In the Court Of Appeals
State of Arizona
Division One

CHRISTOPHER COOK and LEIDRA COOK, Plaintiffs/Appellants, vs. AVÍ CASINO ENTERPRISE, INC., a corporation; IAN DODD; JUAN MEJIA; STEPHANIE SHAIK; DEBRA PURBAUGH, Defendants/Appellees.	1 CA-CV 07-0110 Mohave County Superior Court No. CV 2005-0646

APPELLEES' ANSWERING BRIEF

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STATEMENT OF THE CASE

This is a dram-shop action filed by plaintiffs Christopher Cook ("Cook") and Leidra Cook for injuries received by Cook in a vehicular accident. The defendants include Aví Casino Enterprise, Inc., a corporation of the Fort Mojave Indian Tribe (the "Tribe"), operating an Indian casino on a portion of the Tribe's reservation (the "Reservation") within Nevada. The defendants also include individual Tribal employees Ian Dodd, Juan Mejia, Stephanie Shaik, and Debra Purbaugh, as well as the driver that caused the accident, Andrea Christensen. Although a defendant below, Christensen is not a party to this appeal. Item 1.[1]

Plaintiffs originally filed suit regarding the accident in the United States District Court for the District of Arizona (the "District Court") on May 24, 2004, but the claims against the Tribal defendants were dismissed for lack of diversity of citizenship jurisdiction and sovereign immunity.[2] Item 18. While the District Court action was pending, plaintiffs Cook filed this action against the same parties in Mohave County Superior Court on May 23, 2005. Item 1. The Honorable

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

[2] The District Court dismissed defendants Aví Casino Enterprise, Inc., Juan Mejia, and Stephanie Shaik by written Order dated March 9, 2006, on the basis of lack of diversity. Item 18, Exhibit A. The remaining Tribal defendants (Ian Dodd and Debra Purbaugh) were subsequently dismissed on the basis of sovereign immunity.

James E. Chavez granted the defendants-appellees' motion to dismiss on the basis of sovereign immunity and lack of personal jurisdiction by minute entry dated September 26, 2006. Item 28. Plaintiffs filed a Notice of Appeal on October 6, 2006, although the final judgment was not entered until October 18, 2006. Items 29, 33.

STATEMENT OF FACTS

◆ Introduction

The plaintiffs provide an exhausting list of "facts relevant to issues presented for review," which are then reiterated *in toto* in the body of the brief, but which have no bearing on the dispositive issues of sovereign immunity and lack of jurisdiction over the Tribal defendants. While accepting the exaggerated allegations in the Complaint as true, there are still numerous statements of "fact" that were not alleged in the Complaint and which are simply untrue.

Whether plaintiffs have legitimate claims or not, the central issue for purposes of the underlying motion in this appeal is whether plaintiffs can bring those claims against these defendants in the Superior Court of Arizona. Plaintiffs chose not to sue in Nevada where the portion of the Reservation in which the casino is situated is located, and where the Tribe has a gaming compact, because Nevada has no dram shop law. Plaintiffs chose not to sue in California, where the

plaintiffs and some of the individual defendants reside, and where the seat of government for the Tribe is located, because California has no dram shop law. Plaintiffs also chose not to sue in the Tribal court, although they contend that there is dram shop liability under tribal law, because plaintiffs knew sovereign immunity would bar any such claim. Thus, Plaintiffs chose to file suit, first in federal court, then in state court, in Arizona attempting to take advantage of Arizona's dram shop law and with the misguided belief that sovereign immunity would not apply. Hence, the relevant factual examination for the issues before this court are the facts related to sovereign immunity and jurisdiction. Plaintiffs' counsel has taken unsupported liberties in that regard.

◆ **The Accident**

For purposes of the motion in the trial court below, and for this appeal, the facts regarding the car/motorcycle accident are conceded and, while of consequence to Cook's injuries, are largely irrelevant to the dispositive issues. Cook lives in California. He works in California. Item 1, ¶¶ 2, 10. He was returning to California on his motorcycle from visiting his mother-in-law in Bullhead City, Arizona during the early morning hours of May 25, 2003, when the accident occurred. *Id.* ¶¶ 11-12. Plaintiffs allege that defendant Christensen left the Aví Casino intoxicated and used a casino shuttle bus to get to her personal car

to drive home. While driving along Aztec Road, Christensen crossed the center line and collided with Cook on his motorcycle, causing him serious, permanent injuries. Item 1.

