CASE NO. 10-56671

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JIM MAXWELL and KAY MAXWELL, Individually and as guardians of TREVER ALLEN BRUCE and KELTEN TANNER BRUCE; and JIM MAXWELL, as executor of the ESTATE OF KRISTIN MARIE MAXWELL-BRUCE,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO; ALPINE FIRE PROTECTION DISTRICT; VIEJAS FIRE DEPARTMENT; GREGORY REYNOLDS; ANTHONY SALAZAR; M. KNOBBE; JEFFREY JACKSON; WARREN VOTH; GARY KNEESHAW; WILLIAM REILLY; L. RODRIGUEZ; BRIAN BOGGELN; COLBY ROSS; CHIP HOWELL; MICHAEL MEAD; BRADLEY AVI; JEREMY FELBER; DOES 9-25, San Diego County Employees; and DOES 32-100

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of California
Civil Case No. 07 CV-2385-JAH (WMc)

OPENING BRIEF OF THE PLAINTIFFS-APPELLANTS

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Plaintiffs-Appellants Jim Maxwell and Kay Maxwell, individually and as guardians of Trever Allen Bruce and Kelten Tanner Bruce, and Jim Maxwell, as Executor of the Estate of Kristin Marie Maxwell-Bruce (collectively, the "Maxwell family" or "Plaintiffs") respectfully submit this opening brief in their appeal of the District Court's Orders dismissing on tribal sovereign immunity grounds Appellees-Defendants Viejas Fire Department ("Viejas Fire"), Bradley Avi, and Jeremy Felber (collectively the "Viejas Defendants").

INTRODUCTION

On December 14, 2006, San Diego County Deputy Sheriff Lowell "Sam" Bruce shot his wife Kristin Maxwell Bruce in her jaw with his service weapon. When he shot his wife, Bruce and Kristin were living with their two young children at the home of Kristin's parents – Kay and Jim Maxwell.

After being shot, Kristin was still able to call 911 and to tell a dispatcher that Bruce shot her. Among those who responded to Kristin's shooting were Viejas Fire and two of its employees, Bradley Avi and Jeremy Felber. Their actions, together with those of the other paramedics and police officers who responded, turned the shooting into a much greater tragedy. They grossly mishandled Kristin's medical condition, leading to her death.

Viejas Fire is part of the Viejas Band of Kumeyaay Indians. When the Maxwell family sued the department, and subsequently its two employees Avi and

Felber, they asserted tribal sovereign immunity. The District Court agreed and dismissed the claims. It subsequently certified those Orders for appeal under Federal Rule of Civil Procedure 54(b). This appeal follows.

The District Court's Orders are erroneous in two respects. First, California law specifically limits and defines the qualified immunity that is afforded to emergency workers, including employees of Federally-recognized Indian tribes when those tribes enter into mutual aid agreements. Those statutes were in place when the Viejas tribe knowingly agreed its Fire Department would enter into a mutual aid agreement, and thereby voluntarily subjected its employees to that statutory liability regime and waived tribal immunity.

Second, Avi and Felber are not entitled to tribal immunity even were the doctrine applicable to Viejas Fire. These two paramedics, acting in concert with Alpine and the Sheriff's Department, delayed transporting Kristin and strapped her down in a prone position, thereby causing her death. These actions were not authorized by the Tribe, and certainly lay outside the course and scope of the paramedics' responsibilities. Tribal immunity does not extend to employees in such circumstances.

The Maxwell family is entitled to present their case to a jury. They respectfully ask that Court reverse the District Court's Orders dismissing the Viejas Defendants, and remand for further proceedings.

STATEMENT OF JURISDICTION

A. Subject Matter Jurisdiction

The underlying action included claims against the Viejas Defendants' co-defendants that were brought under 42 U.S.C. §1983. (*See* Plaintiffs-Appellants Excerpt of Record ("ER") ER 71-89 (Second Amended Complaint), ER 294-311 (First Amended Complaint), ER 312-31 (Complaint)). The District Court accordingly had federal question jurisdiction under 28 U.S.C. §1331.

