CASE NO. 11-13673

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHN V. FURRY, as Personal Representative of the Estate and Survivors of TATIANA H. FURRY,

Plaintiff-Appellant,

vs.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida
Case No. 10-cv-24524-PAS

APPELLANT'S REPLY BRIEF

SEAN M. CLEARY
SEAN M. CLEARY, P.A.
19 West Flagler Street, Suite 618
Miami, FL 33130
Telephone: (305) 416-9805

Counsel for Appellant

BRUCE S. ROGOW
BRUCE S. ROGOW, P.A.
500 East Broward Boulevard
Suite 1930
Fort Lauderdale, FL 33394
Telephone: (954) 767-8909

Counsel for Appellant

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THE PLAINTIFF'S COMPLAINT SHOULD NOT HAVE BEEN DISMISSED

The Miccosukee Tribe's assertion of sovereign immunity in this case relies on the accepted general principles of Indian sovereign immunity. We do not disagree with those general principles, but in echoing them, the Tribe tries to sidestep the Plaintiff's narrowed reasons for escaping those principles. The Tribe does acknowledge the Plaintiff's argument: "Furry argues that the combination of §1161, *Rice v. Rehner*, 463 U.S. 713, 726 -27 (1983), Title 25 U.S.C. §1747(b)(2), §285.16(2), Fla. Stat., and the Miccosukee Tribe's application for a [Florida] liquor license constitutes a waiver." Appellee's Brief, p. 20. The Tribe's response is that "the test to determine waiver is a strict test. Waiver must be expressed, not implied." *Id.*

The Tribe, however, utterly fails to mention, or even cite, a recent case analyzing the consequences and responsibilities flowing from an Indian Tribe's choice to become a state licensed alcohol vendor – *Bittle v. Bahe*, 192 P.3d 810 (Oklahoma 2008). See Appellant's Brief, pp. 17-18. Indeed, the Tribe's correct contention that 18 U.S.C. §1161 "states that introducing, possessing, or selling liquor in Indian Country is no longer a criminal offense under sections 1154, 1156, 3113, 3488, and 3669 *as long as those actions conform to state* and tribal law" (Appellee's Brief at 25, emphasis supplied), is telling and supports our position.

Conformity with Florida law means adhering to Florida statute §768.125 which provides

> **768.125 Liability for injury or damage resulting from intoxication.** – A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.

The court below wrote that "[p]ursuant to 18 U.S.C. §1161, Defendants applied for and became licensed to sell and furnish alcohol by the State of Florida Department of Business Regulation, Division of Alcoholic Beverages." DE:59-1. Conformity compels the conclusion that Furry's claim cannot be cavalierly disregarded.

We know that *Rice v. Rehner*, 463 U.S. 713 (1983), has left no doubt that states, not tribes, have the major interest in liquor regulation. *See Fort Belknap Indian Community of Fort Belknap Indian Reservation v. Mazurek*, 43 F.3d 428, 435 (9th Cir. 1994) ("the *Rice* court broadly found that Indian Tribes have no sovereignty interest in liquor regulation."). And *see Van Kruiningen v. Plan B, LLC*, 485 F.Supp. 2d 92, 97-98 (D.Conn. 2007) citing *Rice* in recognizing that the "tribes have long ago been divested of any inherent self government over liquor regulation."

A Connecticut court found that tribes may not use immunity to shield themselves from liability for violating state liquor laws. In *Schram v. Ohar*, 1998 WL 811393 (Conn.Super.Ct. 1998) the court wrote:

> This court holds that the statutes and cases reviewed above call for the right of a private citizen to bring an action against the tribe itself in the area of liquor distribution, as in this case. The court finds that tribal immunity is not a bar to a cause of action arising from the sale of alcohol at the casino. Accordingly, the court still denies the motion to dismiss the case against the tribe itself.

Id. at *3.[1]

Furry's complaint in this case completely concurred with the Florida dram shop pleading law. "With regard to a civil action against a vendor for the sale of alcoholic beverages to a drunkard, the plaintiff need only show that the vendor 'knowingly', rather than 'willfully and unlawfully' sold alcoholic beverages to a person who was a habitual drunkard." *Ellis v. N.G.N. of Tampa, Inc*., 586 So. 2d. 1042, 1048 (Fla. 1991). Nothing except the notion of a cramped view of "waiver" supports the irony of a tribe applying for and agreeing to be bound by state liquor laws, while seeking to deprive citizens of the rights to avail themselves of the state liquor laws to which the tribe acceded.

[1] *But see Greenidge v. Volvo Car Finance, Inc*., 2000 WL 1281541 (Conn.Super.Ct. 2000) disagreeing with *Schram*.

