



**SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY
COURT OF APPEALS**

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SALT RIVER TRIBAL COURT
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MB

STEVEN PANZULLO,

Appellant,

-v-

SALT RIVER GAMING ENTERPRISE ET AL.,

Appellees.

Case No.: APC-22-0001

(C-20-0118)

OPINION AND ORDER

Before, DWORKIN, BENDER, AND AUSTIN, Justices of the SRPMIC Court of Appeals.

An appeal from the SRPMIC Community Court concerning Case No.: APC-22-0001, the Honorable Judge Todd R. Matha presiding.

Dominic Gomez, Taylor & Gomez LLP, for the Appellant.

Dawn Lomahaftewa, SRP-MIC Office of General Counsel, for the Appellees.

OPINION DELIVERED BY JUSTICE AUSTIN, JOINED BY JUSTICE DWORKIN.

This is an appeal from the Community Court's Order, dated January 12, 2022, granting summary judgment in favor of the Appellees. Appellant raises seven issues for this Court to consider on appeal, most of which claim error on the part of the Community Court. Indeed, the Community Court's Order takes center stage in this appeal, but the main act could not have been possible without supporting actors. The Parties should share in the spotlight as they submitted pleadings which contain their own set of issues. On the one hand, Appellant initiated a tort action with a complaint that did not clearly state the claims that he was bringing, nor the damages associated with each claim. On the other hand, Appellees filed a motion for summary judgment that ignored the legal standard set forth in Rule 5-23.7 and submitted affidavits from witnesses that were not disclosed to the Appellant during discovery. The Parties' performances contributed to the Community Court issuing an Order that erroneously granted summary judgment in favor of the

Appellees. This tale of tragedies prompts this Court to clarify the rules governing summary judgment and establish a legal standard to prevent future cases from going off script. The Community Court's Order is reversed and vacated.

I.

On March 16, 2018, Appellant Steven Panzullo and his acquaintance Steven Salamone were at Talking Stick Resort. While there, a casino employee named Raceal Deleon overheard the two talking about Salamone being in possession of a gun. Deleon reported what he heard to Debbie Salcido, the security shift supervisor for the casino. Casino security personnel approached Panzullo and Salamone and questioned them about the gun. Parties dispute what transpired during the interaction between casino security, Panzullo, and Salamone. Regardless, the Salt River Police Department ("SRPD") was called to intervene in the matter.

Appellees allege that when the police officers arrived, Panzullo and Salamone were escorted to the casino security offices and put into separate holding cells. While detained, police officers questioned Panzullo and Salamone. Panzullo alleges that during his detainment he was forcibly put against a wall, had his phone ripped from his hands, subjected to a full body search, and placed in handcuffs in an aggressive manner. He alleges further that he sustained injury to his hand, thumb, and wrist. No gun was found on either Panzullo or Salamone. Eventually, they were released and escorted to the entrance of the casino. No charges were filed against the individuals.

After the incident, Panzullo retained Dominic Gomez, an Arizona licensed attorney, to assist with filing a tort claim against Appellees. Under the Gaming Compact between the Salt River Pima-Maricopa Indian Community ("Community") and the State of Arizona, the Community is required to "establish written procedures for the disposition of tort claims arising from personal injury or property damage alleged to have been suffered by patrons and invitees" of the

Community's gaming facilities such as Talking Stick Resort.¹ Moreover, the Community is required to maintain an insurance policy of at least \$2,000,000 for tort claims, and neither the insurer nor the Community may invoke sovereign immunity up to the policy limits in tort actions.²

Accordingly, Panzullo, through his attorney Mr. Gomez, filed a tort claim with Tribal First, the insurer for Talking Stick Resort, under the Community's *Tort Claim Processing Procedure*.³ On September 17, 2018, Tribal First issued a letter to Panzullo which indicated that its investigation did not find any negligence or liability on behalf of Talking Stick Resort. The letter further stated that Panzullo may pursue his claim in the Community Court if he disagreed with the findings.