◆ **Jurisdictional Facts**

Appellants' Opening Brief ignores Reservation boundaries to give the mistaken impression that certain acts occurred in the State of Arizona. The Tribe's Reservation straddles three states: California, Nevada, and Arizona. As plaintiffs' Complaint acknowledges, the Aví Resort & Casino itself "is located a few hundred yards on the Nevada side of the Nevada-Arizona border." Item 1, ¶ 14. As noted in the corporate articles (Sixth Article), the casino's gaming compact is not with Arizona, but with Nevada.[3] Item 20, Exhibit 2; Item 24, Exhibit B. If Christensen

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[3] Among the glaring misrepresentations made by plaintiffs' counsel to the trial court, and unabashedly repeated on appeal, is the contention that Aví Casino Enterprise (the Tribal corporation operating the Aví Resort & Casino) has a separate gaming compact with the State of Arizona and that it owns and operates the Spirit Mountain Casino in Mohave County, Arizona. *See* Appellants Opening Brief at 8-9 & 27-28. Spirit Mountain Casino and Aví Resort & Casino are different casinos in different Reservation locations. Even the plaintiffs' anecdotal documentation of the business operations of the Spirit Mountain Casino show that their representation is not true. Item 20, Exhibits 7-11. The Spirit Mountain Casino is owned and operated by the Tribe, not Aví Casino Enterprise. *Id.* It was the Tribe that entered the intergovernmental gaming compact with the State of Arizona and which has been operating the Spirit Mountain Casino since 1995. *Id.* Likewise, to the extent the Tribe agreed to pay part of its gaming revenue to Arizona, it has nothing to do with the operations of Aví Casino Enterprise or the Aví Resort & Casino located on the Reservation within Nevada.

was overserved alcohol, that occurred on a portion of the Reservation within Nevada.

Plaintiffs' counsel repeatedly tries to give the impression in the opening brief (for examples, at 4-5, 7-8) that the accident occurred in Arizona. In their Complaint, plaintiffs described the Reservation as being "69% . . . located within the state of Arizona." Item 1 ¶ 3. The Reservation itself is not Arizona, although it may be surrounded by it. Plaintiffs' Complaint acknowledged that the accident actually occurred on the Reservation. "His route of travel traversed a part of the Fort Mojave Indian Reservation, along Aztec Road, within Mohave County, Arizona." *Id.* ¶ 12.[4] Thereafter, plaintiffs merely describe the events as occurring on Aztec Road, or in Mohave County, or in Arizona, and omit that the location is on the Reservation.

Plaintiffs' counsel makes reference in the opening brief (at 2, 27) to the defendant corporation having been incorporated by execution of articles in Arizona, apparently referring to the geographical location where someone merely signed/notarized a document. Aví Casino Enterprise, Inc. is **not** an Arizona

[4] The accident occurred one mile east of Veteran's Bridge, entirely within the boundaries of the Fort Mojave Indian Reservation. Item 18.

corporation.[5] As conceded by plaintiffs' Complaint (Item 1 ¶ 3), Aví Casino Enterprise, Inc. was "incorporated under the code of the Fort Mojave Indian Tribe." This is further borne out by its articles of incorporation (Item 20, Exhibit 2; Item 24, Exhibit B), certified by the Tribal Council of the Fort Mojave Indian Reservation, and stating that it was incorporated "pursuant to the Fort Mojave Business Corporation Ordinance." This is also confirmed in the corporation bylaws. Item 24, Exhibit A.

Plaintiffs' opening brief (at 2, 10, 19) also attempts to portray Aví Casino Enterprise as not entitled to assert the Tribe's sovereign immunity because it is a corporate entity. Instead, plaintiffs attempt to distinguish the casino-owning enterprise from the Tribe. As already noted, the defendant corporation was formed under Tribal law. The Fourth Article of the corporate articles clearly states: "This corporation shall be owned by the Fort Mojave Indian Tribe." Item 20, Exhibit 2. That article further states that the corporation has no stock and that "[t]he members of the Fort Mojave Tribal Council, on behalf of and for the benefit of the Fort Mojave Indian Tribe, shall perform the customary functions of shareholder." *Id.* The Fifth Article provides that the Tribal Council shall select the corporate

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[5] Regardless of where someone may have been when their signature was notarized, under Tribal law the corporation was created by filing its articles at the Tribal Headquarters located on the Reservation near Needles, California. *See* Item 18, Exhibit A.