The claims against the Viejas Defendants are brought under state law. However, those claims address the same common nucleus of facts concerning the Defendants' actions that caused the death of Kristin. (*See* ER 71-89, ER 294-311, ER 312-31). Accordingly, there is supplemental jurisdiction over the claims against the Viejas Defendants.[1] *See* 28 U.S.C. §1367(a) ("in any civil action of which the district courts have original jurisdiction, the district courts shall have

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[1] In the proceedings below, both groups of paramedics who responded to the scene (the Viejas Fire Department and the Alpine Fire Department) challenged the existence of supplemental jurisdiction. The District Court did not reach the issue as to Viejas because of the ruling on tribal sovereign immunity. But it did as to Alpine, finding that the state claims raised as to the actions of the Alpine paramedics were intertwined with the federal law claims against the County of San Diego and thus that there was supplemental jurisdiction. (ER 59:7-17). Although there are some differences between the actions of Alpine and Viejas paramedics, at the end of the day they are like-positioned with regard to supplemental jurisdiction because the state law claims against them, like the federal law claims against the County of San Diego defendants, concern the conduct immediately following Kristin's shooting and leading up to her death.

supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy...."); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (claims are part of the "same case or controversy" when they arise from a common nucleus of operative facts, such that a plaintiff would ordinarily be expected to try them all in a single judicial proceeding).

B. Appellate Jurisdiction

The Orders dismissing the Viejas Defendants (*see* ER 38-48, 49-58) were interlocutory because they dismissed only some of the parties and claims in the case. Thus, on their own, they would not be appealable absent a final judgment.

However, the Maxwell family moved for certification of the Orders under Fed. R. Civ. Proc. 54(b) because the Viejas Defendants were dismissed based upon a jurisdictional issue (sovereign immunity) that was unique to those defendants and thus certification would aid the ultimate efficient resolution of the case. *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1484 (9th Cir. 1993) (recognizing that Rule 54(b) was properly invoked where some of the defendants had been dismissed based on jurisdictional issues unique to those defendants). The motion for certification was unopposed. (ER 37:12-13).

The District Court granted the motion and certified under Rule 54(b) the two Orders dismissing the Viejas Defendants. (ER 37:14-17 ("This Court agrees with

plaintiffs that certification under Rule 54(b) is appropriate in that, resolution of an appeal, if any, of the jurisdictional issues . . . could possibly avoid having to conduct multiple trials in this case.").

Following certification on September 24, 2010,[2] the Maxwell family filed a timely notice of appeal on October 21, 2010. (ER 69-70). Accordingly, the Court has appellate jurisdiction.

STATEMENT OF THE ISSUES PRESENTED

1. Did the District Court err in concluding that the Viejas Defendants had tribal sovereign immunity when the Viejas Tribe had agreed to provide paramedic services under a mutual aid agreement pursuant to California law, and that law states that paramedics who provided such services will be liable for grossly negligent acts?

2. Did the District Court err in concluding Avi and Felber were entitled to tribal sovereign immunity when they are being sued in their individual capacities for grossly negligent acts, and when they are not high tribal officials acting in official tribal capacities?

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[2] The certification Order is dated September 23, 2010, but it issued September 24, 2010.

STATEMENT OF THE CASE AND OF THE FACTS

A. Factual History

On December 14, 2006, Kristin Maxwell Bruce was shot in the jaw by her husband, a correctional deputy with the San Diego County Sheriff's Department. Kristin called "911" to request an ambulance. (ER 295-96, 300). The Sheriff's Department and Alpine Fire District responded. (ER 301). The Alpine ambulance was not at the Alpine station, so a different ambulance, from the Viejas Band of Kumeyaay Indians Reservation's fire department, was dispatched pursuant to a mutual and automatic aid agreement for emergency services in Alpine. (ER 138-139, 192, 247-49, 253-55).

Medic 25, a Viejas Fire ambulance, arrived at the scene and Kristin was alert, breathing and sitting up, with the Alpine paramedics tending her bleeding jaw. (ER 255). Medic 25 was the sole vehicle authorized to transport Kristin to a medical facility. (ER ER 256).

The paramedics – including the Viejas Defendants – then rendered grossly negligent care, causing Kristen's death. (ER 305-06).[3] The San Diego County

[3] It goes beyond the scope of the subject Orders, which were heard on the pleadings combined with facts relevant to the question of tribal sovereign immunity, but in essence the sheriff's deputies and paramedics delayed the departure of the ambulance causing increased blood loss and harm, and the paramedics placed Kristen in a prone position, causing her breathing to be obstructed.

Medical Examiner who performed the autopsy on Kristin has testified that the injuries suffered by Kristin were survivable and "reparable" with prompt medical attention. (ER 98-99).

B. Procedural History

1. The Original Complaint and Dismissal of Viejas Fire

Plaintiffs filed this action on December 19, 2007. (ER 312). In their initial complaint, they alleged Section 1983 claims against the County of San Diego and state law claims of wrongful death, survival action, excessive force, battery, and intentional and negligent infliction of emotional distress against the Alpine Fire Department and Viejas Fire. (ER 312-29)

In response to the initial complaint, Viejas Fire filed a motion to dismiss asserting tribal sovereign immunity. (ER 338). The District Court granted that motion on June 3, 2008, holding that Plaintiffs had failed to show the Court had subject matter jurisdiction by failing to provide evidence of the existence of a mutual aid agreement that might constitute a waiver of tribal sovereign immunity under California law. (ER 56-58).