Subsequently, on March 16, 2020, Panzullo filed a Civil Complaint against Appellees on alleging, what appears to be, multiple and various tort claims but no specific amount of damages. Mr. Gomez was not able to represent Panzullo because under the SRPMIC Code of Ordinances, "Professional attorneys [are] not permitted to practice before the court in civil matters" other than eminent domain cases.⁴ Panzullo was therefore required to retain a lay advocate to represent him before the Community Court.

On May 7, 2020, Appellees moved to dismiss the Civil Complaint under Rule 5-14.2 of the Rules of Civil Procedure for failing to state a claim upon which relief can be granted. In their motion, Appellees argued that the incident involving Panzullo was handled solely by the SRPD, and Appellees were not a "superior" of the SRPD. Therefore, Appellees "did not owe a duty for safety over" Panzullo, and thus there could be no breach of duty to him. The Community Court denied the motion, finding that the Civil Complaint met the necessary elements to assert a cause of

¹ *State of Arizona Amended and Restated Gaming Compact*, Section 13(c).

² *Id.* at Section 13(d).

³ Adopted by Community Resolution SR-2024-2000.

⁴ SRPMIC Code of Ordinances, Section 4-4.

action under Rule 5-11 of the Rules of Civil Procedure. The Community Court also took notice of Rule 5-15.2(c)(3) which advise courts not to dismiss actions “based on major and minor concerns” in the pleadings. The Community Court reasoned that its decision was in accordance with the Community’s recognized principle of doing “substantial justice.” Rule 5-15.2(c).

On August 2, 2021, the Community Court issued a Scheduling Order which set deadlines for discovery and ordered the Parties to submit final witness lists by October 1, 2021. Trial was set for October 18, 2021 but was later continued to December 7, 2021. On November 30, 2021, Panzullo moved to continue the trial, and with no objection from Appellees, the Community Court pushed the trial back to January 31, 2021.

On December 1, 2021, Appellees filed a motion titled, “Defendant Salt River Pima-Maricopa Indian Community’s Motion for a Summary Judgment to Dismiss Plaintiff’s Civil Complaint.” The motion indicated in the caption that it was being filed “Pursuant to SRPMIC Rules of Civil Procedure Rule 5-14.2” which governs answers to complaints and motions to dismiss. Additionally, the first paragraph stated that the Appellees were moving for “Summary Judgment to dismiss Plaintiff’s Civil Complaint” pursuant to Rule 5-23.7 which governs motions for summary judgment.

The motion contained a heading titled, “Motion to Dismiss or Motion for Summary Judgment.” However, the motion did not set forth any legal standards that would support a motion to dismiss or a motion for summary judgment. In fact, the relevant rule—Rule 5-23.7(b) which pertains to summary judgment for the defending party—was completely left out of the motion. The motion presented the same arguments in Appellees’ first motion to dismiss, namely that the Appellees were not a superior of the SRPD and not involved in the investigation of Panzullo. In addition, the motion made mention of sovereign immunity; however, it is difficult to discern whether Appellees were raising sovereign immunity as a defense. The motion merely stated, “The

Community, its' [sic] departments, employees and enterprises possess sovereign immunity. However, there is a limited waiver of [sic] for tort claims for incidences occurring at the casino."

Attached to the motion were exhibits and affidavits from witnesses not previously disclosed to Panzullo. Consequently, in his response to the motion, Panzullo objected to the use of the affidavits and exhibits on grounds that they were not submitted in good faith because they were not disclosed before the discovery deadline set forth in the Community Court's Scheduling Order. Like Appellees, Panzullo failed to cite to any rules or set forth any legal standards that would justify denying a dismissal or summary judgment. On January 12, 2022, the Community Court granted summary judgment in favor of Appellees.

The Community Court's Order Granting Summary Judgment was based primarily on three findings: (1) Panzullo was not able to demonstrate "the presence of a genuine factual dispute relating to whether an employee, agent, or principle" of Talking Stick Resort caused his alleged injuries; (2) Panzullo was not able to present "a persuasive legal argument that a business entity is responsible for a tort arising from a customer's physical injury allegedly committed by local law enforcement"; and (3) Talking Stick Resort did not confer any duty or responsibility upon the SRPD during the police investigation. This appeal followed.

II.

