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)

APPELLANTS' REPLY BRIEF

Daniel M. Benjamin
Ballard Spahr LLP
401 West A. Street, Suite 1150
San Diego, California 92101
Telephone: (619) 696-9200
Facsimile: (619) 696-9269
Email: benjamind@ballardspahr.com

Todd Thibodo
Law Offices of Todd D. Thibodo
A Professional Corporation
16133 Ventura Boulevard, Suite 580
Encino, California 91436
Telephone: (818) 907-5769
Facsimile: (818) 907-5793
Email: todd@thibodo.com

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INTRODUCTION

Two individual paramedics employed by Viejas Fire responded to a 911 call at the Maxwell family residence. This response occurred in Alpine, California. It did not occur on any tribal lands. It did not involve tribal officials. The response involved grossly negligent medical services and intentional acts that resulted in the death of Kristin Maxwell-Bruce. Those services were provided under a mutual aid agreement pursuant to California law that provided only for *qualified* immunity for tribal paramedics who responded to emergency calls off of tribal lands. Holding the Viejas Tribe liable for that conduct will not impinge on the Tribe's sovereign immunity. It voluntarily and expressly agreed to be part of the California legal scheme. And holding those paramedics liable will not impact the Tribe at all – they are named as individual defendants, with liability sought against them individually only.

These are the basic facts and law. The Viejas Defendants' Opposition Brief ("Opp.") has not changed any of them. They argue that tribal sovereign immunity must be expressly waived. Agreeing to a contract subject to a state regulatory scheme that limits liability *is* an express waiver of immunity. The Viejas Defendants argue that the doctrine of tribal immunity that applies to tribal officials carrying out tribal policy can also reach employees who are not carrying out policy. That applies only where the ultimate recovery is truly sought against the

tribe. Here it is sought as to the individuals. And the Viejas Defendants at the end of their brief have utterly misconstrued what happens when tribal officials take coordinated actions with state officials under color of state law that violate §1983. It is quite clear that such actions are not subject to tribal sovereign immunity as demonstrated below.

For all of these reasons, and the rest stated below, the Maxwell family asks that the Court reverse the Orders below dismissing the Viejas Defendants.

ARGUMENT

I. Viejas Voluntarily and Expressly Waived Its Sovereign Immunity by Choosing to Enter into a Mutual Aid Agreement Subject to California Law Whether or Not It Intended that Result

The Viejas Defendants begin their argument that they did not waive sovereign immunity by pointing out that a State cannot waive an Indian tribe's sovereign immunity, only the federal government or tribe can. (Opp. at 10). However, Plaintiffs are not asserting that the State of California waived Viejas' immunity. Plaintiffs are asserting that *Viejas* waived its sovereign immunity. Viejas did so by voluntarily and expressly entering into mutual aid agreements that are governed by Cal. Health & Safety Code §13863(b). That section limits the immunity of tribal paramedics to the "same immunity from liability for civil damages" as is provided for other paramedics (except for acts and omissions occurring on tribal land). Cal. Health & Safety Code §13863(b).

The principal that an Indian tribe can waive its sovereign immunity by voluntarily subjecting itself to a State's legal scheme in a contract or other agreement is not novel. As pointed out in Plaintiffs' opening brief, this principal was established in *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001) (tribe's entry into contract with state law arbitration and choice of law provisions deemed voluntary waiver of immunity); *accord Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1 (2002) (similar).

This is no different than if the Viejas Tribe was contracting with IBM to provide IBM with accounting services. IBM could not require that the Viejas Tribe provide those services. Nor could IBM unilaterally waive the Viejas Tribe's immunity for it. *However*, IBM could say that anyone who contracts to provide it with accounting services must agree to waive any sovereign immunity they have. And if the Viejas Tribe then agreed to the contract, it would be a waiver. In the same manner, California could not require that the Viejas Tribe provide paramedic services off the reservation. Nor could it unilaterally waive the Viejas Tribe's sovereign immunity for it. However, California could (and did) adopt a statutory scheme that limited the immunity of tribal paramedics who agreed to perform mutual aid services outside tribal lands to the same immunity enjoyed by other

paramedics. *See* Cal. Health & Safety Code §13863(b). When the Viejas Tribe then agreed to provide such services, it waived its immunity.