2. The First Amended Complaint and the Dismissals of Avi and Felber

Plaintiffs filed a motion to amend their complaint on November 8, 2008 that named the individual Sheriffs' Department deputies and supervisors, the Alpine

Fire Department EMTs and Viejas Fire paramedics Jeremy Felber and Bradley Avi. (ER 341).

Thereafter, Donald Butz, Viejas Fire Chief, filed a declaration regarding Viejas Fire's mutual aid arrangements. (ER 267-69). Butz stated when he had been hired as Fire Chief in 2005, Viejas Fire was contracted with Lakeside Fire Protection District to operate and staff the fire department on the Viejas reservation. (ER 268 at ¶2). In 2006, however, the Viejas Band decided it would take over operations from the Lakeside district and it did so effective October 1, 2006. (ER 268 at ¶3). Both before and after it became an independent fire department, Viejas Fire provided mutual aid to the Alpine area as well as other parts of San Diego County. (ER 100-266 (collecting evidence regarding Viejas' entry into mutual aid agreements and fact that response to the Maxwell residence was connected to such agreements)). Butz's declaration, however, did not address those arrangements as they existed in December 2006.

Butz's declaration also failed to explain that in December 2005, the Viejas tribe entered into the Intergovernmental Agreement with the County of San Diego (the "Agreement"), acknowledging its responsibility for serving the area surrounding the reservation and responding to emergency calls under mutual aid arrangements with other fire departments in San Diego County. (ER 101 at ¶ 2 & ER 107-21).

Plaintiffs sought depositions of Jeremy Felber and Bradley Avi, as well as documents from Viejas Fire regarding the incident and the mutual aid arrangements under which Felber and Avi responded. Viejas Fire interposed objections, and Messrs. Felber and Avi did not appear. (ER 101 at ¶ 5). Following discussions with counsel, Plaintiffs sought a Rule 30(b)(6) deposition of Viejas Fire Department dealing with the jurisdictional issue, but Viejas Fire refused. (*Id.*)

Plaintiffs subpoenaed and obtained copies of mutual aid agreements pertaining to Viejas Fire from the other fire departments in the Heartland zone. (ER 102 at ¶ 6). In addition, Plaintiffs requested and received documents from the County concerning the EMS system and the December 14, 2006, response, including the Intergovernmental Agreement between the County of San Diego and the Viejas Tribe, dated December 14, 2005. (ER 101 at ¶ 2 & ER 107-21). Plaintiffs also deposed the Heartland dispatch system's person most knowledgeable regarding the arrangements, Charles Alexander, and obtained documents which show that Viejas will be dispatched to the Alpine area when the Alpine ambulance is not available. (ER 126-27, 138-39). Additional documents obtained from the Heartland system show that under these arrangements, Viejas Fire responds to hundreds of emergencies off its reservation each year since at least 2005. (ER 183-89).

The Maxwell family ultimately was granted leave to amend. However, Avi and Felber then moved to dismiss on tribal sovereign immunity grounds, which motion was granted. (ER 38-48).

C. The Rule 54(b) Certification and Appeal

Plaintiffs then sought certification under Fed. R. Civ. Proc. 54(b) of the two Orders dismissing the Viejas Defendants. On September 24, 2010 certification was granted. (ER 36-37). This appeal followed.[4]

STANDARD OF REVIEW

The issue in this case is whether the District Court erred in dismissing the Viejas Defendants based upon tribal sovereign immunity. Whether an Indian tribe possesses sovereign immunity is a question of law reviewed *de novo*. *See Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007); *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002). Dismissals based on sovereign immunity also are reviewed *de novo*. *See Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1203 (9th Cir. 2003); *Steel v. U.S.*, 813 F.2d 1545, 1548 (9th Cir. 1987).

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[4] Subsequently, the District Court has denied a summary judgment motion by the individual San Diego County Sherriff's Deputies, while granting motions by the County of San Diego and the Alpine-related defendants. (ER 1-35). The individual San Diego County Sherriff's Deputies have filed an appeal that is currently pending before this Court as *Maxwell, et al. v. County of San Diego, et al.*, Ninth Cir. Case No. 10-56706.

The District Court also determined certain questions of law, including statutory interpretation questions. These determinations of law similarly are reviewed *de novo*. *U.S. v. Cabaccang*, 332 F.3d 622, 624-25 (9th Cir. 2003).