The trial court recognized that this is a tragic case, but concluded that the Aví Resort & Casino and the accident location are all on the Reservation of the Tribe and that Aví Casino Enterprise is wholly-owned by the Tribe, meaning that the tribal entity and its employees all have sovereign immunity.

> This is a tragic case. Plaintiff Christopher Cook was severely injured by an intoxicated driver, Defendant Christensen. Plaintiff alleges Christensen, an employee of Aví Casino, consumed excessive amounts of alcohol at the Aví Casino after working her shift. She then drove from the casino located in Nevada to the Arizona side of the Colorado River where the accident occurred.
>
> The Aví Casino and the accident location are all on the reservation of the Fort Mohave [sic] Indian Tribe. Aví Casino Enterprises is a corporation wholly owned by the Fort Mohave [sic] Tribe.
>
> After review of the pleadings and arguments of Counsel, the Court finds that Aví Casino Enterprises and its' employees are entitled to sovereign immunity. The Court further finds that this Court lacks personal jurisdiction of the [Tribal defendants].

Item 28. The trial court correctly ruled that the Complaint against the Tribal/casino defendants failed to state a claim upon which relief can be granted. Item 33.

ISSUES PRESENTED FOR REVIEW

1. Are Aví Casino Enterprise, Inc., a Tribal entity formed under Tribal law and wholly owned and operated by the Fort Mojave Indian Tribe, and the Tribal employees, protected from suit by the Tribe's inherent sovereign immunity?

2. Can an Arizona state court exercise personal jurisdiction over a Tribal entity or non-resident employees where the conduct giving rise to the lawsuit and the accident itself occurred entirely on the Indian Reservation?

3. Assuming subject matter jurisdiction existed (which it did not), did the trial court commit an abuse of its discretion by failing to afford plaintiffs an opportunity for jurisdictional discovery where there was no basis to allow a "fishing expedition" by plaintiffs in the hope of bolstering support for personal jurisdiction?

STANDARD OF REVIEW

Motions to dismiss under Arizona Rules of Civil Procedure rule 12(b) are reviewed *de novo* with respect to questions of sovereign immunity, subject matter jurisdiction, and personal jurisdiction. *E.g.*, *Goddard v. Fields*, 214 Ariz. 175, 177, 150 P.3d 262, 264 (Ct. App. 2007); *Filer v. Tohono O'Odham Nation Gaming Enterprise,* 212 Ariz. 167, 169, 129 P.2d 78, 80 (Ct. App. 2006); *Mitchell v. Gamble*, 207 Ariz. 364, 367, 86 P.3d 944, 947 (Ct. App. 2004); *Morgan Bank (Delaware) v. Wilson*, 164 Ariz. 535, 536, 794 P.2d 959, 960 (Ct. App. 1990). "Arizona courts have also recognized the doctrine of tribal sovereign immunity. . . . Either explicit congressional authority or consent of a tribe is necessary to find a waiver of the immunity." *Val/Del, Inc. v. Superior Court*, 145 Ariz. 558, 560, 703 P.2d 502, 504 (Ct. App. 1985).

The discovery request plaintiffs made as part of their opposition to the motion to dismiss was denied by operation of law when the motion to dismiss was granted. *See State v. Hill*, 174 Ariz. 313, 323, 848 P.2d 1375, 1385 (1993)("A motion that is not ruled upon is deemed to be denied by operation of law"); *Monti v. Monti*, 186 Ariz. 432, 436, 924 P.2d 122, 126 (Ct. App. 1996)("When the final judgment did not address the motion, the motion was considered denied by operation of law"). *See also Atchison v. Parr*, 96 Ariz. 13, 15, 391 P.2d 575, 577 (1964); *Pearson v. Pearson*, 190 Ariz. 231, 237, 946 P.2d 1291, 1297 (Ct. App. 1997). The standard of review for denial of a discovery request is abuse of discretion. "A trial court has broad discretion in matters of discovery, and its decision will not be disturbed absent a showing of an abuse of that discretion." *Lewis v. Arizona DES,* 186 Ariz. 610, 616, 925 P.2d 751, 757 (Ct. App. 1996). *Accord Tritschler v. Allstate Insurance Co.*, 213 Ariz. 505, 518, 144 P.3d 519, 532 (Ct. App. 2006); *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission*, 211 Ariz. 337, 359, 121 P.3d 843, 865 (Ct. App. 2005).