Second, the Viejas Defendants accurately state that a waiver of sovereign immunity must be "express." (Opp. at 11-12). That is true, but the Viejas Defendants appear to misunderstand what constitutes an express waiver. As the *Smith* court explained, the Supreme Court's *C & L Enterprises* decision rejected the argument that "the contract language [at issue] constituted only a waiver by implication, because the contract did not use the words 'sovereign immunity,' or expressly state that the defense of sovereign immunity is waived." *Smith*, 95 Cal. App. 4th at 6-7 (citations omitted). Instead, the Supreme Court held that "by agreeing to submit all disputes to arbitration, to enforcement in any court of competent jurisdiction, and accepting Oklahoma law as the law governing the contract, the tribe had clearly and explicitly waived its sovereign immunity." *Id*. at 7 (citing *C & L Enterprises*, 532 U.S. at 412-13). In other words, where the terms of a contract expressly subject themselves to a state legal scheme that will waive sovereign immunity, that is an express waiver of immunity.

Here, that is exactly what happened. As the District Court concluded, the Viejas Tribe expressly subjected itself to a mutual aid agreement (actually, several). (*See* ER 43 n.3). Once it did, it made an express waiver of immunity by accepting that legal scheme. *See C & L Enterprises*, 532 U.S. at 412-13.

Viejas argues that its mutual aid agreements sought to explicitly retain its sovereign immunity (Opp. at 13), a sort of "have your cake and eat it too" position where Viejas tried to gain the benefits afforded by California's mutual aid agreement statutory scheme, without paying the price of agreeing to California's regulatory system. The tribe in *C & L Enterprises* attempted a similar argument, asserting that its arbitration clause only meant that it agreed to the alternative dispute system of Oklahoma, but not that such system would have any actual effect on the tribe since it could not be enforced against it. *C & L Enterprises*, 532 U.S. at 421-22. The Supreme Court rightly rejected that argument:

> The clause no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime. **That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration**.

Id. at 422 (emphasis added).

Similarly, the mutual aid agreement had a real world objective – to create a system for enforceable and uniform mutual aid agreements where Indian tribes, if they provided services off their lands (in return for getting assistance on their lands) were going to be subject to California law as to the immunity of a paramedic. Indeed, in many respects the Viejas Defendants are repeating the argument made by the tribe in *Smith*, 95 Cal. App. 4th at 8, that the tribe did not subjectively understand that its contract would be deemed an express waiver.

However, as the *Smith* court concluded, an express waiver can and does occur when a tribe voluntarily subjects itself to a state legal scheme that abrogates immunity, whether or not that was the tribe's subjective intent. *Id*.

Despite the District Court's finding that there were mutual aid agreements (ER 43 n.3), the Viejas Defendants continue to assert that none was in effect as of December 2006. (Opp. at 13-14). That is just incorrect. As summarized in Plaintiffs' Opening Brief, there were several operative mutual or automatic aid agreements, both written and unwritten, in operation at the time. Rather, what the Viejas Defendants are trying to do is to put form over substance because some of the agreements were "automatic aid agreements," unwritten (but nonetheless actual) agreements, or contained in other contracts that included agreements to provide mutual aid as part of broader terms (*e.g.*, the intergovernmental agreement between the County of San Diego and the Viejas Tribe, that contained many different provisions including one acknowledging it was providing mutual aid). Plaintiffs will not restate all the evidence on reply – the citations are in the opening brief and in the record – but the fact is quite clear that the Viejas Tribe had entered into mutual aid agreements as of December 2006 and responded to the Maxwell family home on that basis in December 2006. (*See* Plaintiffs' Opening Brief at 8-9, 17-19 (citing, *inter alia*, ER 107-21, 166-81, 195-227, 235-42, 250-51)).

Lastly as to the issue of waiver, the Maxwell family wants to draw the Court's attention to what the Viejas Defendants did *not* argue anywhere in their Opposition brief to this Court. In the decision below, the District Court erroneously found that entering into a mutual aid agreement under Cal. Health & Safety Code §13863 did not waive immunity. (ER 45). The Viejas Defendants note this decision (Opp. at 8), but then are conspicuously silent on the issue in the entirety of the argument section of their brief, which never once explains how that construction of the statute was correct. (*See* Opp. at 9-22 (argument section of the brief, which never once addresses the issue)). This strategic silence and overlooking of the issue makes sense; the District Court's decision was in error.