ARGUMENT

I. Viejas Waived Sovereign Immunity When It Entered Into a Mutual Aid Agreement under Cal. Health & Safety Code §13863.

The Viejas Defendants responded to the Maxwell home under a mutual aid agreement that provided it would respond to emergencies when Alpine's ambulance was not available. (ER 43 n.3 (Court's Order finding the existence of the agreement); ER 126, 138-39).

A mutual aid agreement is a creature of Cal. Health & Safety Code §13863(b), which provides:

> "A district may … enter into mutual aid agreements with any private firm, corporation or federally recognized Indian tribe that maintains a full-time fire department. **The firm, corporation, or federally recognized Indian tribe, or any of its employees, shall have the same immunity from liability for civil damages on account of personal injury to or death of any person . . . resulting from acts or omissions of its fire department personnel in the performance of the provisions of the mutual aid agreement as is provided by law for the district and its employees, except when the act or omission occurs on property under the control of the** firm, corporation, or **federally recognized Indian tribe**."

Cal. Health & Safety Code §13863(b) (emphasis added) (hereinafter, "Section 13863(b)").

The statutory immunity afforded to emergency personnel under California law thus extends to any employees of a tribal full-time fire department operating under a mutual aid agreement subject only to the exception for actions taken on tribe-controlled property. This immunity exempts such workers from liability for their acts except those performed not in good faith or in a grossly negligent manner. Cal. Health & Safety Code §§1799.106, 1799.107; *Eastburn v. Reg'l Fire Prot. Auth.*, 31 Cal. 4th 1175, 1185 (2003). In all other relevant respects, a fire protection district is not immune from suit; it may "sue and be sued." Cal. Health & Safety Code §13861(a).

Thus, the clear legislative intent of Section 13863(b) is that emergency workers who render aid side-by-side should not be governed by differing levels of immunity, but rather each employee (and entity) is subject to the same legal standard for liability.

The Viejas Band knew of this statute and that its employees would be governed by this immunity scheme when they agreed to provide mutual aid, and the Band could have decided to exclude itself from the operation of the statute by declining to enter into a mutual aid agreement under California law. But it did not, and instead voluntarily and expressly brought itself within the system under which its paramedics Avi and Felber responded to the scene on December 14, 2006.

These actions are sufficient to find a knowing and clear waiver of tribal sovereign immunity. An on-point example is the case of *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), where a tribe's decision to enter into a contract with state law arbitration and choice of law provisions was deemed to be a voluntary waiver of immunity.

In that case, the Citizen Band of Potawatomi Indian Tribe of Oklahoma entered into a roofing contract with C & L Enterprises. The contract contained an arbitration clause and choice of law provision. The arbitration clause referred to the Construction Industry Arbitration Rules of the American Arbitration Association, and provided that an award and the choice of law provision stated that the contract would be "governed by the law of the place where the Project is located." *C&L Enterprises*, 532 U.S. at 415.

The Supreme Court held that the law of the state where the contract was entered into, Oklahoma, "has adopted a Uniform Arbitration Act, which instructs that '[t]he making of an agreement . . . providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder.'" *Id.* The Court further noted that the Oklahoma "Act defines 'court' as 'any court of competent jurisdiction of this state.'" *Id.* at 416. Consequently, the Court held:

> We are satisfied that the Tribe in this case has waived, with the requisite clarity, immunity from the suit C & L brought to enforce its

> arbitration award. . . . The contract's choice-of-law clause makes it plain enough that a "court having jurisdiction" to enforce the award in question is the Oklahoma State court in which C &L filed suit. **By selecting Oklahoma law ("the law of the place where the Project is located") to govern the contract, the parties have effectively consented to confirmation of the award "in accordance with" the Oklahoma Uniform Arbitration Act,** *id*., at 46 ("judgment may be entered upon [the arbitration award] in accordance with applicable law"); Okla. Stat., Tit. 15, §802.A (1993) ("This act shall apply to . . . a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties.")

Id. at 418-19 (reference to record on appeal omitted; emphasis added). Thus, the Court concluded that by entering into the contract, "the Tribe clearly consented to arbitration and to enforcement of arbitral awards in Oklahoma State court; the Tribe thereby waived its sovereign immunity…." *Id*. at 423.

