Supreme Court of Florida

Case No.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

CARLOS BERMUDEZ, et al.,

Respondents.

On Review from the Third District Court of Appeal
Case No. 3D12-842, 3D12-871

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner, the Miccosukee Tribe of Indians of Florida (hereinafter, the "Miccosukee Tribe"), is a sovereign nation and federally-recognized Indian tribe.

The relevant facts underlying this case involve an attempt by two attorneys, Guy A. Lewis and Michael R. Tein (hereinafter, collectively referred to as "Attorneys Lewis and Tein"), to commit a fraud upon the Circuit Court of Miami-Dade County, Florida, the Bermudez family (Plaintiff in the underlying litigation and Respondents in this case), the Miccosukee Tribe, and two individual members of the Miccosukee Tribe (Defendants in the underlying litigation). From 2006 through 2009, Attorneys Lewis and Tein and their law firm, Lewis Tein, PL, received payments from the Miccosukee Tribe, without the express consent or knowledge of the Miccosukee Tribe or the Defendants, an amount totalling between 3.1 and 4 million dollars for the legal representation of the Defendants in an wrongful death case where the Plaintiff's wife was killed as a result of the Defendants' negligence.

On August 30, 2011, at an Evidentiary Hearing to determine the amount of attorneys' fees and costs to be awarded to Plaintiff's counsel for post judgment discovery abuse by Attorneys Lewis and Tein, Attorney Tein, under oath, and in the presence of Attorney Lewis, testified that the Defendants had been paying, and had been responsible for, their legal fees. This statement by Attorney Tein was a

falsity. Throughout the post-judgment proceedings, Attorneys Lewis and Tein raised the defense that the Defendants were uncollectible. Attorneys Lewis and Tein knew, at the time these statements were made, that the former Chairman of the Miccosukee Tribe, Billy Cypress, had misappropriated and diverted funds of the Miccosukee Tribe, without the express consent or knowledge of the Miccosukee Tribe, millions of dollars to Attorneys Lewis and Tein as "legal" fees in the underlying litigation.

On September 2, 2011, the Plaintiff in the case below filed a Motion for Criminal Contempt and Sanctions against Attorneys Lewis and Tein alleging that these attorneys had committed perjury, a fraud upon the court, and misrepresented the source of payment for their attorneys' fees in the case. The Plaintiff's attorney attached to his motion copies of sixty-one (61) checks totaling 3.1 million dollars from the Miccosukee Tribe payable to Lewis Tein PL as legal fees in the underlying litigation. The Miccosukee Tribe authorized its Tribal Attorney to disclose these sixty-one (61) checks to the Circuit Court in order to prevent the fraud Attorneys Lewis and Tein were attempting to perpetrate regarding the source of their attorney's fees.

On February 10, 2012, Attorneys Lewis and Tein issued a subpoena for the deposition of the Miccosukee Tribe's Tribal Attorney. On February 28, 2012, the Miccosukee Tribe filed an Emergency Motion for Protective Order and to Quash

Subpoena Issued to Tribal Officer based on tribal sovereign immunity. On March 5, 2012, Attorneys Lewis and Tein filed a Response to the Emergency Motions for Protective Order and to Quash Subpoenas, in which they argued that the Tribal Attorney had waived tribal sovereign immunity by providing Plaintiff's counsel with copies of the checks. On March 5, 2012, the Circuit Court found that the Tribal Attorney "gave a limited waiver of sovereign immunity by disclosing checks and check stubs to plaintiff's counsel." Trial Court Order (Mar. 5, 2012).

On April 3, 2012, the Miccosukee Tribe sought certiorari review of the trial court order with the Third District Court of Appeal[1]. On May 23, 2012, the Third DCA affirmed the order of the trial court erroneously concluding that the Tribal Attorney's action of providing non-confidential checks and check stubs to a party in litigation is a "clear, explicit, and unmistakable waiver of the Miccosukee Tribe's claim of sovereign immunity." Decision at 8 (A copy is attached in the Appendix). The Miccosukee Tribe filed a motion for a rehearing, rehearing en banc, and/or certification of a question of great public importance on June 12, 2012, which was summarily denied on July 19, 2012.

