Hopi Tribe v. Ariz. Snowbowl Resort Limited Partnership

Full Citation: Hopi Tribe v. Ariz. Snowbowl Resort Ltd. P'ship, 430 P.3d 362 (Ariz. 2018).
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Opinion's Author: Justice Pelander
Joined By: Vice Chief Justice Brutinel, Justice Timmer, Justice Gould, and Justice Lopez

Practitioners: For quick reference, please see the "Issue" and "Holding" sections.

Facts: Over sixteen years ago, the City of Flagstaff ("City") contracted to sell reclaimed wastewater to Arizona Snowball Resort Limited Partnership ("Snowbowl") for artificial snowmaking at its ski area on the San Francisco Peaks. Because the Peaks are located on federal land, the U.S. Forest Service conducted a lengthy environmental impact inquiry, culminating in the agency's approval. Thereafter, various tribes (including the Hopi Tribe ("Tribe")) and other parties unsuccessfully challenged the proposed snowmaking under several federal laws.

Following the federal court litigation, Snowbowl, the City, the U.S. Department of Agriculture, and the Hopi Tribe continued to discuss alternatives to reclaimed water, but no agreement was reached. The City also held public hearings on the matter, at which the Tribe and other interested parties voiced their opposition to the use of reclaimed wastewater on the peaks. In 2010, the City ultimately voted to proceed with the reclaimed water contract and, after more public comment, denied a motion to reconsider.

Procedural History: This case is currently before the Arizona Supreme Court. The Hopi Tribe filed this suit in 2011 against the City on various state law grounds, alleging among other things that the City's sale of reclaimed wastewater to make artificial snow is a public nuisance that will result in unreasonable harm to the environment and the Hopi Tribe. The Tribe claimed that it has special interests in the environment of the San Francisco Peaks and that

> it "will suffer specific injury" from the "runoff, windblown snow, increased unnatural noise, and elevated air pollution [that] will pervade beyond the Snowbowl Resort Area" and into areas the Tribe uses "for ceremonial practices, hunting[,] . . . the gathering of natural resources[,] . . . and utilitarian purposes." For example, "natural resources that the Hopi collect, as well as shrines, sacred areas, and springs on the Peaks will come into contact with the blown reclaimed wastewater," "negatively impact[ing] the Tribe's use of the wilderness and surrounding areas.[1]

The City filed a third-party indemnification claim against Snowbowl, which then filed a 12(b)(6) motion to dismiss the Tribe's public nuisance claim, arguing that the Tribe's alleged damages do not constitute the "special harm" needed to maintain that claim. The City later joined in that motion, and the trial court granted it, ruling that the Tribe "failed to satisfy the

[1] Hopi Tribe v. Ariz. Snowbowl Resort Ltd. P'ship, 430 P.3d 362, 364 (Ariz. 2018).

[special injury] requirement on the basis of . . . religious or cultural practices." The court also granted Snowbowl and the City's request for attorney fees. The court of appeals reversed, concluding that "the Tribe has alleged a special injury sufficient to survive the motion to dismiss" because "interference with a place of special importance can cause special injury to those personally affected, even when that place of special importance is upon public land."[2] The court also vacated the trial court's fee award.

The Arizona Supreme Court granted review because whether an alleged special injury sufficiently supports a claim for public nuisance is an issue of statewide importance. Solely for purposes of their motion to dismiss, Snowbowl and the City concede that the Tribe adequately alleged a public nuisance.

Issues: Private parties may bring public nuisance claims in Arizona if the alleged nuisance caused the plaintiff special injury, meaning "damage [that is] different in kind or quality from that suffered by the public in common."[3]

1. Does a private party experience special injury when a nuisance significantly impedes the use and enjoyment of a place of special importance?
2. Does a private party experience special injury when a nuisance damages a place of emotional, cultural, and religious significance?
3. Does a private party that frequently uses a resource experience special injury when a nuisance impedes the party's use of the resource?
4. Does the special injury requirement apply with less force when a plaintiff seeks to enjoin an alleged public nuisance, rather than seek damages?

Holding:

1. No. The only public nuisance claims in which the court has recognized special injury involved property or pecuniary interests not present here.[4]
2. No. The determinative issue in a public nuisance case is whether injury to the plaintiff is "different in kind from 'that suffered by [the public].'"[5] The Hopi's injury is different only in degree because the Peaks are a place of special importance to all Americans, who are entitled to use and enjoy it in a condition "untrammeled by man."[6]
3. No. "[W]e have never held that a common injury may become 'special' merely because the party's use of public property is frequent or the degree of harm alleged is substantial."[7] The tribes alleged injury is different only in degree, which does not make it "different in kind or quality from that suffered by the public."[8]

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[2] *Id.* at 365 (citing Hopi Tribe v. Ariz. Snowbowl Resort Ltd. P'ship, 418 P.3d 1032, 1036–37 (Ariz. App. 2018)).
[3] *Id.* at 364–65 (citing Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz., 712 P.2d 914, 918 (Ariz. 1985).
[4] *Id.* at 366.
[5] *Id.* at 369.
[6] *Id.* (citing 16 U.S.C. § 1131(c)).
[7] *Id.* at 370.
[8] *Id.* at 371 (citing *Armory Park*, 712 P.2d at 918).