SUMMARY OF ARGUMENT

The Appellants' Opening Brief is mostly an incantation of the same unavailing arguments raised below, spiked with inflammatory and often inaccurate

factual allegations and a recalcitrant refusal to acknowledge the controlling legal authorities. In the face of precedent from the United States Supreme Court dating back 175 years, and cases directly on point recently decided by the 9th Circuit and the Arizona Court of Appeals, it is hard to justify even filing suit against these Tribal defendants, let alone pursuing parallel appeals of the dismissals of both the state and federal actions.

On the issue of sovereign immunity, the plaintiffs do not even pretend to seek a modification or reversal of existing law, perhaps cognizant of the fact that sovereign immunity can only be abrogated by an act of Congress. Instead, the plaintiffs continue to parrot lengthy quotes and *dicta* from inapposite cases for the false premise that tribal corporations do *not* have sovereign immunity. *See* Appellants' Opening Brief at 12-21; *but see Kiowa Tribe v. Mfg. Techs., Inc.,* 523 U.S. 751 (1998); *Allen v. Gold Country Casino,* 464 F.3d 1044 (9th Cir. 2006); *Filer v. Tohono O'Odham Nation Gaming Enterprise,* 212 Ariz. 167, 129 P.2d 78 (Ct. App. 2006)(all contradicting plaintiffs' position).

The plaintiffs' quixotic crusade to subject Indian Tribes or corporations to the long-arm personal jurisdiction of neighboring states is equally unfounded. A state cannot exercise jurisdiction over a tribe or tribal enterprise without its consent, and the Arizona Supreme Court has put the issue to rest in a factually

similar dram shop case, holding that a Nevada casino's advertising in Arizona or employment of Arizona residents did not confer personal jurisdiction because the accident itself did not arise out of those "forum-related activities." *Williams v. Lakeview Co.,* 199 Ariz. 1, 13 P.3d 280 (2000). Given the pure issues of law compelling dismissal, the trial court did not commit reversible error by declining to indulge the plaintiffs' request for "jurisdictional discovery."

ARGUMENT

I. THERE IS NO SUBJECT MATTER JURISDICTION.

A. The State Court Has No Jurisdiction Over an Indian Tribe or a Tribal Entity Without the Tribe's Consent.

The sovereign immunity issue is dispositive of this case. For more than 175 years, the United States Supreme Court has recognized that Indian tribes are sovereign nations, which have "territorial boundaries, within which their authority is exclusive, and have a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." *See Worchester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). Each tribe exercises inherent authority over their members and territories, and jurisdiction over civil disputes arising on the reservation is specifically vested in tribal court and governed by tribal law. *See Williams v. Lee*, 358 U.S. 217 (1959); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Oklahoma Tax Commissions v. Citizen Bank of Potowatomi Indian*

Tribe, 498 U.S. 505 (1991); *Navajo Nation v. McDonald*, 180 Ariz. 539, 885 P.2d 1104 (Ct. App. 1994). Thus, independent of the Tribe's immunity from suit, it is the Tribe's status as a sovereign nation that precludes the exercise of state court jurisdiction in the first instance. The Mohave County Superior Court cannot exercise jurisdiction over Aví Casino Enterprise without the Tribe's consent any more than it could compel the Fort Mojave Indian Tribe to defend an action in state court.[6] *See Warm Springs Forest Products Industries v. Employee Benefits Ins. Co.*, 74 Or. App. 422, 703 P.2d 1008, *aff'd*, 300 Or. 617, 716 P.2d 740 (1985); *see also White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971); *White Mountain Apache Tribe v. Industrial Commission*, 144 Ariz. 129, 696 P.2d 223 (Ct. App. 1985); *Tohono O'Odham Nation & Tohono O'Odham Housing Authority v. Schwartz*, 837 F. Supp. 1024 (D. Ariz. 1993); *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986).