Similarly, in *Marceau v. Blackfeet Housing Auth.*, 455 F.3d 974, 978 (9th Cir. 2006), a tribe established a housing authority by ordinance that gave the tribe's "irrevocable consent to allowing the Authority to sue and be sued in its corporate name," and further provided that any judgment against the Authority would not be a lien on the Authority's property but would be paid out of "its rents, fees or revenues." *Id*. at 981. The Court found, first, that a plain reading of the ordinance showed the tribe intended to waive its immunity when it enacted the ordinance. *Id.* Second, the Court reasoned, the tribe's establishment of the Housing Authority as a public enterprise also served as a waiver since it thereby incurred contractual

obligations that would be illusory were they not enforceable due to sovereign immunity. *Id.* at 983.

Also on-point is the case of *Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1 (2002). There, the court found that an Indian tribe waived sovereign immunity by entering into a contract with an arbitration clause that provided for enforcement in "any court having jurisdiction thereof[.]" The court rejected the tribe's argument that it could not have waived sovereign immunity, because it did not subjectively understand that its entry into contract containing an arbitration clause would be construed as a waiver of sovereignty. *See id.* at *3.

In this case, the applicable state law that the Viejas Defendants voluntarily subjected themselves to by entering into a mutual aid agreement is Section 13863(b). That law provides that when a tribe enters into such a mutual aid agreements, its employees "**shall have the *same* *immunity*** from liability for civil damages on account of personal injury to or death of any person . . . **as is provided by law for the …district employees** . . . , except when the act or omission occurs on property under the control of the . . . federally recognized Indian tribe." Cal. Health & Safety Code §13863(b) (emphasis added). Just as the tribes in *Marceau, C & L Enterprises* and *Smith* waived sovereign immunity by application of state law through the contracts, in this case Viejas waived sovereign immunity by application of California law through its mutual aid agreement.

Indeed, Plaintiffs demonstrated before the district court that the Viejas Defendants had entered into several mutual aid agreements and that the Viejas Defendants were responding pursuant to several such agreements when they brought their ambulance and paramedics to the Maxwell home.[5] (ER 101-103 at ¶¶2, 3, 6, 7, 10-12 (and the exhibits cited in those paragraphs)).

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[5] The District Court's June 3, 2008 Order granting Viejas Fire's motion to dismiss on sovereign immunity grounds was based solely on Plaintiffs' inability to provide "evidence to support their allegations concerning the existence of a mutual aid agreement[.]" (ER 57:16-20). That Order was only possible because, at the time of briefing, Plaintiffs had yet to have the opportunity to conduct discovery to demonstrate the existence of a mutual aid agreement. The District Court erroneously insisted that Plaintiffs produce such evidence because of the argument by Viejas Fire that, on a motion to dismiss for lack of subject matter jurisdiction, Plaintiffs had the burden of actually coming forward with evidence to support their allegation.

To the contrary, although a District Court can consider evidence outside the pleadings on a motion to dismiss for lack of subject matter jurisdiction, that cannot be conflated with a duty by the plaintiff to produce such evidence *unless the defendant had actually produced evidence negating the allegation*. This is the distinction between a motion to dismiss based upon subject matter jurisdiction that contains only a facial attack on the pleadings, versus one that raises factual questions:

> Rule 12(b)(1) attacks on jurisdiction can be either facial, confining the inquiry to allegations in the complaint, or factual, permitting the court to look beyond the complaint. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.2000). **Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence** properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.1989).

(continued...)

Specifically, the Viejas Fire Department is one of several local fire agencies with whom the Alpine Fire Department had mutual aid and automatic aid agreements in 2006, according to the 2006 Alpine Community Protection and Evacuation Plan. (ER 102 at ¶ 9, ER 195-227). The Viejas Fire Department also is dispatched by the Heartland Communications Facility and has been since July 2005.[6] Heartland Dispatch was responsible for dispatching its ambulance to the Maxwell home. Viejas currently has an automatic aid agreement (a "memorandum of understanding") with the several Heartland zone agencies and historically has had that agreement, whether in writing or not. (ER 102 at ¶ 6, 103 at ¶ 12, 166-81, 235-42). Under these arrangements, Viejas Fire responded literally hundreds of times to calls placed through the Heartland dispatch system in 2005-2007. (ER 183-87). Avi and Felber's ambulance, M25, was slated to respond under these arrangements. (ER 126, 139).

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Savage v. Glendale Union High School, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003) (emphasis added).

Here, Viejas never produced any evidence showing that there was no mutual aid agreement. And, indeed, once Plaintiffs took third party discovery, they in fact identified multiple mutual aid agreements. (*See* ER 43 at n.3). Thus, on the subsequent motion to dismiss by Avi and Felber, the District Court correctly found that there was a mutual aid agreement (*see id.*), although it erroneously found that tribal sovereign immunity still applied.

