **Comity**

We are faced with dueling trials with conflicting judgments stemming from the same cause of action in two separate jurisdictions. Accordingly, for contradictory judgments to exist, we would be required to reject comity because the YAN Tribal Court action is clearly barred under California's principles of *res judicata* and collateral estoppel. The unique circumstances of this case - - combined with two appellate court decisions in California that have already applied California law over consensual litigants - - lead this Court to conclude that comity should be applied or, in other words, that the California Court of Appeal's decisions should be accepted as precedent and followed by the Yavapai-Apache Nation courts under the doctrine of comity.

Judge Little does not quite state that a "false statement" was made; however, it is an essential element of the negligent misrepresentation claim and is implied in the judgment and order. Yet, it contradicts the finding of the San Diego jury. The conflict breeds forum shopping, lack of comity, and ultimately disrespect for the law. YAN initially



chose California as the forum to litigate its case. In response to La Posta's declaratory cross-claim directed at shielding its RSTF revenue from attachment for the debt, YAN raised its cause of action based on an alleged misrepresentation. We believe that it is bound by its legal tactics and by its own handling of the fraud claim.<sup>6</sup>

Neither the "full faith and credit clause" of the U.S. Constitution (Art. IV, §4) nor Title 28 U.S.C. §1738 are generally understood to apply to Indian Tribes, but to states and territories of the United States.<sup>7</sup> Comity, however, applies between state court and tribal court decisions. Comity is defined as:

Courtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will...In general, principle of "comity" is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect.

Black's Law Dictionary (5th ed. 1979).

We do not believe that a "tug-of-war" should exist in this case with conflicting results and forum shopping. See, e.g., *Leon v. Numkena*, 142 Ariz. 307, 309 (Ariz. App. 1984) (wife first filed in Hopi Tribal Court; but after losing custody of minor children, she filed a second action in the Arizona State Court for a conflicting award of custody).

Likewise, many tribal courts have recognized state court judgments in appropriate circumstances.... This may lead to an impasse in tribal and state court relations if neither is willing to take the initiative and recognize the others' decrees. The Idaho Supreme Court has even mentioned the

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<sup>6</sup> We also question whether YAN's factual allegations support a cause of action for negligent misrepresentation given the discussion in *La Posta II*, at p. \*12, ending with the quote from *Stockton Mortgage, Inc. v. Tope*, 233 Cal.App.4th 437, 458 (2014) that "Although a false promise to perform in the future can support an *intentional* misrepresentation claim, it does not support a claim for *negligent* misrepresentation."

<sup>7</sup> To be sure, competing arguments exist. See *Leon v. Numkena*, 142 Ariz. 307, 311 (Ariz. App. 1984) (clause does not apply to Tribal Court); *Federal Courts, Tribal Court, and Comity: Developing Trial Judiciaries and Forum Selection*, Vol. 19, Univ. of Ark. L.R., Issue 2, Art. 2 (1997); Arnold, Reckless & Wolf, Center for Court Innovation, *Strategies for Bridging the Divide*, (2011); Vetter, *Of Tribal Courts and "Territories", Is Full Faith and Credit Required?*, Vol. 23, Calif. Western L.R., No. 2, Art. 4 (1987); Note, *Arizona Appellate decisions – Indian Law: The Application of Full Faith and Credit to Indian Nations*, 20 Ariz. L.R. 1064 (1978) (The Note argues that the federal statute should apply); Cohen's Handbook of Federal Indian Law at §7.07[2]9c (Lexis Nexis 2012 ed.).

impasse in resolving itself to recognize tribal court decisions. *Sheppard* [v. *Sheppard*], 655 P. 2d 895, 902 n. 2 [(Idaho 1982)].

Jones, *Tribal Considerations in Comity and Full Faith and Credit Issues*, Vol. 68 North Dakota L.R., No. 3, Art. 4 (1992). “Collateral attacks” on the first judgment are not allowed. *Sheppard*, at 901-02.