In limited cases, a federal court can have subject matter jurisdiction over a tribal corporation based on diversity of citizenship or cases involving a federal

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[6] Although not relevant to the analysis here, a state court can exercise jurisdiction over a Tribe or tribal entity under limited circumstances only when expressly authorized by Congress or by consent of the Tribe. This is similar to the principle that a Tribe's sovereign immunity is absolute, subject only to abrogation by Congress or an express waiver by the Tribe.

question, for example, but there is no constitutional counterpart for a state court to exercise subject matter jurisdiction over a sovereign nation. As noted in one case erroneously relied upon by the plaintiffs, a tribal corporation might be susceptible to suit in a court of competent jurisdiction, "unless it enjoys some legal excuse, *e.g.* sovereign immunity." *R.C. Hedreen v. Crow Tribal Housing Authority*, 521 F. Supp. 599, 603 (D. Mont. 1981). Unless the Tribe consents to jurisdiction, the Mohave County Superior Court is not a court of competent jurisdiction for a tort claim against a Tribal entity for claims occurring on the Reservation, in addition to the fact that any claim against the Tribe or Aví Casino Enterprise is barred by sovereign immunity.

B. Aví Casino Enterprise Has Sovereign Immunity.

The attack on sovereign immunity begins with the flawed premise that sovereign immunity simply does not extend to tribal corporations. *See* Appellants' Opening Brief at 12-21. Not surprisingly, the plaintiffs do not cite any case in any jurisdiction that actually stands for this proposition. Instead, the plaintiffs rely upon lengthy quotes and *dicta* from cases where the corporation was *not* wholly-owned and operated by the tribe, or where the tribe *waived* its sovereign immunity. In every other case, the law is clear that a tribe's subordinate commercial organizations, such as wholly-owned tribal corporations and economic

"enterprises," share the tribe's sovereign immunity. *White Mountain Apache Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971); *White Mountain Apache Tribe v. Industrial Commission*, 144 Ariz. 129, 696 P.2d 223 (Ct. App. 1985); *see also In re: Green*, 980 F.2d 590 (9th Cir. 1992)(business corporation created under tribal law is clothed with the tribe's sovereign immunity); *Elliot v. Capital Int'l. Bank and Trust*, 870 F. Supp. 733, 735 (E.D. Tex. 1994)(sovereign immunity for limited liability bank chartered, governed and owned by Indian tribe).

Sovereign immunity is not affected by whether the tribe or its business entity is engaged in "commercial activities," either on or off the reservation. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* 523 U.S. 751 (1998)(sovereign immunity from suit on promissory note executed off the reservation); *Allen v. Gold Country Casino,* 464 F.3d 1044 (9th Cir. 2006)(Indian casino functions as an arm of the tribe and has sovereign immunity). The key is whether the entity is wholly-owned and operated by the tribe, not whether it is a "for profit" corporation.

> **This immunity extends to business activities of the tribe, not merely to governmental activities.** *See id.* at 760, 118 S.Ct. 1700; *Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1100 (9th Cir.2002). **When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe**. *See*, e. g., *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 978 (9th Cir. 2006) (holding that Blackfeet Tribe's sovereign immunity extends to Blackfeet Housing Authority); *Redding Rancheria v. Super. Ct.*, 88 Cal. App. 4th 384, 388-89, 105 Cal. Rptr.2d 773 (2001) (holding that off-reservation casino owned and

> operated by tribe was arm of the tribe, and therefore was entitled to sovereign immunity); *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App. 4th 632, 642, 84 Cal. Rptr. 2d 65 (1999) (recognizing sovereign immunity of for-profit corporation formed by a tribe to operate the tribe's casino). **The question is not whether the activity may be characterized as a business, which is irrelevant under *Kiowa*, but whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe.**

Allen v. Gold Country Casino, 464 F.3d 1044 (9th Cir. 2006)(emphasis added). The record establishes that Aví Casino Enterprise, Inc. is a Tribal corporation, formed under Tribal law, governed by the Tribal Council for the benefit of the Tribe, and the revenue of which is deposited into the Tribal treasury.