As they acknowledge, in the proceeding below, the Viejas Defendants encouraged the court to focus on a "legislative analysis" of the statute that stated the legislative intent of the statute was to enable fire departments to obtain liability insurance. (ER 45; Opp. at 7-8). That, of course, is not how statutory analysis ought to work. One legislative purpose (liability insurance) does not necessarily foreclose another (ensuring a consistent standard of care for all recipients of paramedic services in California). Indeed, if this was the only purpose for Cal. Health & Safety Code §13863, then the statute's entire discussion of the qualified immunity applicable to tribal paramedics would be superfluous. *See Boise Cascade Corp. v. U.S. Envtl. Prot. Agency*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("we must

interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.").

And, even more importantly, an analysis of a statute to determine its purpose and meaning is supposed to start with its plain language – and to end there if it is clear. *Connecticut Nat'l. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. …that a legislature says in a statute what it means and means…what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'.") (citations omitted). Here, Cal. Health & Safety Code §13863 plainly states tribal paramedics operating under mutual aid agreements "shall" have the "same immunity from liability for civil damages" as is provided for other paramedics (except for acts and omissions occurring on tribal land). No recourse to legislative history is thus even necessary – which may be why the argument section of the Viejas Defendants' brief is so conspicuously silent on the issue.

Thus, for all of these reasons, the Maxwell family asks that the Court hold that by entering into a mutual aid agreement under Health & Safety Code §13863, the Viejas Defendants waived tribal sovereign immunity and can be liable for

grossly negligent acts or acts in bad faith pursuant to Cal. Health & Safety Code §§1799.106, 1799.107, the same as any other paramedics in California.

II. Avi and Felber Are Not Immune from Suit

A. Tribal Sovereign Immunity Does Not Extend to Employees such as Avi and Felber, Who Were Sued as Individuals and Were Not Carrying Out Any Tribal Policy

The Viejas Defendants' argument as to the alleged immunity of Avi and Felber is mixing together distinct concepts to extend that immunity into circumstances to which it does not reach: A suit against two employees of a tribe who did not carry out policy or discretionary functions and who are being sued as individuals.

There is immunity for tribal officials exercising discretionary powers where the nature of the action (usually by a high tribal official) means that the individual is really acting as the tribe itself in such situations. *Turner v. Martire*, 82 Cal. App. 4th 1042, 1046-49 (2000) (conducting extensive survey of Supreme Court and Ninth Circuit precedent and concluding that "'tribal officials' to whom immunity should extend are those who perform a high-level or governing role in the affairs of the tribe. Such individuals are required to make the kind of discretionary judgments which [the applicable Ninth Circuit and Supreme Court decisions] recognize cannot be made effectively without immunity."); *Baugus v. Brunson*, 890 F. Supp. 908, 911-12 (E.D. Cal. 1995) (similar); *see Otterson v. House*, 544

N.W.2d 64, 66-67 (Minn. Ct. App. 1996) (similar conclusion, but applying law outside Ninth Circuit).

Many of the cases cited by the Viejas Defendants fall into the category of tribal officials and discretionary decisions. *E.g.*, *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478-80 (9th Cir. 1985) ("individual tribal officials [were] acting in their representative capacity and within the scope of their authority" in carrying out official tribal policy by excluding the plaintiff from the lands); *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983) (plaintiff sued tribe and official concerning taxation of non-tribal members on tribal lands and the individually named defendant "was joined as a party to this action in her official capacity as Tribal Revenue Clerk" with "no allegation that [she] exceeded the scope of her authority" as she was simply carrying out the tribe's taxation policy).