The dram shop cases offered by the court below, reprised in the Tribe's Reply, *Filer v. Tohono O'Odham Nation Gaming Enterprise*, 129 P.3d 78 (Ariz. Ct. App. 2006); *Foxworthy v. Puyallup Tribe of Indians Association*, 169 P.3d 53 (Wash. Ct. App. 2007); *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W. 2d 843 (Tex. Ct. App. 1997), do not support sovereign immunity. But each of those cases were troubled by that result or were waiting for direction from the Supreme Court.

The Texas Court of Appeals said:

> Even if it were possible to construe a private suit under the Act as an enforcement action by the state, we could not conclude that tribal sovereign immunity would be waived because federal courts have not resolved whether actions for money damages brought to enforce alcohol-related laws fell within the waiver of immunity described by the United States Supreme Court in *Rice v. Rehner*.

Holguin, 954. S.W. 2d at 854.

The Washington Court of Appeals deferred to the "express abrogation" doctrine, while recognizing that "*Kiowa Tribe* [523 U.S. 751 (1998)] dicta appears to support *Foxworthy's* policy argument" that sovereign immunity is not immutable. *Foxworthy*, 169 P.3d at 59. In *Filer*, the Arizona Court of Appeals quoted the *Kiowa* sovereign immunity doubts, prefacing the quote with "the Supreme Court there aptly remarked." *Filer*, 129 P.3d at 85. We quoted most of that portion of the *Kiowa* quote in our Initial Brief, pp. 8-9.

Filer went further, recognizing that *Rice v. Rehner* did not raise, address, or decide whether a private citizen could sue a tribe in state court "if the action had some connection to the state's regulation of alcohol." *Id.* at 84. But the court upheld sovereign immunity although it voiced sympathy with the Supreme Court's abrogation dicta. Chief Judge Pelander wrote for the court:

> This conclusion, we hasten to add, may be unsatisfactory to some and arguably is divorced from the realities of the modern world, in which on-reservation Indian gaming and alcohol sales have become commonplace. As the Court observed in *Rice*, "distribution of liquor has a significant impact beyond the limits of [a][r]eservation," "[t]he State has an unquestioned interest in the liquor traffic that occurs within its borders," and " '[a] State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention.'" 463 U.S. at 724.

Id. at 84-85.

The off-reservation effects that are relevant to dram shop liability go to the heart of the safety and well being of a community in which an Indian tribe operates state licensed alcoholic beverage licenses. *Bittle v. Bahe* says it best: "alcoholic beverage laws protect the public. . . ." 192 P.3d at 827-828; Appellant's Initial Brief at 17-18.

We have attempted to provide the Court with a principled basis for concluding that the admixture of abrogation and waiver, viewed against the lessons of *Rice v. Rehner* and the doubts of *Kiowa Tribe of Oklahoma v. Manufacturing*

Technologies Inc., combined with Title 18 U.S.C. §1161's instance on conformity with state laws, supports the ability to sue the Miccosukee Tribe in this case.

The issue is important to the public, to Indian tribes, to the continuing success of the internal relationships between the states, the tribes and the federal government, and of course, to the Plaintiff. Resolution in favor of Furry would be consistent with the best interests of all, and consistent with precedent that recognizes that what is "express" may be determined from the context of the legislation and the policy issues in play. See Appellant's Initial Brief, pp. 15-16, citing cases which the Miccosukee Tribe's Brief has assiduously avoided.

CONCLUSION

For the reasons advanced here and in the Initial Brief, the decision below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

/s/ Bruse S. Rogow
BRUCE S. ROGOW
Florida Bar No. 067999
BRUCE S. ROGOW, P.A.
500 East Broward Blvd., Suite 1930
Fort Lauderdale, FL 33394
Ph: (954) 767-8909
Fax: (954) 764-1530
Email: brogow@rogowlaw.com
and
SEAN M. CLEARY
Florida Bar No. 146341
SEAN M. CLEARY, P.A.
19 West Flagler Street, Suite 618
Miami, FL 33130
Ph: (305) 416-9805
Fax: (305) 416-9807
Email: sean@clearypa.com

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 1, 806 words.

/s/ Bruce S. Rogow
BRUCE S. ROGOW

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 5, 2011, the foregoing document was served on the below via U.S. Mail:

Bernardo Roman, III, Esquire
Law Office of Bernardo Roman III, P.A.
1250 S.W. 27th Avenue, Suite 506
Miami, FL 33135

Yinet Pino, Esquire
1250 Southwest 127th Avenue
#560
Miami, FL 33135

/s/ Bruce S. Rogow
BRUCE S. ROGOW