[6] Plaintiffs obtained and filed with the District Court a copy of Viejas Fire's July 2005 contract with the Heartland Communications Facility Authority ("HCFA"). (ER 229-31).

The evidence also shows that the 911 emergency calls placed from the Maxwell home went through the Heartland dispatch system, resulting in the dispatch of the Viejas ambulance, Medic 25 and Defendants Bradley Avi and Jeremy Felber. Viejas' own Heartland Dispatch Report showed that "automatic aid" was "given." (ER 250-51, 257, 259; *see also* ER 131-34). The operator of that system testified that an agreement by Viejas was the basis for the Medic 25 response. (ER 138-39).[7]

Moreover, in December, 2005, the Viejas tribe had entered into the Agreement with the County of San Diego acknowledging its responsibility for serving the area surrounding the reservation and responding to emergency calls under mutual aid arrangements with other fire departments in San Diego County. (ER 101 at ¶2, 113-14).[8] Thus, the fact that Viejas responded to the Maxwell

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[7] An automatic aid agreement is a type of mutual aid agreement and nothing in the Health & Safety Code defines or requires use of the specific term "mutual aid" in order to trigger the applicability of Section 13863. Heartland's division manager, Charles Alexander, testified that automatic aid is "an agreement where district boundaries essentially drop, and if the normal first in unit for that area is not available, the next closest unit regardless of jurisdiction will respond in there and help out;" such as where "Viejas agrees to provide a medic to Alpine, in response Alpine agrees to provide a medic unit for Viejas." (ER 132-33, 77-78). Clearly, such an arrangement is an agreement for "mutual aid" as well.

[8] The Agreement states:

> The Viejas Fire Department, which is staffed with professional firefighters certified as emergency medical technicians, equipped with

(continued...)

family residence was the result not only of its agreement with the Heartland dispatch, but also with the County itself.

By entering into these agreements, the Viejas Tribe clearly made its Fire Department employees subject to the immunity provisions of Section 13863(b). In this case, the waiver was even clearer than in *Marceau, C & L Enterprises* and *Smith.* In those cases, the statutory provisions and contracts contained no reference to any alteration of a party's immunity. Here, in contrast, section 13863(b) specifies that paramedic responders under mutual aid agreements "shall have the **same immunity** from liability for civil damages on account of personal injury to or death of any person . . . as is provided by law for the …district employees . . . , except when the act or omission occurs on property under the control of the . . . federally recognized Indian tribe." (Emphasis added)

Indeed, it would not even matter if this language did not actually reference sovereign immunity so long as that was the result of the provision. The Supreme Court specifically rejected the argument that there must be an explicit reference to

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(...continued)

> two fire engines and two ambulances, provides full-time fire protection and emergency medical services to the reservation, as well as to the non-reservation surrounding rural area. In addition to providing service to the local area, the Viejas Department also provides mutual aid service to other departments in San Diego County….

(ER 113-14).

"sovereign immunity" in order to have an effective waiver. *C & L Enterprises*, 532 U.S. at 420-421. In this case, however, Section 13863(b) makes explicit reference to the fact that when a tribe enters into a mutual aid agreement, it "shall have the same immunity from liability" as the fire protection district.

Finally, the interpretation of Section 13863(b) advocated by The Viejas Defendants before the district court contradicts basic statutory interpretation cannons. The Viejas Defendants argued that Section 13863(b) created a *floor* of immunity and that the sovereign immunity of a federally recognized Indian tribe is an additional protection. Such an interpretation of the statute, however, makes no sense. The statute specifically refers to federally recognized Indian tribes, and there is no reason to establish a floor below a level of immunity claimed to be absolute. The Court should therefore reject the interpretation urged by the Viejas Defendants because it would render the statute's specific references to Indian tribes superfluous. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotation marks omitted)); *Wash. Mkt. Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'").

In sum, the Court should find that the Viejas Defendants are entitled only to qualified or limited immunity for acts other than those performed in bad faith or in a grossly negligent manner – i.e., the "same immunity from liability for civil damages . . . as is provided by law for . . ." other persons or entities providing paramedic services in California. Cal. Health & Safety Code §13863(b); *see also*, Cal. Health and Safety Code §1799.107; *Marceau*, 455 F.3d at 981.

II. Avi and Felber Were Not High Tribal Officials, Nor Were They Acting within the Scope of Responsibilities for Any Tribal Function

Even if Viejas Fire was immune, the District Court erred in ruling that such immunity extended to Avi and Felber. Avi and Felber are paramedics; they are not "tribal officials" nor are they being sued in any official capacity. Rather, the First Amended Complaint alleges they are liable on the basis of their own acts and omissions and in their personal capacity. (ER 74 at ¶ 9, ER 78 at ¶ 38.)