This rule exists for simple policy reasons that are helpful to understand in considering why such immunity will not automatically[1] extend to employees carrying out non-discretionary functions. An Indian tribe has sovereign immunity in its government functions absent a waiver. However, a tribe – like any entity – can only act through individuals. The tribe's officials, when carrying out the

[1] As noted *infra*, it can still apply to an employee sued in his or her official capacity where recovery is sought from the tribe. But that is not this case.

discretionary functions necessary to the tribe's sovereign powers, must accordingly enjoy the same immunity, otherwise the tribe's immunity could be abrogated by the simple device of suing the official. *See Turner*, 82 Cal. App. 4th at 1047 ("sovereign immunity may not be avoided by nominally suing an individual when the suit is, in substance, to compel action by the sovereign") (citing *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 688 (1949)).

Thus, for example, in *Hardin*, the tribe's policy of exclusion of the plaintiff from tribal lands could only be carried out with protection of the tribe's immunity from any challenge to that sovereign function if the officials conducting the policy were also immune. Permitting a suit against the officials would, in essence, be an end-run around the immunity that let the plaintiff effectively attack the policy in court. The same is true in *Snow*. The tribe's taxation policy could only be carried out by officials. If the officials could be sued for carrying out the policy, it would let the plaintiff effectively perform an end-run around the tribe's immunity and protection from attacks on its sovereign functions. *Turner*, 82 Cal. App. 4th at 1047 ("Because it involved, in substance, a suit against the tribe rather than its officer, *Snow* cannot be read as establishing that *individual* immunity attaches without regard to the nature of a tribal officer's official position and duties.") (italics in original).

Of course, this case does not involve any such issue. Avi and Felber are not tribal officials carrying out tribal policies through the exercise of discretionary functions. They are individual paramedics, employees of the Viejas tribe, who are sued as individuals for providing grossly negligent medical care, such that there is no end run to prevent a tribal official from carrying out a tribal, sovereign policy. In *Hardin* or *Snow*, success in the lawsuit would have prevented the tribe from controlling its lands or taxation policies. Here, success in this lawsuit would not prevent the Viejas Tribe from carrying out paramedic services, it will just hold individuals who carry out those policies in a grossly negligent manner personally liable.

Plaintiffs do not dispute that even some lawsuits against tribal employees carrying out non-discretionary functions also can be foreclosed in limited circumstances – but that rule is limited to cases involving lawsuits against an employee in their official capacity such that recovery will be from the tribe's coffers. Thus, for example, in *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002), cited by the Viejas Defendants, tribal officials were sued in "their official capacities" as a suit "against the tribe" with regard to their law enforcement actions on tribal land. *Id.* at 492.

The same is true of *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008), the case upon which the Viejas Defendants rely more than any other.

There, the plaintiff alleged "in each substantive count of his complaint that [the officials] acted in the course and scope of their authority as casino employees." *Cook*, 548 F.3d at 727. Thus, the plaintiff "sued [the individual defendants] in name **but seeks recovery from the Tribe**; his complaint alleges that [the Tribe] is vicariously liable for all actions of [the individual defendants]...." *Id.* (emphasis added).

Here, in contrast, Plaintiffs named Avi and Felber in their individual capacities. (ER 74 at ¶ 9, ER 78 at ¶ 38.) In the comparable situation of other government employees, it is well established that where employees are named in their individual capacities and not in effect against the sovereign, then it may be pursued. *Larson*, 337 U.S. at 686-87 ("the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him. [Citations omitted]. ... [T]he principle that an agent is liable for his own torts 'is an ancient one and applies even to certain acts of public officers or public instrumentalities'"). There is no reason why employees of Indian tribes should enjoy a greater level of immunity than is afforded to employees of other sovereign governments.

It is this rule that was applied in *Turner*, 82 Cal. App. 4th at 1046-50, a case that the Viejas Defendants have no proper response to and that they thus seek to burry in a footnote. (*See* Opp. at 18 n.5). In that case, the defendants were

employed by a tribe as law enforcement officers, although they were not members of the tribe (much as Avi and Felber were employed as paramedics, but not members of the Viejas Tribe). *See Turner*, 82 Cal. App. 4th at 1045. The plaintiffs alleged that while they were at the tribe's casino to speak with employees about legal rights, the defendant tribal law enforcement officers unlawfully assaulted them and "detained and arrested them." *Id.* The plaintiffs then sued the defendants as individuals, and the court recognized that such a lawsuit against an individual employee that did not involve a discretionary function or recovery against the tribe was permissible. *Id.* at 1054 ("we conclude that, to qualify as 'tribal officials' for immunity purposes, defendants also must show they performed discretionary or policymaking functions within or on behalf of the Tribe, so that exposing them to liability would undermine the immunity of the Tribe itself.").[2]