4. No. No Arizona case has distinguished for analytical purposes actions seeking damages from those seeking only injunctive relief for a public nuisance.[9] "But even assuming that the special injury criteria differ for equitable remedies, those criteria are inapposite—the complaint states the Tribe is seeking an injunction 'or in the alternative damages.'"[10]

Disposition: The Arizona Supreme Court affirmed the trial court's judgement in favor of Snowbowl and the City on the Tribe's public nuisance claim. The court of appeals opinion was vacated and the case was remanded to the court of appeals to determine whether the trial court's fee award is supportable and appropriate under A.R.S section 12-341.01(A). The Arizona Supreme Court stated "[i]n our discretion, assuming the statute applies, we decline the City and Snowbowl's request for fees incurred in this [c]ourt."[11]

Reasoning:

Places of Special Importance

- The court declines to create a new category for special injuries from a public nuisance. In *Sears*, the court held as a matter of law that a "negative impact on the 'character and quality of the plaintiffs' community'—a place of special importance to the plaintiffs—was, 'as a matter of law, not sufficient to establish . . . any special injury.'"[12] Creating a place of special importance category does not comport with the underlying rational for the special injury requirement. First, because a particular place's religious importance is inherently subjective, courts are ill-equipped to determine whether "one form of incidental interference with an individual's spiritual activities" should be analyzed differently form that of another.[13] Thus, courts are unable to "weigh the adverse effects" of an alleged interference against a place of religious importance, potentially allowing "every member of the public . . . to sue for a common wrong," which is precisely what the special injury requirement is meant to prevent.[14] Second, invasions of rights common to all the public should be remedied by public officials.[15] The "special injury requirement serves a gatekeeping function that prevents courts from deciding issues under the guise of public nuisance claims when such issues are best left to public officials, a pivotal principle in federal cases grappling with religious freedom challenges to public land uses."[16]

Damages to a place of emotional, cultural, and religious significance

- The determinative issue in a public nuisance case is whether injury to the plaintiff is "different in kind from 'that suffered by [the public].'"[17] Congress protected and

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[9] *Id.*
[10] *Id.* at 371.
[11] *Id.* at 372.
[12] *Id.* at 367 (quoting Sears v. Hull, 961 P.2d 1013, 1016, 1018 (Ariz. 1998)).
[13] *Id.* at 367 (citing Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988)).
[14] *Id.* (citing *Lyng*, 485 U.S. at 449; *Armory Park*, 712 P.2d at 918).
[15] *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 821C cmt. b (AM. LAW INST. 1979)).
[16] *Id.*
[17] *Id.* at 369.

preserved the land in question "for the use and enjoyment of the American people in such manner as will leave [it unimpaired for future use and enjoyment of the wilderness."[18] The Hopi's injury is different only in degree. The Peaks are a place of special importance to all Americans, who are entitled to use and enjoy it in a condition "untrammeled by man."[19]

Frequent use of a resource

- The Tribe argues that *Spur Industries*, *Arizona Cooper*, and Restatement (Second) of Torts section 821C make clear that "degree of harm cannot be ignored" and "frequent use of a resource" almost always indicates a "special interest" the public does not share.[20] But the court has never recognized "that a common injury may become 'special' merely because the party's use of public property is frequent or the degree of harm alleged is substantial."[21] *Spur Industries* is distinguishable because the discussion of degree related to "the difference between a private and public nuisance," not whether degree is relevant to the special injury inquiry.[22] Further, the Restatement simply concludes that "in determining whether there is a difference in the kind of harm, the degree may be a factor of importance that must be considered."[23] The Restatement also makes clear "it is not enough that the plaintiff has suffered the same kind of harm or interference but to a greater extent or degree."[24] The Tribe's alleged injury is therefore different only in degree, which does not make it "different in kind or quality from that suffered by the public in common."[25]

Injunctive Relief Standard

- The special injury requirement does not apply with less force when a plaintiff seeks to enjoin the alleged public nuisance.[26] Arizona jurisprudence does not analyze actions seeking damages differently from actions seeking only injunctive relief in public nuisance cases.[27] Even if the special injury requirement were applied differently, the Tribe in their complaint sought both an injunction "or in the alternative, damages."[28]

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[18] *Id.* (citing 16 U.S.C. § 1131(a)).
[19] *Id.* (citing 16 U.S.C. § 1131(c)).
[20] *Id.* at 370.
[21] *Id.*
[22] *Id.* (citing Spur Indus. v. Del E. Webb Dev. Co., 494 P.2d 700, 705 (Ariz. 1972)).
[23] *Id.* at 371 (quoting RESTATEMENT (SECOND) OF TORTS § 821(c) cmt. c (AM. LAW INST. 1979)).
[24] *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 821(c) cmt. b (AM. LAW INST. 1979)).
[25] *Id.* (citing *Armory Park*, 712 P.2d at 918).
[26] *Id.*
[27] *Id.*
[28] *Id.*