Tribal immunity covers "tribal officials when acting in their official capacity and within their scope of authority." *U.S. v. Oregon,* 657 F.2d 1009, 1013 n. 8 (9th Cir. 1981); *Snow v. Quinault Indian Nation,* 709 F.2d 1319, 1321 (9th Cir. 1983), *cert. denied,* 467 U.S. 1214 (1984). As the courts apply this rule, such immunity does not cover tribal employees who are sued in their personal capacities, nor officials when they act outside of their official capacity and authority. *E.g.*, *Baugus v. Brunson*, 890 F. Supp. 908, 911 (E.D. Cal. 1995). In order to be considered a "tribal official" entitled to immunity, one must perform a high-level

or governing role within the tribe. *Baugus*, 890 F. Supp. at 911; *Turner v. Martire,* 82 Cal. App. 4th 1042, 1049 (2000). The rationale for extending immunity to high-level officials is that such individuals are required to make the kind of discretionary judgments which cannot be made effectively without immunity. *Turner,* 82 Cal. App. 4th at 1049. Obviously, that reasoning does not apply to employees who do not make high-level decisions, and therefore neither does sovereign immunity.[9]

Avi and Felber did not occupy positions of discretionary decision-making for the Tribe. Both were rank-and-file employees of Viejas Fire. Such positions do not benefit from tribal sovereign immunity, even if the employee is viewed as an agent of the tribe in performing his work. As the Court held in *Baugus*, "[t]he mere fact that [a non-Indian security guard employee of an Indian enterprise] was acting as an agent for his employer, the Tribe, does not cloak him with the Tribe's immunity." *Baugus*, 890 F. Supp. at 912. Likewise, the *Turner* court held tribal law enforcement officers do not qualify as "tribal officials" because they were not in a position to perform official policy-making functions on behalf of the Tribe;

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[9] Defendants relied below on the proposition that *Cook v. AVI Casino Enterprises* decision overruled this line of authority. Since the Ninth Circuit did not even address the issue, that position is untenable. Moreover, as discussed in depth below, the Ninth Circuit expressly noted in *Cook* that the individual defendants were "nominal defendants" who were being sued in order to hold the tribe vicariously liable. *Cook v. AVI Casino Enters., Inc.,* 548 F.3d 718, 727 (9th Cir. 2008).

thus these employees are **not** afforded with Tribal immunity in performing acts outside the scope of their authority. *Turner*, 82 Cal. App. 4th at 1048-55. The *Turner* court noted that the question of immunity should not be taken lightly, as immunity comes at a great cost for the Plaintiff with an otherwise meritorious claim, which can be denied only on the basis that he or she had the misfortune of being injured by an official. *Id.* at 1047-48.

Defendants Avi and Felber did not attempt to show that they were inherently protected by tribal sovereign immunity, but argued instead that as long as they acted within the scope of their employment, they were entitled to immunity,[10] and that there is no allegation that they exceeded the scope of their employment. Not so.

First, as established in the above-cited cases, the correct question is whether Avi and Felber were high-level officials making discretionary decisions. They were not.

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[10] The only California case Defendants cite for this proposition is *Trudgeon v. Fantasy Springs Casino,* 71 Cal. App. 4th 632 (1999). In *Trudgeon* the court did not reach the issue of how far the immunity protection would extend, because there were no actual individuals named for the court to make that determination based on the position of the individual. *Id.* at 643. Moreover, the *Trudgeon* court relied on the Ninth Circuit's previous decision in *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991), which involved a complaint that alleged no individual action by any of the tribal officials named as defendants. *Id.* at 664.

Second, Plaintiffs do allege that Avi and Felber exceeded the scope of their employment. Specifically, the First Amended Complaint states that they failed to provide the emergency medical services, including transport, that they were there to provide. The respective roles of Viejas, Alpine and the County in causing the delay in Kristin's transport and her death will be significant factors in determining each Defendant's liability. Viejas, Alpine and the County were all at the scene, and all were acting at the same time. The combined actions of all Defendants caused Kristin's death.

The gross negligence alleged in the First Amended Complaint extends far beyond the care that the paramedics' duties authorized (and required) them to give. As alleged in the complaint, Kristin's death was caused by Avi and Felber acting in concert with the County of San Diego. (ER 78 at ¶ 38). Therefore, Defendants Avi and Felber also participated in the section 1983 violations, for which they are not entitled to tribal sovereign immunity. "If . . . the individual tribal defendants acted in concert with the police defendants, whose actions we have here held to be 'under color of the state law,' their actions cannot be said to have been authorized by tribal law." *Evans v. McKay*, 869 F.2d 1341, 1348 n.9 (9th Cir. 1989). The facts and the law therefore do not support Avi and Felber's attempt to cloak themselves with sovereign immunity.