> With the Tribe owning and operating the Casino, there is no question that these economic and other advantages inure to the benefit of the Tribe. Immunity of the Casino directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general. . . . **In light of the purposes for which the Tribe founded this Casino and the Tribe's ownership and control of its operations, there can be little doubt that the Casino functions as an arm of the Tribe. It accordingly enjoys the Tribe's immunity from suit.** *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000) (stating that tribal housing authority "as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity"); *Marceau*, 455 F.3d at 978 (recognizing that tribal sovereign immunity "extends to agencies and subdivisions of the tribe").

Id. at 1047 (emphasis added); *See also Filer v. Tohono O'Odham Nation Gaming Enterprise,* 212 Ariz. 167, 129 P.3d 78 (Ct. App. 2006).

Ignoring the state and federal authorities directly on point, plaintiffs cite to only one Arizona case, *Dixon v. Picopa Construction Co.*, 160 Ariz. 251, 772 P.2d 1104 (1989), as purported authority for the notion that tribal corporations engaged in "commercial activity" are not entitled to sovereign immunity. *See* Appellants' Opening Brief at 12-14. In *Dixon*, the central question was whether the housing authority was even a subordinate business of the tribe. In fact, the *Dixon* court first recognized the well-established law that subordinate economic organizations are clothed with tribal immunity, but noted that the construction company in *Dixon* was not owned or operated by the tribe, the officers or directors were not members of the tribal government (and were not even required to be enrolled members of the tribe), and that the corporation's own charter established that it was purely commercial and did not provide any other protection or benefit to the tribe. *Dixon,* 160 Ariz. at 256, 258, 772 P.2d 1109, 1111. Thus, because the corporation was not a "subordinate economic enterprise," it did not share the tribe's sovereign immunity. *Id.*

The plaintiffs also quote liberally from the *Dixon* case regarding the "policy considerations" and "historic rationale" as to why sovereign immunity supposedly should not apply to tribal corporations. Again, these selected quotes are out of place. As the Arizona Court of Appeals noted in the *Filer* case:

> As does the Gaming Enterprise, we question the applicability of *Dixon's* policy discussion in this context. *Dixon* addressed whether the defendant construction company, Picopa, was a subordinate economic organization of the tribe, not whether tribal immunity barred a particular cause of action. The court held "Picopa [was] not a subordinate economic organization . . . and hence may not assert the Community's tribal immunity." 160 Ariz. at 259, 772 P.2d at 1112. This case presents no such issues.

Filer v. Tohono O'Odham Nation Gaming Enterprise, 212 Ariz. 167, 172 n.8, 129 P.3d 78, 83 n.8 (Ct. App. 2006).

The creation of Aví Casino Enterprise not only stands in sharp contrast to what amounted to a *non*-tribal entity in the *Dixon* case, it fits the model for a subordinate economic organization entitled to immunity. *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971). The articles of incorporation specifically state that "[t]his corporation shall be owned by the Fort Mojave Indian Tribe," and that "[t]he members of the Fort Mojave Tribal Council, on behalf of and for the benefit of the Fort Mojave Indian Tribe, shall perform the customary functions of shareholders of the corporation." Item 18, Exhibit A. Furthermore, the articles specifically provide that "all capital surplus of the corporation, whether in cash or property, shall be deposited in the general fund of the Fort Mojave Indian Tribe." *Id.* The bylaws of Aví Casino Enterprise also confirm that Aví Casino Enterprise is a subordinate business enterprise by stating that the corporation "shall be owned by the Fort Mojave Indian Tribe" and that the

Tribal council shall perform the customary functions of shareholders for the benefit of the Tribe. Restated Bylaws, Section 1.1, Item 18, Exhibit B. Finally, the plaintiffs cannot legitimately question whether Aví Casino Enterprise shares the Tribe's sovereign immunity when the bylaws include a section entitled "**Sovereign Immunity**" and provide that Aví Casino Enterprise can only waive its sovereign immunity in a contract or written obligation, and that "**[t]he corporation retains its sovereign immunity** to the extent not expressly waived within said instrument, contract or other written obligation." *Id.* (emphasis added).

Thus, not only does Aví Casino Enterprise have sovereign immunity by virtue of being owned and operated by the Tribe, with all assets being held for the benefit of the Tribe, the corporate bylaws explicitly provide that Aví Casino Enterprise intends to retain that sovereign immunity unless expressly waived in writing by Aví Casino Enterprise. The plaintiffs in this case have never claimed that the Fort Mojave Indian Tribe or Aví Casino Enterprise have expressly waived sovereign immunity. Thus, the trial court below correctly applied the law in granting the motion to dismiss on sovereign immunity. "Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize." *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979).