Even more notable is the Viejas Defendants' utter failure to respond to *Baugus*, 890 F. Supp. 908. There, the defendant tribal employee (a security

[2] The Viejas Defendants attempt to characterize *Turner* as involving a personal assault as to which the defendants' employment was irrelevant. (Opp. at 18 n.5). That characterization of *Turner* is inaccurate. These were tribal law enforcement officers who used pepper spray and handcuffs to arrest someone on tribal property; there was no allegation they were off duty or the like. *See Turner*, 82 Cal. App. 4th at 1045. The court went through an eight page analysis as to why such persons do not qualify for immunity when sued as individuals. *See id.* at 1046-54. It was only at the end of that analysis, after finding the officers could not qualify for immunity, that as an alternative ground the court noted that the officers may also have exceeded the scope of their authority as an additional reason to find they lacked immunity, *see id.* at 1055, a factor that in any case also is present here.

employee) "was acting in his official capacity and within the scope of his authority" when he made a citizen's arrest of the plaintiff. *Id*. at 911. Nonetheless, the court found he was not immune because he was not a tribal official enforcing tribal policy. *Id.* at 912. In particular, and distinguishing the case from the later decision in *Cook*, the employee was sued in his individual capacity, and no recovery was sought from the tribe on any vicarious liability theory. *See id*.

Cook certainly did not modify the ruling of cases such as *Baugus*. *Cook* simply looked at the fact that in that particular suit the employees were sued in their official capacity on the theory that the tribe should be vicariously liable. *Cook*, 548 F.3d at 727. That is not this case.

The Viejas Defendants argue that it is not enough that Plaintiffs allege that Avi and Felber were acting in their personal capacities and outside the scope of their authority in providing grossly negligent medical services. They argue that immunity extends to "officials who are sued in their individual capacities." (Opp. at 19). However, the cases they cite do not support overcoming the allegations of Plaintiffs' complaint in this case.

The Viejas Defendants cite *Hardin*, 779 F.2d at 478-79. In that case, as pointed out above, tribal *officials* were carrying out tribal *policy* of excluding the plaintiff from the tribal lands. Allowing that suit would effectively prevent that policy from being carried out at all. Similarly, in *Great Western Casinos, Inc. v.*

Morongo Band of Mission Indians, 74 Cal. App. 4th 1407, 1422 (1999), also cited by Defendants, the plaintiff sued individual tribal council members for voting to enter into and then to suspend and to terminate a contract. Again, official policy carried out by tribal officers was at issue.

The Viejas Defendants reach outside the Ninth Circuit and California to cite the district court case of *Romanella v. Hayward*, 933 F. Supp. 163 (D. Conn. 1996). (Opp. at 19, 20). In that case, the plaintiff's complaint did "not allege that the individual defendants acted beyond the scope of their authority as tribal officers. Consequently, her action against the tribal officers [wa]s a suit against the tribe." *Id.* at 167. It was only at oral argument that the plaintiff suggested she could sue the individuals in their individual capacities, which the court deemed unsupported by the complaint simply because the defendants were acting as employees and the court did not think it could be alleged they acted outside their official capacities. *Id*. at 167-68. The *Romanella* court, which was not applying Ninth Circuit law, does not appear to have put much analysis into this final, quick conclusion as to a proffered amendment to the complaint that was only offered at oral argument. This is in contrast to the decisions in *Baugus* and *Turner*, which did have to carefully analyze Ninth Circuit decisions in correctly concluding that,

assuming the defendant is sued as an individual, the scope of immunity should be limited to officials carrying out discretionary functions.[3]

Further, in contrast to *Romanella*, Plaintiffs allege that Avi and Felber both provided grossly negligent medical services and delayed the departure of Kristin's ambulance based upon unlawful instructions by the County police – the latter of which is actually an intentional act. While these acts may have related to their jobs as paramedics, grossly negligent services – and in particular intentionally delaying the ambulance – hardly are actions taken in an official capacity. *See Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) ("When such officials act beyond their authority, they lose their entitlement to the immunity of the sovereign.").