Appellant presents seven arguments on appeal which are consolidated into the following issues:

1. Whether the Community Court conducted the proper legal analysis in determining Appellees' motion for summary judgment;
2. Whether a party may support a motion for summary judgment using affidavits from witnesses not previously disclosed to the other party; and
3. Whether Appellant should have been able to use his state-licensed attorney Dominic Gomez to represent him before the Community Court.

Rule 12(c)(6) of the Rules of Civil Appellate Procedure requires parties on appeal to identify the

standard of review for each issue presented. There are four standards of review: *de novo*, abuse of discretion, clearly erroneous, and substantial evidence.⁵ *De novo* means “to review anew or afresh. . . . as if the [Court of Appeals] was sitting as the trial court.”⁶ Questions of statutory interpretation, jurisdiction, and law are reviewed under the *de novo* standard.

The issues presented in this case involve questions of law. Therefore, we review each one in turn and *de novo* with no deference given to the Community Court’s decision. *In the Matter of N.A.F., Fragua v. Antone*, APJ-19-0002 (“Under the *de novo* standard of review, this Court affords no deference to the lower court’s determination and reviews the case on the same standard applied by the trial court.”).

III.

The first issue is whether the Community Court conducted the proper legal analysis in determining Appellees’ motion for summary judgment. We hold that the Community Court did not.

This Court has never been called upon to interpret the rule governing motions for summary judgment. Accordingly, this is a case of first impression. Rule 5-23.7 of the SRPMIC Rules of Civil Procedure permits both claimants and defending parties to move for summary judgment at any time with or without supporting affidavits. Rule 5-23.7(a)-(b). The Rule states that “if the pleadings, depositions, answers to questions and admissions, together with affidavits, if any, show that there is no genuine issue as to any material (relevant, important and/or necessary) fact,” then the Community Court shall grant summary judgment in favor of the moving party. Rule 5-23.7(d). The Community Court may grant summary judgment “as to all or any part of a claim.” Rule 5-23.7(b), (e).

A party who moves for summary judgment must show that it is “entitled to judgment as a matter of law.” For a claimant, this means that it must show that there is no genuine dispute as to

⁵ Rules Committee Note to Rule 12(c)(6), Rule of Civil Appellate Procedure, Appendix.

⁶ *Id.*

any material fact and all of the elements of the asserted claim are met. Material facts are those that are relevant, important, and necessary to prove the elements of a claim. For a defending party to prevail on a motion for summary judgment, it must show that there is no genuine dispute as to any material fact and at least one of the elements of the asserted claim cannot be met. To survive summary judgment, the non-moving party must show that a genuine dispute does indeed exist as to any material fact which justifies the case proceeding to trial.

In this case, Appellant is appealing the Community Court's Order Granting Summary Judgment in favor of Appellees. While we review the Community Court's application and interpretation of the rule pertaining to summary judgment, we also note the confusing nature of Appellees' motion. Appellees filed a motion titled, "Defendant Salt River Pima-Maricopa Indian Community's Motion for a Summary Judgment to Dismiss Plaintiff's Civil Complaint." The title seemed to suggest that Appellees were moving for both summary judgment and a dismissal. In the case caption, it stated that the motion was being brought "Pursuant to SRPMIC Rules of Civil Procedure Rule 5-14.2" which governs answers and motions to dismiss. Then, in the first paragraph of the motion, Appellees stated that they were moving the Community Court "for a summary judgment to dismiss Plaintiff's Civil Complaint . . . pursuant to SRPMIC Civil Procedure Rule 5-23.7."

To start, a motion for summary judgment is not the same as a motion to dismiss. They are governed by different rules and legal standards. Appellees asked the Community Court to grant "summary judgment to dismiss Plaintiff's Civil Complaint." However, a grant of summary judgment means that the moving party is "entitled to judgment as a matter of law." It is therefore a judgment on the claims, not a dismissal. While a party may move for summary judgment, or in the alternative, a dismissal, this was not an option for Appellees. Their motion contained facts and arguments that they presented in a prior motion to dismiss which was denied by the Community

Court. The law of the case doctrine foreclosed Appellees from requesting a dismissal on the same grounds that the Community Court previously ruled on. As a result, their motion could only be for summary judgment. Though this was not part of the Community Court's Order, we find that it is important to recognize the effect of the law of the case doctrine and the finality of prior rulings.