The balance of the cases cited by the plaintiffs-appellants are quoted for the "policy" arguments favoring claims against Indian tribes or tribal corporations, but have no application to this case. First, plaintiffs cite *R.C. Hedreen Co. v. Crow Tribal Housing Authority,* 521 F. Supp. 599 (D. Mont. 1981), for the false statement that tribal corporations are distinct legal entities that do not possess sovereign immunity. The court in *R.C. Hedreen* did not even reach the issue of the tribal corporation's immunity, but instead focused on whether a tribal corporation might be considered a "citizen" of the state in which it is doing business for purposes of exercising federal diversity of citizenship jurisdiction. *Id.* at 602. In fact, the court acknowledged that a tribal corporation might be subject to federal diversity jurisdiction, but still not be susceptible to suit unless the corporation waived its sovereign immunity. *Id.* at 603.

Most of these cases cited by the plaintiffs actually acknowledge the tribe's inherent sovereign immunity, but involve claims where the tribe or the corporation *waived* its sovereign immunity. In *Parker Drilling Co. v. Metlakatla Indian Community,* 451 F. Supp. 1127 (D. Alaska 1978), for example, the Indian corporation was organized pursuant to a particular federal law (§17 corporations under the Indian Reorganization Act) whereby Congress provided that an Indian tribe can create a corporation and waive its sovereign immunity with respect to that

corporation. Similarly, in *Namekagon Development Co., Inc. v. Bois Forte Reservation Housing Authority,* 395 F. Supp. 23, 27 (D. Minn. 1974), the Minnesota District Court concluded that the tribal housing authority waived its sovereign immunity by a tribal resolution giving "irrevocable consent" to sue and be sued for any claim or obligation. Again, these plaintiffs have never claimed, nor is there any evidence of record, that Aví Casino Enterprise waived its sovereign immunity.

C. Sovereign Immunity Protects the Tribal/Casino Employees.

Plaintiffs implicitly agree that if Aví Casino Enterprise has sovereign immunity then it would protect the employees in the course and scope of their duties. *See Filer v. Tohono O'Odham Nation Gaming Enterprise*, 212 Ariz. 167, 129 P.3d 78 (Ct. App. 2006)(sovereign immunity of casino enterprise extends to individual employees who allegedly overserved alcohol to a patron who caused an accident). Thus, the only attempt to distinguish *Filer* is to point out that the *Filer* plaintiffs conceded – as they were bound to do – that a wholly-owned tribal entity shares the same sovereign immunity as the tribe itself, whereas the plaintiffs in this case still refuse to do so.

The *Filer* case was a wrongful death dram shop claim against a tribal casino and the employees who allegedly over served the patron that caused the accident.

In recognizing the immunity of the casino and its employees, the court noted that "[t]he parties do not dispute that the Gaming Enterprise, as a subordinate economic enterprise of the Tohono O'Odham Nation, is entitled to the same immunity as the Nation" and that "[t]hey also agree on the well-settled principle that 'tribal immunity is a matter of federal law and is not subject to diminution by the States.'" *Filer v. Tohono O'Odham Nation Gaming Enterprise*, 212 Ariz. 167, 169-170, 129 P.3d 78, 80-81 (Ct. App. 2006). The plaintiffs in *Filer* argued that the tribe had waived its sovereign immunity because it had a liquor license issued by the State of Arizona, but the court of appeals ruled that state regulation did not amount to a waiver of tribal sovereign immunity nor confer a private cause of action against the casino. Furthermore, the *Filer* court followed federal law and the 9th Circuit rulings to affirm that the tribe's sovereign immunity extends to the individual employees who served the alcohol. *Id.* at 174-75, 129 P.3d at 85-86; *see Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983); *see also Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843 (Tex. App. 1997)(tribal sovereign immunity applied, had not been waived, and therefore barred a private suit brought under the Texas Dram Shop Act.) In this case, as long as Aví Casino Enterprise

Interestingly, while the plaintiffs previously argued that Aví Casino Enterprise is "separate and distinct" from the Fort Mojave Indian Tribe to try to disclaim immunity, they now focus almost exclusively on the business activities of the Tribe in a misguided attempt to confer personal jurisdiction over Aví Casino Enterprise. The fact that the Tribe operates a different casino (Spirit Mountain) and that the Tribe entered into a separate intergovernmental agreement with Arizona for that different casino has nothing to do with exercising personal jurisdiction over Aví Casino Enterprise.