SUMMARY OF ARGUMENT

The denial of the Miccosukee Tribe's Petition for Writ of Certiorari based on tribal sovereign immunity expressly and directly conflicts with previous

[1] Hereinafter, District Court of Appeal is abbreviated as "DCA."

decisions of the Florida Supreme Court and the First, Second, Third, and Fourth DCA in Florida, as well as federal law. In each of the cases cited herein, these Courts have maintained a uniformity of decision on this same point of law: tribes are immune from suit unless there has been an express, clear, and unequivocal waiver of tribal sovereign immunity by the Tribe or Congress, which cannot be implied. The Third DCA departed from this established principle of law. Therefore, this Honorable Court has discretionary jurisdiction to resolve this conflict.

JURISDICTIONAL ARGUMENT

This Miccosukee Tribe requests this Honorable Court exercise its discretionary jurisdiction to review the Third DCA's Decision of May 23rd, 2012, denying the Miccosukee Tribe's Petition for Writ of Certiorari based on an alleged waiver of tribal sovereign immunity. The Florida Supreme Court has discretionary jurisdiction to review the decision under Article V, § 3(b)(3), Fla. Const. and Fla. R. App. P. 9.030(a)(2)(A)(iv), because it expressly and directly conflicts with the decisions of *Houghtaling v. Seminole Tribe of Fla*., 611 So. 2d 1235 (Fla. 1993); *Miccosukee Tribe of Indians v. Napoleoni*, 890 So. 2d 1152 (Fla. 1st DCA 2004); *Cupo v. Seminole Tribe of Fla.*, 860 So. 2d 1078 (Fla. 1st DCA 2003) *rev. denied*, 870 So. 2d 821 (Fla. 2004); *Seminole Tribe of Fla. v. Ariz*, 67 So. 3d 229 (Fla. 2d DCA 2010); *Seminole Tribe of Fla. v. McCor*, 903 So. 2d 353 (Fla. 2d DCA 2005);

Cypress v. Tamiami Partners, Ltd., 662 So. 2d 1292 (Fla. 3d DCA 1995); *Askew v. Seminole Tribe of Fla*., 474 So. 2d 877 (Fla. 4th DCA 1985), and *Seminole Police Dept. v. Casadella*, 478 So. 2d 470 (Fla. 4th DCA 1985).

The Third DCA set out to determine "[w]hether the trial court departed from the essential requirements of law by denying Mr. Roman's Motion for Protective Order and to Quash [His] Subpoena for Deposition." Decision at 5. The Third DCA erroneously held that the trial court did not depart from the requirements of the law and completely misinterpreted the law regarding tribal sovereign immunity. The issue is whether the Miccosukee Tribe's Tribal Attorney, acting in the scope of employment and on behalf of a federally recognized and sovereign Indian tribe, waived the Tribe's sovereign immunity from suit by providing non-confidential copies of checks and check stubs to a party in a litigation to which the Tribe is not a party when state and federal law hold that a tribe is immune from suit unless there has been a clear and unequivocally expressed waiver by the tribe or Congress, which cannot be implied.

I. The Third District Court of Appeal's decision finding a waiver of tribal sovereign immunity by the Miccosukee Tribe's decision to share information with the trial court, in order to prevent a fraud upon the court, directly and expressly conflicts with decisions of this Court and of the First, Second, Third, and Fourth District Court of Appeal as well as federal law regarding tribal sovereign immunity.