In assessing Appellees' motion, the Community Court cited to Rule 5-23.7(d), which governs motions for summary judgment brought by a defending party. The Community Court stated that the burden is on the moving party to "show that there is no genuine issue as to any material" fact and there is "an absence of evidence to support an essential element of the nonmoving party's claim." The Community Court made the following findings and granted summary judgment in favor of the Appellees: (1) Appellant was not able to demonstrate "the presence of a genuine factual dispute relating to whether an employee, agent, or principle" of Talking Stick Resort caused his alleged injuries; (2) Appellant was not able to present "a persuasive legal argument that a business entity is responsible for a tort arising from a customer's physical injury allegedly committed by local law enforcement"; and (3) Talking Stick Resort did not confer any duty or responsibility upon the SRPD during the police investigation. We are not reviewing the Community Court's findings in this appeal. Rather, our focus is on the proper application of Rule 5-23.7 and the relevant legal standard.

Determining whether summary judgment is appropriate in an action depends on the claims asserted. Accordingly, it is imperative that the complaint clearly state the complainant's claims, the elements of each claim, and the relief requested.⁷ In reviewing Appellant's Civil Complaint, it was

⁷ In fact, this is required by Rule 5-11(b). That Rule requires complaints to contain: (1) a short and plain statement of the Court's jurisdiction; (2) a short and plain statement of the claim showing that the plaintiff is entitled to relief; and (3) a demand for relief.

difficult to ascertain what claims were being asserted.⁸ Throughout the Civil Complaint, Appellant mentions various legal terms, in no particular order, some relating to intent and causation, some being claims, and others being elements to different claims. For instance, section XXX of the Civil Complaint states: "Defendant Salt River Gaming and its employees, agents, principals, etc. unreasonably, negligently, recklessly, etc. breached their duties of care owed to Plaintiff and allowed Plaintiff to be falsely harassed, arrested, imprisoned, slandered, libeled, assaulted, and battered." The next section, XXXI, states: "Defendant Salt River Gaming and its employees, agents, principals, etc.'s actions, unreasonableness, negligence, gross negligence, and/or recklessness are the direct and proximate cause of the incident and Plaintiff's damages; as a result, Plaintiff suffered significant harm and damages." These statements undoubtedly leave the Court and Appellees guessing which claims are being asserted by Appellant.

It would appear from the face of the Civil Complaint that Appellant is alleging claims of harassment, false arrest, unlawful imprisonment, slander, libel, assault, battery, and negligence. However, in Appellees' Motion for a Summary Judgment to Dismiss Plaintiff's Civil Complaint, they never state which claims they are moving for summary judgment on or whether they are moving for summary judgment as to some or all of the claims asserted by Appellant.

As previously stated, the burden is on the moving party to show that it is entitled to judgment as a matter of law. For defending parties, this means that they must show that there is no

⁸ In addition, Appellant did not request a specific amount of damages for each claim. In tort actions against the Community's gaming facilities, claimants should include a specific amount of damages for each or all of their claims. This is because under section 13(d) of the gaming compact between the State of Arizona and the Community, the Community agrees that neither its insurer nor the gaming facility may invoke sovereignty immunity up to the limits of the Community's insurance policy. Therefore, if the Community carries general liability insurance for personal injury or property damage with a single limit of \$2,000,000 per occurrence and in the aggregate, the insurer and the gaming facility cannot claim sovereign immunity in a tort action where the claimant is requesting a total of \$2,000,000 or less in damages. If the claimant requests damages above \$2,000,000, then the insurer and/or the gaming facility may invoke sovereign immunity for the amount over \$2,000,000. In Appellant's response to Appellees' motion for summary judgment, he argues that the Appellees are precluded from invoking sovereign immunity under the Gaming Compact. However, Appellant did not specify the amount of damages he was requesting in his Civil Complaint. Therefore, his argument may or may not be true.

genuine dispute as to any material fact and at least one element of the claim asserted cannot be met. This requires the moving party to identify in their motion which claims they are requesting summary judgment for and the elements of each claim.⁹ Appellees failed to do so and therefore failed to meet their burden. Consequently, the Community Court's Order Granting Summary Judgment in favor of Appellees is reversed and vacated.