The plaintiffs cannot point to any of the traditional indicia of "substantial" or "continuous and systematic" activities to confer general jurisdiction. There is nothing to suggest that Aví Casino Enterprise owns any land in Arizona or has any business offices or agents in this state. The sum and substance of the "contacts" of Aví Casino Enterprise (as distinguished from the Tribe itself) is the observation that the Aví Casino & Resort has a website and advertises "extensively" in Arizona. To the extent any such activities or contacts are traceable directly to Aví Casino Enterprise as a named party, it would scarcely meet the threshold for the "minimum contacts" to be considered for purposes of specific jurisdiction, and falls far short of the continuous and systematic business activities required for general jurisdiction to exist. The suggestion that discovery is necessary to uncover these

supposed "contacts" only reinforces the point that any business activities are not "substantial" nor "continuous and systematic."

B. <u>There is No Specific Jurisdiction.</u>

Specific jurisdiction exists when a defendant purposely avails himself of the privilege of conducting activities in the state, the claim arises out of those activities, and the exercise of jurisdiction would be reasonable. *In re Consolidated Zicam Product* Liability Cases, 212 Ariz. 85, 127 P.3d 903 (Ct. App. 2006). This nexus requirement "goes to the very heart of minimum contacts," and has been the basis for dismissing dram shop claims for lack of personal jurisdiction over out-of-state casinos. In *Westphal v. Mace,* 671 F. Supp. 665 (D. Ariz. 1987) the court unequivocally concluded that there was no personal jurisdiction over the Nevada defendants who owned and operated the Riverside Resort hotel in Laughlin because the claim itself did not arise out of any of the defendants' activities in Arizona. "The actual damage causing event must occur in the forum. Feeling the effect of an out-of-state event in the forum is not enough for personal jurisdiction to exist." *Id.* at 668.[7] In *Williams v. Lakeview Co.,* 199 Ariz. 1, 13 P.3d 280 (2000), the Arizona Supreme Court determined that there was no personal

[7] *Accord Houghton v. Piper Aircraft Corp.*, 112 Ariz. 365, 369, 542 P.2d 24, 28 (1975); *Rowell Laboratories, Inc. v. Superior Court*, 117 Ariz. 400, 402, 573 P.2d 91, 93 (Ct. App. 1977).

part located within Arizona. Whether to permit any such discovery was committed to the trial court's discretion and no abuse is shown on this record in declining to permit that discovery.

IV. CONCLUSION.

Tribal sovereign immunity precludes subject matter jurisdiction by the state court over these defendants-appellees. That issue is case-dispositive and the trial court dismissal should be affirmed on that basis. Ignoring that issue, dismissal was also appropriate on the alternative ground that personal jurisdiction was lacking for the "non-resident" defendants, including Aví Casino Enterprise, Juan Mejia, and Stephanie Shaik. The trial court was not obligated to permit plaintiffs to engage in jurisdictional discovery in the mere hope that sufficient facts might be developed to support an assertion of personal jurisdiction and the court did not abuse its discretion by failing to permit that discovery. The judgment should be affirmed.

RESPECTFULLY SUBMITTED this 11th day of May, 2007.

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By _____

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CERTIFICATE OF COMPLIANCE

I, Theodore A. Julian, Jr., do hereby certify that Appellant's Opening Brief is in compliance with Rule 14(a) of the Arizona Rules of Civil Appellate Procedure, in that it is double spaced with a proportionate spaced typeface of Times New Roman, 14 point, with a total of 7,926 words.

Theodore A. Julian, Jr.
Attorney for Appellees

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

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

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SUBSCRIBED AND SWORN to before me this 11th day of May, 2007, by Theodore A. Julian, Jr.

Notary Public

OFFICIAL SEAL
SHELLY L. MONDAVI
Notary Public - STATE OF ARIZONA
MARICOPA COUNTY
My Commission Expires January 20, 2009

My Commission Expires:

January 20, 2009