Florida courts have adopted and recognized that tribes have sovereign immunity from suit. *Houghtaling*, 611 So. 2d 1235; *Cypress*, 662 So. 2d 1292;

Ariz, 67 So. 3d at 231; *McCor*, 903 So. 2d 353; *Napoleoni*, 894 So. 2d 1153; *Cupo*, 860 So. 2d 1078; *Askew*, 474 So. 2d 879; and *Casadella*, 478 So. 2d 470. The Miccosukee Tribe, as a federally recognized Indian tribe and a sovereign tribal government, is not subject to a court's jurisdiction absent the *clear, express, and unmistakable waiver/consent of the Tribal Council* or the clear, express, and unmistakable abrogation of Congress. *Houghtaling*, 611 So. 2d 1236; *Cypress*, 662 So. 2d 1292 ("Florida state courts do not have subject matter jurisdiction unless the tribe has expressly consented to suit or Congress has waived the tribe's sovereign immunity"); *Napoleoni*, 894 So. 2d 1153; *Ariz*, 67 So. 3d 231; *McCor*, 903 So. 2d 353; *Cupo*, 860 So. 2d 1078; *Casadella*, 478 So. 2d 470. Congressional waiver or abrogation of tribal sovereign immunity must be unequivocal and does not arise by implication. *McCor*, 903 So. 2d 358; *Askew*, 474 So. 2d 879; *Casadella*, 478 So. 2d 471. Such waiver or abrogation simply does not exist in this case. Therefore, the Third DCA decision is a clear departure from the essential requirements of the law. *McCor*, 903 So. 2d 355-356; *Cypress*, 662 So. 2d 1292; *Napoleoni*, 894 So. 2d 1154.

Florida and federal law have clearly stated that tribal immunity from suit shields the Miccosukee Tribe and its officers, including Tribal Attorney, from depositions and other discovery. *Cypress*, 662 So.2d at 1292 (holding that the Miccosukee Tribe's Chairman and tribal attorney enjoyed immunity from suit **and**

were not subject to the court's discovery order setting their depositions). In *Cypress*, Tamiami Partners, Ltd. filed a suit against the Miccosukee Tribe, the Tribe's Chairman and the Tribal Attorney. *Cypress*, 662 So.2d at 1292. The trial court entered an order setting the depositions of both tribal officials. The Third DCA stated "Petitioners Billy Cypress and Dexter Lehtinen, officials of the Miccosukee Tribe, seek certiorari review of the trial court's discovery order setting their depositions. We grant certiorari, finding that sovereign immunity protects petitioners." *Id*. The Court clearly and succinctly held:

> Florida state courts do not have subject matter jurisdiction over a Native American tribe unless the tribe has expressly consented to suit or Congress has waived the tribe's sovereign immunity to civil actions. *Houghtaling v. Seminole Tribe of Florida*, 611 So.2d 1235 (Fla. 1993). Here, the record clearly shows that sovereign immunity has attached to shield petitioners from suit. Accordingly, the discovery order below must be quashed as a departure from the essential requirements from the law. *See Martin-Johnson, Inc. v. Savage*, 509 So.2d 1097 (Fla. 1987); *Greenstein v. Baxas Howell Mobley, Inc.*, 583 So.2d 402 (Fla. 3d DCA 1991).

Id. The Third District quashed the discovery order. *Id*.

Similarly, in *Napoleoni*, the Miccosukee Tribe sought a writ of certiorari to review a discovery order requiring a tribal official to appear for deposition. *Napoleoni*, 890 So.2d at 1153. The First District Court granted certiorari and quashed the discovery order. *Id*. In so doing, it explained:

> In *Cypress v. Tamiami Partners, Ltd.*, 662 So.2d 1292 (Fla. 3d DCA 1995), the trial court issued a discovery order setting the depositions of two officials of the Miccosukee Tribe, the same Tribe involved in

> this case. The action was brought by a non-tribal company hired to manage the Tribe's bingo gaming facility. The Third District found that the trial court departed from the essential requirements of the law because the Tribe had not expressly consented to the suit, nor had Congress waived the Tribe's immunity. *Id.* at 1292. The discovery order here, as in *Cypress*, is a departure from the essential requirements of law that cannot be remedied on final appeal; therefore, we grant certiorari.