IV.

The second issue is whether a party may support a motion for summary judgment using affidavits from witnesses not previously disclosed to the other party. We hold that under the common law of the Community a party is not permitted to use affidavits from witnesses not previously disclosed to the other party to support a motion for summary judgment.

Rule 5-23.7(b) allows defending parties to move for summary judgment at any time "with or without supporting affidavits." If a party submits affidavits along with its motion for summary judgment, Rule 5-23.7(f) requires the affidavits to: (1) be made on personal knowledge; (2) set forth specific facts as would be admissible in evidence; and (3) show affirmatively that the affiant is competent to testify to the matters stated. Affidavits shall not be submitted in bad faith or for the purpose of delay. Rule 5-23.7(f). Moreover, the Community Court may deny the motion for summary judgment, allow more time for further discovery, or permit additional affidavits when the moving party's affidavits are insufficient. Rule 5-23.7(g).

In moving for summary judgment, Appellees submitted affidavits from two individuals — Jonathan Gann and Bruce Tunniff — whose names were not disclosed to Appellant before the close of discovery and not listed in Appellees' final witness list.¹⁰ Appellant thus objected to the

⁹ Rule 5-23.7(b) permits the movant to request for summary judgment "as to all or any part of a claim." In addition, the movant may request for summary judgment on all, or any number of the claims asserted.

¹⁰ Under the Community Court's Scheduling Order, dated August 2, 2021, the Parties were ordered to submit final witness lists on or before October 1, 2021.

affidavits and moved to strike them from the Community Court's consideration. The Community Court denied Appellant's motion to strike, reasoning that Rule 5-23.7 "does not require that an affiant appear on a movant's" final witness list.

The Community Court is correct that Rule 5-23.7 does not require affiants to be listed in a movant's final witness list. However, the Community Court's Scheduling Order was clear in that final witness lists were due on or before October 1, 2021. Despite being aware of the Scheduling Order, Appellees submitted their disclosure statement and final witness list forty-one calendar days after the October 1st deadline.¹¹ Jonathan Gann and Bruce Tunniff were not listed in the final witness list, so they most likely would not have been able to offer testimony at the trial under Rule 5-18.1(c).¹² Nonetheless, the Community Court ruled that Appellees could use affidavits containing testimony by Jonathan Gann and Bruce Tunniff to support their motion for summary judgment.

If this Court were to uphold the ruling of the Community Court on this issue, then we run the risk of setting a precedent where any party can file a motion for summary judgment and use undisclosed evidence that would not be admissible at trial. For parties who run afoul of discovery deadlines or neglect to disclose evidence, this presents an opportunity for them to have their case resolved using evidence deemed inadmissible at trial. It is a way for a party to avoid trial where he or she may be at a disadvantage due to the inability to use inadmissible evidence. Additionally, it undermines the purpose of discovery rules. At oral arguments, when counsel for Appellees was asked about the type of precedent that this might set, she agreed that it would not be a good precedent.

Both Parties acknowledge that there is an element of unfairness when a party uses

¹¹ The Community Court made mention of Appellees' late filings in footnote 6 of its Order.

¹² Under Rule 5-18.1(c), undisclosed witnesses or evidence may not be admissible at any further proceeding or trial.

undisclosed evidence to support a motion for summary judgment. Yet, the Community Court permitted it. In its Order Granting Summary Judgment in favor of Appellees, the Community Court cited to cases from foreign jurisdictions which allow such practices.¹³ When there is no Community ordinances and case law on point, before relying on the laws of foreign jurisdictions, the Community Court should consider recognizing and using the common law as instructed by Section 4-1(b) of the SRPMIC Code of Ordinances.