The San Diego jury expressly found that no “false” statement by La Posta had been made. The California Court of Appeal found that the finding precluded “negligent representation” as a matter of California law. We find that the decision by the California Court of Appeal is dispositive of the issue - - in addition to the issue of *res judicata* or collateral estoppel. If we were to decide otherwise, we would inevitably invite “forum shopping” and “tug-of-war” litigation, which undermines respect for the rule of law and the California court adjudication - - the forum initially chosen by YAN.

### **The Declaratory Judgment Decision**

We address the declaratory judgment decision briefly only to remind the tribal court judges of the importance of complying with Section 207, YAN Judicial Code, which provides, in relevant part, that:

Each trial final decision of the Tribal Trial Court shall be recorded in writing and include written findings of fact and conclusions of law. The written decision shall provide the date of the decision, the case number, the names of all parties, the substance of the complaint, the relevant facts found by the Court to be true, the Court’s decision, and the conclusions of law supporting the Court’s decision.

We have vacated Judge Little’s decision on YAN’s negligent misrepresentation claim which is the predicate for the ruling in YAN’s favor on its declaratory judgment claim. To grant YAN’s request declaring that it could attach La Posta’s payments from the RSTF, it was necessary to make the legal conclusion that negligent misrepresentation constitutes a form of fraud under California law. La Posta’s failure to appear at the hearing did not relieve the judge from making that determination. Judge Wilber in her “Conclusions of Law” did not make any analysis of California law to inform this court, the California Superior Court or California Court of Appeal as to how she concluded that

negligent misrepresentation is an “act of fraud” under California law. See “Final Judgement”.

YAN contends Section 207 was satisfied by Judge Wilber’s conclusion of law stating:

Petitioner has met the burden of proof by a preponderance of the evidence regarding its Third Cause of Action and is entitled to seek collection for the debt owed by La Posta due to its negligent misrepresentation. This triggers the Nation [sic] ability to collect funds from Revenue Sharing Account Trust Funds (RSTF).

The problem with that contention is that no factual findings based on evidence heard at the status conference are set forth in the “Final Judgement.”<sup>8</sup> An even bigger hole in YAN’s contention is that there are no California cases cited in the “Final Judgement”, which hold that negligent misrepresentation is a form of fraud under California law.

Section 207 requiring findings of fact and conclusions of law is there for an important reason. Reviewing courts and, just as importantly, the litigants are entitled to know the factual and legal basis for a judge’s decision. Without that, the litigants and reviewing courts are left to wonder what evidence the judge found credible and what law the judge applied in making his/her ruling. We again “urge the Nation’s trial judges to make comprehensive and robust findings of fact and conclusions of law addressing all witnesses, exhibits and legal issues when required to do so by Section 207, YAN Judicial Code.” *Gutierrez v. Sanchez*, YAAP 22-01 (App. Jan. 31, 2023).

Therefore, the judgment on the declaratory judgment claim is vacated not only because the predicate finding, the negligent representation decision, is vacated, but also because there was no legal basis given for the ruling as required by the Nation’s judicial rules.

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<sup>8</sup> There is no mention of any witnesses being present or of any evidence being heard at the Status Conference other than judicial notice being taken of “Exhibits 1 – 7 admitted during the trial with Judge Anthony Little.” During oral argument, La Posta questioned whether it would be a denial of due process for a judge who did not personally hear the witnesses to make credibility determination necessary in determining whether a party met its burden of proof. We need not decide that issue because we have vacated the judgment on the declaratory judgment claim for other reasons.

## Conclusion

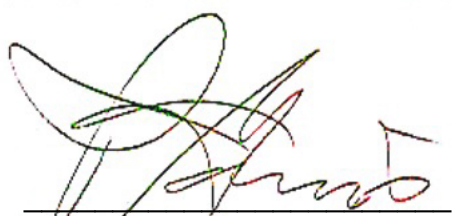
For the reasons stated above, the “Final Judgement” dated February 2, 2023, is vacated and YAN’s Complaint is dismissed with prejudice.

The Court deems moot all other issues raised by the parties on appeal as well as all pending and unresolved motions.


Dated this 12th day of December, 2023.



Associate Justice John Trebon



Associate Justice Rodolfo Garcia



Associate Justice Gary E. Donahoe

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