Lastly, the Viejas Defendants argue that sovereign immunity "does not turn on the form of judicial process or the remedy sought, but upon the essential nature and effect of the proceeding." (Opp. at 19). That is actually Plaintiffs' point. The

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[3] Defendants also cite *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App. 4th 632 (1999). (Opp. at 20). In that case, only the Indian tribe's casino was a named defendant; there was simply a possibility that the complaint could be amended to name certain officers or agents who were named as Does. *Trudgeon*, 71 Cal. App. 4th at 643. Any ruling thus appears to have been unnecessary dicta. In any case, if the Court examines the decision it will see that the *Trudgeon* court never reached the point of considering (much less issuing any holdings on) the difference between tribal officials versus employees, the difference between discretionary and non-discretionary functions, or whether the hypothetical amendment of the complaint to name specific Doe defendants would seek personal liability against them. *Id*. at 643-44. Thus, it contains no instructive analysis at all.

essential nature and effect here is to hold two individuals personally liable. Holding them personally liable will not take funds from the Tribe's coffers, and it will not prevent the Tribe from carrying out any policy. It will simply hold individuals personally liable for grossly negligent and intentional misconduct.

B. Avi and Felber Can Be Sued for Acts Taken in Concert with County of San Diego Employees

It is worth separately highlighting the degree to which the Viejas Defendants have completely misread *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989), which case establishes an independent basis for finding that Avi and Felber are not immune. The relevant portion of *Evans* concerned the court's analysis of 42 U.S.C. §1983 claims brought against local police officers and certain tribal defendants who were alleged to have acted in concert with them. *See Evans*, 869 F.2d at 1347-48. The plaintiffs alleged that the police and tribal officials acted in concert in unlawfully arresting them. *Id*. at 1343-44, 1348.

The court first held that the actions at issue were properly stated under §1983 against the police officers as alleging deprivations "under color of state law." *Id*. at 1348. The court then turned to the tribal officials, who argued that they were operating under tribal, not state, law and thus immune. *Id.* The court rejected that argument, explaining that "private parties who act in concert with officers of the state are acting under the color of state law within the meaning of section 1983." *Id*. (citing *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 930-31

(1982)). In a footnote, the court explained why the fact that the tribal officials were alleged to be operating under color of state law foreclosed assertion of tribal sovereign immunity:

> While officials and agents of an Indian tribe do not have the same immunity as the tribe itself, *Kennerly* [*v. U.S.*, 721 F.2d 1252, 1259 (9th Cir. 1983)], tribal immunity nevertheless extends to individual tribal officials while "acting in their representative capacity and within the scope of their authority." *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985). *See also United States v. Yakima Tribal Ct.*, 806 F.2d 853, 861 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069, 107 S.Ct. 2461, 95 L.Ed.2d 870 (1987). Although the allegedly unconstitutional arrests and seizures of which the Evanses complain were accomplished pursuant to orders of the Tribal Court, we disagree with the district court's conclusion that the individual tribal defendants were "at all times pertinent to this action, acting within their official capacities and under authority of tribal law." *See Evans v. Little Bird*, 656 F. Supp. 872, 875 (D. Mont. 1987). **If appellants are able to prove that the individual tribal defendants acted in concert with the police defendants, whose actions we have here held to be "under color of state law," their actions cannot be said to have been authorized by tribal law**. *Cf. Ex parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441, 453-54, 52 L.Ed. 714 (1907) (enforcement of unconstitutional act by state official is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity).

Evans, 869 F.2d at 1348 n.9 (emphasis added).

It is this crucial footnote that the Viejas Defendants appear to have completely misread. They argue that this footnote somehow, by referencing *Ex parte Young*, establishes that the Ninth Circuit was limiting the plaintiffs in *Evans* to prospective, injunctive relief. (Opp. at 21 (citing *Evans*, 869 F.2d at 1348 n.9)).