Avi and Felber relied on *Cook v. AVI Casino Enters., Inc.,* 548 F.3d 718 (9th Cir. 2008), but is distinguishable both on its facts and in the theories of liability asserted by the plaintiff. In *Cook*, the plaintiff was injured by a car driven by an employee of the Tribe, and sued to recover damages from the Tribe along with a corporation established by the Tribe, the employee, Christensen, who had injured him in a car accident; *and* two other individual employees, Dodd and Purbaugh, who were a manager and bartender who were responsible for over serving alcohol to the other tribal employee who was the driver of the car that injured Cook. It is clear from the decision that tribal employee Christensen *was not* immune from civil liability for her actions. *Id.* at 721. Cook also alleged the Tribe was vicariously liable because Dodd and Purbaugh had acted in their official capacity and within the scope of their employment. *Id.* at 727. The Tribe, Dodd and Purbaugh argued they were immune from suit under tribal immunity. *Id*. The Court held that just as the Tribe was immune from suit for the actions of its employees, the managers who were sued only in their official capacity were also immune. *Id.*

In *Cook*, the question whether the actions underlying the liability were within the scope of the employees' responsibilities was not contested; indeed, the plaintiffs sought such a finding affirmatively, since they also sought to impose liability on the Tribe via *respondeat superior*. Therefore, the *Cook* Court clearly

focused on the fact that the plaintiff was naming Dodd and Purbaugh only as a means of imposing vicarious liability on the Tribe, which it found impermissible. *Id.* *Cook* therefore is consistent with the well-established principles that a suit seeking damages against an officer in his personal capacity does not offend sovereign immunity. *See Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 684-88 (1949) (there is no immunity when suit addressed to officer seeks to recover damages for the agent's personal actions; the judgment sought will not require action by the sovereign or disturb the sovereign's property).

Here, the *Cook* analysis does not apply. Avi and Felber – like tribal employee Christensen in the Cook case – are not named in their capacity as managers (indeed, they are not) or for actions taken strictly in their official capacity as members of the Viejas Fire Department. Rather, Avi and Felber responded to the scene in lieu of Alpine's ambulance and their grossly negligent acts and omissions at the scene contributed to Kristin's death and Plaintiffs' injury. Moreover, the First Amended Complaint alleges that the actions of Avi and Felber were beyond the scope of their responsibilities as paramedics.

In order to constitute a case analogous to *Cook*, the Complaint here would have to allege liability against Avi and Felber's *supervisors* in their official capacities for actions taken on the reservation (for example, negligent supervision). This is not the case; rather, the Complaint alleges Avi and Felber in their personal

capacities and acting on behalf of the Alpine paramedics, took wholly unwarranted actions and caused Kristin's death. This case is wholly distinguishable from *Cook*.

In summary, the First Amended Complaint presents no issue of tribal sovereignty. Avi and Felber are not Tribal officials, the Complaint against them is not based on the actions of the Tribe, and the Complaint does not seek to impose vicarious liability on the Tribe. Avi and Felber responded to the Maxwell home as a substitute for the Alpine ambulance under the mutual aid agreements among Viejas and the other members of the Heartland zone, as discussed below. If Plaintiffs demonstrate, as expected, that Avi and Felber were acting outside the course and scope of their employment, Viejas Fire would face no vicarious liability and therefore would not have any interest in this suit. For these reasons, the District Court erred in dismissing the claims against them.

CONCLUSION

The Maxwell family respectfully requests that the Court reverse the Orders dismissing the Viejas Defendants and remand for further proceedings consistent with the Court's decision.

Dated this 31st day of January, 2011.

BALLARD SPAHR LLP
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A Professional Corporation

By: /s/
DANIEL M. BENJAMIN

STATEMENT OF RELATED CASES

A related appeal is pending before the Court in the case of *Maxwell, et al. v. County of San Diego, et al.*, Ninth Cir. Case No. 10-56706. That appeal is from the same district court case as this appeal. The appellants in the other case are the individual San Diego County officers who the Maxwell family sued based upon both their role in the death of Kristin and their treatment of the Maxwell family. The officers moved for summary judgment on qualified immunity grounds and the District Court denied the motion. The officers have now appealed that ruling.

Dated this 31st day of January, 2011.

BALLARD SPAHR LLP
LAW OFFICES OF TODD D. THIBODO
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DANIEL M. BENJAMIN

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