Section 4-1(b) states that the Community's courts "shall determine [] cases upon the customary law of the Community as may be augmented by the common law [] in order to do substantial justice to the parties in the dispute." Section 5-1 clarifies that the "law of the Community," which consists of the Community's ordinances and common law, "shall be controlling." Indeed, the Community's courts are permitted to use procedural rules from the federal courts "to fashion a remedy," but it is within the discretion of the court. Finally, in determining issues of law, the Community's courts may use as a resource, cases decided by other Indian tribes, the United States, and the several states and territories of the United States. In resolving disputes for which there is no specific ordinance that governs, the Community Court should first ask whether there is a common law principle that can be used in the case. Only then should the Community Court consider cases from other tribal courts and cases from state and federal courts. In applying the law of any foreign jurisdiction, the Community Court should consider whether the underlying legal principle and remedy conform to the Community's concept of substantial justice.

Oliver Wendell Holmes, Jr., the author of the Common Law, once said, "The life of the law has not been through logic but experience." Justice Holmes is correct in that the common law does not derive from logic, but rather, it is born from the experiences of the people it governs. The

¹³ The Community Court's Order contains footnotes which cite to a multitude of state and federal cases that address various legal issues raised in the case.

common law comes from the interactions between people in the Community. It may not be written, but it lives in the hearts and minds of the people of the Community. It survives through the Community's customs, traditions, and way of life.

Where there is a common understanding between people, then most likely there is a common law principle. In this case, both Parties admit that the use of undisclosed evidence to support summary judgment is unfair. We agree. Allowing this kind of practice undermines the purpose of discovery rules and grants the moving party an opportunity to prevail in a case that might otherwise be lost at trial. This is not substantial justice, and if a party cannot obtain substantial justice in a court of law, then the people lose faith in their judicial system, and they lose respect for the rule of law.

It is one of the roles and duties of this Court to set legal standards, interpret the rules, and provide direction to the Community's trial courts. In this instance we were able to acknowledge the role of the common law in resolving disputes before the Community's courts.

V.

The third issue is whether Appellant should have been able to use his state-licensed attorney Dominic Gomez to represent him before the Community Court. Our decisions on the first two issues are sufficient to resolve this appeal. Accordingly, we do not need to reach the third issue.

The Community Court's Order is reversed and vacated. This case is remanded to the Community Court for proceedings consistent with this Opinion.

SO ORDERED this 17th day of August, 2022.

Electronically approved 8/17/2022

/s/

Joseph Austin, **Justice**

Electronically approved 8/15/2022

/s/

Judith Dworkin, **Justice**

CONCURRENCE BY JUSTICE BENDER

Although I do not join my colleagues' thorough and thoughtful opinion, I concur in their decision to vacate the Summary Judgment in this case and to remand the case to the Community Court for further proceedings. The Community Court appears to have held that, in order to recover for his alleged injuries, Plaintiff would have to prove that the Talking Stick Resort Police, as distinguished from the Salt River Community Police, conducted the detention, interrogation and search that allegedly caused injury to him. That holding, I believe, was incorrect. Even if Plaintiff cannot prove that the Resort's Police directly participated in his arrest, interrogation and search, but that those actions were carried out entirely by the Salt River Community Police, Plaintiff may, in my view, nevertheless be entitled to recover damages from Salt River Gaming Enterprises if he can prove that Resort Police acted negligently in giving Salt River Police information that caused the Salt River Police to believe that Plaintiff was in possession of a gun, when he was not, and to act upon that belief. If Plaintiff can prove that Resort Police gave Salt River Police incorrect information indicating that Plaintiff was in possession of a gun, without themselves having sought to confirm the accuracy of that information or having warned Salt River Police that the information was unverified hearsay, I believe that a jury might reasonably conclude that Resort Police negligently injured Plaintiff by telling Salt River Police that Plaintiff might have a gun when he did not, in fact, have a gun, and when there was insufficient basis for either police department, without further investigation, to detain and search Plaintiff on suspicion of having a gun.

The Summary Judgment should be vacated, and the case remanded for further proceedings, because Plaintiff is entitled to an opportunity at trial to show that one or more members of the Talking Stick Resort Police acted negligently by informing the Salt River Police that there was reason to believe that Plaintiff was in possession of a gun on Casino property without either determining themselves that there was reason to believe that Plaintiff had a gun or making clear to

the Salt River Police that Casino Police had themselves made no investigation or determination of whether Plaintiff had a gun.



Electronically approved 8/17/2022

/s/

Paul Bender, Justice

Electronically signed this 17th day of August, 2022