The footnote does no such thing. The reference to *Ex parte Young*, 209 U.S. at 159-60, is not in regard to the holding of *Ex parte Young* concerning injunctive relief. Rather, the court was referencing the separate principle, also established *Ex parte Young*, that by definition an unconstitutional act cannot be deemed authorized by state law. Thus, the court was drawing the comparison that the officer's acts in *Evans*, if unconstitutional, by definition could not be deemed authorized by tribal law, since like state law, tribal law is limited by the U.S. Constitution.

Nowhere in the *Evans* decision is there any suggestion that the plaintiffs were seeking injunctive relief and not damages (which makes sense because the arrests *already happened*). To the contrary, in discussing the identical §1983 claims made against the police officers, the court specifically discussed the fact that the plaintiffs in *Evans* were seeking monetary damages. *Evans*, 869 F.2d at 1348 n.8 (discussing and rejecting at the pleading state the officer's argument that they were immune from "liability for damages").

The fact that *Evans* concerned monetary damages, not injunctive relief, can then be confirmed in reviewing the decision below that the Ninth Circuit was reversing. That opinion specifically noted that the plaintiff sought monetary damages from the individual tribal defendants. *See Evans v. Little Bird*, 656 F.

Supp. 872, 874 (D. Mont. 1987) ("The Evans seek monetary damages against the tribal defendants pursuant to 42 U.S.C. §§ 1981, 1983....").

In sum, *Evans* stands for exactly the proposition that Plaintiffs cited it for – tribal employees acting in concert with persons acting under color of state law are themselves acting under color of state law. Their immunity is subject to the qualified immunity of §1983, not tribal sovereign immunity as the District Court erroneously held.

Here, it is alleged that certain of the actions taken by Avi and Felber were in concert with the County of San Diego. (ER 78 at ¶ 38). Indeed, the nature of these allegations are now spelled out – as the District Court concluded, there is sufficient evidence to withstand summary judgment establishing that the individual County Defendants, acting under color of state law, delayed Kristin's ambulance, causing her death. (ER 298 at ¶13). Avi and Felber were in charge of that ambulance, and thus are equally responsible with the County Defendants for ensuring it timely left the home. (ER 4). As to those actions, taken under color of state law, Avi and Felber can only enjoy qualified immunity, not the absolute tribal immunity applied by the District Court. The case should be reversed and remanded on this additional ground.[4]

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[4] Two additional issues require a response. The Viejas Defendants assert that they cooperated discovery. (Opp. at 7 n.2). The record is clear,
(continued...)

CONCLUSION

The Maxwell family asks that the Court reverse the Orders below dismissing the Viejas Defendants and remand for further proceedings.

Dated this 30th day of March, 2011.

BALLARD SPAHR LLP
LAW OFFICES OF TODD D. THIBODO
A Professional Corporation

By: /s/
DANIEL M. BENJAMIN

(...continued)
however, that they never responded to discovery until after they were dismissed, when Avi and Felber appeared for depositions. (ER 101 at ¶5, ER 157-64; SER 8:8-12). As for the claim that "Avi and Felber had agreed to submit to depositions irrespective of the outcome of their motion to dismiss" (Opp. at 7 n.2 (citing SER 7, 8)), the Viejas Defendants omit the fact that Avi and Felber always took the position they would only appear *after* the motions to dismiss were decided. (SER 8:8-12). Plaintiffs' point and objection that they received no discovery from the Viejas Defendants prior to their dismissal (when it would have mattered in establishing the record on a jurisdictional issue as to which evidence outside the complaint can be considered) is exactly correct.

The Viejas Defendants also predictably try to take advantage of the subsequent dismissal of the Alpine Defendants on summary judgment. (*See* Opp. at 9 n.3). First, that decision will be appealed. Second, the Viejas Defendants are not the Alpine Defendants. Plaintiffs believe they will be able to prevail on any equivalent motion by the Viejas Defendants – of course, first Plaintiffs must have opportunity to prosecute the claims, which has thus far been blocked by the erroneous assertion of immunity.

CERTIFICATE OF BRIEF FORMAT COMPLIANCE

I certify that pursuant to Fed. R. App. Proc. 32(a)(7)(C), this reply brief is proportionally spaced, has a type face of 14 points or more and contains 5,753 words.

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BALLARD SPAHR LLP
LAW OFFICES OF TODD D. THIBODO
A Professional Corporation

By: /s/
DANIEL M. BENJAMIN