Napoleoni, 890 So.2d at 1154. Under the precedents of *Houghtaling, Cypress,* and *Napoleoni*, in addition to *Cupo, Casadella, McCor*, and *Ariz,* tribal sovereign immunity protects the Tribe and Tribal Attorney from being subject to subpoenas duces tecum for deposition, as were served by Lewis Tein PL.

> The Third DCA Opinion expressly misapprehends federal and state law regarding tribal sovereign immunity when it reasoned that: Mr. Roman, **in an act** approved by the Tribe, admittedly, has purposefully sought to participate in or influence a state court proceeding. **We can conceive of no motive** for the Tribe or Mr. Roman to have done so. The only **plausible** legal conclusion **that can be drawn from the actions** of Mr. Roman and the Tribe in this case is the one made by the trial court—the Tribe's and Mr. Roman's **conduct** constituted a clear, explicit, and unmistakable waiver of the Tribe's claim to sovereign immunity.

Decision at 8 (emphasis supplied). The Miccosukee Tribe's sovereign immunity cannot be waived through an action or implication found to be a "plausible legal conclusion" constituting "a clear, explicit, and unmistakable waiver of the Tribe's claim to sovereign immunity."

The Third DCA misunderstood the Miccosukee Tribe's alleged role in the litigation, which was merely to prevent two attorneys from perpetrating a fraud

upon the trial court. The Miccosukee Tribe did not expressly waive, nor consent to being subject to state court jurisdiction, and there has been no abrogation by Congress. There is no case law finding that the mere action of providing a party in litigation with non-confidential checks and check stubs, without further input, constitutes a "clear, explicit, and unmistakable waiver of the Tribe's claim of sovereign immunity." The Miccosukee Tribe is not a party to the litigation. There has been no evidence showing that the Miccosukee Tribe has unequivocally expressed a waiver of its immunity, rather the Third DCA inferred such waiver, thus departing from the essential requirements of the law.

II. This Court should exercise discretion because this case involves an issue of great public importance.

The decision under review is of great public importance because it jeopardizes the government to government relations between the Miccosukee Tribe and the State of Florida. Almost every day the Miccosukee Tribe receives requests from the States of Florida and its agencies for records and assistance in criminal, civil, and administrative matters (involving disclosure of documents such as police reports, accident reports, or assistance in the prosecution of crimes). If the Third DCA decision that the mere act of sharing of documents, even if only to prevent the perpetration of a fraud on a court, constitutes a waiver of sovereign immunity, a disastrous impact will result in cooperation between the tribes and state. If the trial court's finding of a limited waiver of tribal sovereign immunity by virtue of a

limited, discretionary, and/or administrative sharing of third-party, non-confidential information by the Miccosukee Tribe regarding the payment of attorneys' fees received by Attorneys Lewis and Tein is allowed to stand, there may be adverse consequences to governmental relations between the tribal, state and federal governments because any attempted cooperation will be interpreted as a waiver of sovereign immunity.

CONCLUSION

The Miccosukee Tribe asks this Honorable Court to assert its discretionary jurisdiction to resolve the conflict caused by the Third DCA decision regarding tribal sovereign immunity and which in turn jeopardizes tribal cooperation with the State. Briefs on the merits regarding the issue of tribal sovereign immunity would assist this Court in further understanding the issues.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been sent regular mail to: Ira M. Elegant, Esq., Buchbinder & Elegant, P.A., Attorneys for Lewis Tein, 46 S.W. 1st Street, 4th floor, Miami, FL 33130 and sent regular mail to: Ramon Rodriguez, Attorney for the Plaintiffs, of Ramon M. Rodriguez, P.A., located at Le Jeune Centre, Suite 537, 782 N.W. Le Jeune Road, Miami, FL 33126, this 29th day of August, 2012.

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CERTIFICATE OF COMPLIANCE AS TO FONT SIZE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), I hereby certify that the foregoing brief has been prepared and is in compliance with the font size of Times New Roman 14-point font as required by this Rule.

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