Docket No. 10-56671

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JIM MAXWELL and KAY MAXWELL, individually and as guardians of Trevor Allen Bruce and Kelton Tanner Bruce; et al.,

Plaintiffs-Appellants,

vs.

COUNTY OF SAN DIEGO; VIEJAS FIRE DEPARTMENT; BRADLEY AVI; JEREMY FELBER; et al.,

Defendants-Appellees.

On Appeal from the United States District Court
For The Southern District of California
Civil Case No. 3:07-cv-02385-JAH-WMC
The Honorable John A. Houston, Judge

APPELLEES' ANSWERING BRIEF

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March 1, 2011

Daniel M. Benjamin
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Re: *Maxwell v. County of San Diego, et al.*
Ninth Circuit Docket No. 10-56671
Our File No. 093259-00044

Dear Mr. Benjamin:

This will confirm that the court has granted my request for a 14-day extension to file the Appellee's Answering Brief. Thank you for your professional courtesy in agreeing not to oppose the request.

Regards,

HIGGS FLETCHER & MACK LLP

VICTORIA E. FULLER

VEF/vfcr

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Appellees and Defendants, the VIEJAS BAND OF KUMEYAAY INDIANS (the "Viejas Band"), BRADLEY AVI ("Avi"), and JEREMY FELBER ("Felber"), sometimes referred to collectively as "Viejas," respectfully submit this Appellees' Answering Brief in response to the Opening Brief filed by the Plaintiffs and Appellants, JIM MAXWELL and KAY MAXWELL (referred to collectively as the "Maxwells"):

I.
INTRODUCTION

An off-duty deputy sheriff shot his wife, Kristen Maxwell-Bruce, in the jaw. Avi and Felber – who were emergency medical technicians with the Viejas Fire Department – responded to a 911 call, along with emergency personnel affiliated with the Alpine Fire Department. Despite their efforts to save her, Ms. Maxwell-Bruce did not survive the shooting. The Maxwells (the parents of the decedent) filed a complaint against the Viejas Band, Avi, and Felber, among other defendants, alleging that their supposedly "gross negligence" caused Ms. Maxwell-Bruce's death. But the Viejas Band (and Avi and Felber) filed motions to dismiss the complaint, arguing that the court lacked subject matter jurisdiction on the basis that they were entitled to sovereign immunity. The district court agreed, and entered orders dismissing all of the Viejas defendants.

The Maxwells appealed those orders of dismissal, raising two arguments. First, while they do not contest the general proposition that the Viejas Band is immune from suit, they contend that it has entered into a written contract that supposedly contains an express waiver of its sovereign immunity. Second, the Maxwells argue that Avi and Felber are not immune from liability because: (a) they are not sufficiently "high" tribal officials; (b) they were sued in their "personal" capacity (rather than their official capacity), and (c) they were supposedly acting outside the scope of their authority.

Viejas responds, first, that the Viejas Band has *not* waived its sovereign immunity, because it has never entered into any agreement that contains such a waiver, express or otherwise (and, in fact, the agreements in the record contain provisions that expressly *retain* its immunity from suit). Second, Viejas explains that Avi and Felber are also immune from liability because: (a) that protection is not limited to "high" officials; (b) they were sued in their official capacity (as emergency medical technicians working for the Viejas Band); and, finally, (c) all of their conduct was within the scope of their authority.

II.

STATEMENT OF JURISDICTION

Viejas argued (successfully) below that the district court *lacked* subject matter jurisdiction of the claims alleged against it. The Maxwells have taken the position – in the proceedings below, and here, on appeal – that the district court had (and that this Court has) supplemental jurisdiction of those claims under 28 U.S.C. section 1367(a). (AOB 3-4.)[1]

While Viejas maintains its position that there is no subject matter jurisdiction, it concedes that the district court certified the orders at issue for appeal on September 24, 2010, and that the Maxwells filed a timely notice of appeal on October 21, 2010. (1 ER 36-37, 69-70.)

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[1] All facts set forth in this Brief are supported by reference to the Clerk's Record, abbreviated as: (CR [docket number]); to the Excerpts of Record filed with the Opening Brief, abbreviated as: ([volume] ER [page]:[line]); to the Supplemental Excerpts of the Record filed herewith, abbreviated as: (SER [page]:[line]), or to the Opening Brief filed by the Maxwells, abbreviated as: (AOB [page]).

III.

ISSUES PRESENTED

The Maxwells have presented two issues in their Opening Brief:

(1) Whether the district court erred in dismissing the claims against the Viejas Band on the basis of sovereign immunity, and in concluding that the Viejas Band has never waived that immunity; and

(2) Whether the district court erred in concluding that Avi and Felber were also entitled to sovereign immunity, because they were sued in their official capacity as emergency personnel, and because their actions were within the scope of their authority.

IV.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

A. The Original Complaint, and the Dismissal of the Viejas Band.

The Maxwells commenced this litigation with a Complaint alleging federal claims (under 28 U.S.C. section 1983) against defendants affiliated with the County of San Diego, and also alleging state law claims of wrongful death and other related torts against the Viejas Fire Department (and also against the Alpine Fire Department, which has no affiliation with an Indian tribe). (2 ER 312.)

The Viejas Band responded to the Complaint by filing a motion to dismiss all of the claims alleged against it. (CR 12.) In the motion, the Viejas Band explained that the district court lacked subject matter jurisdiction on the basis of sovereign immunity. (*Id.*)

The Maxwells filed an opposition to the motion, contending, as they do here, that the Viejas Band waived its sovereign immunity by entering into a mutual aid agreement. (CR 18.) The Maxwells relied on Health and Safety Code section 13863, which affords immunity from civil liability, except for gross negligence, to entities that provide emergency services under such an agreement. The Maxwells contended that, by entering into a mutual aid agreement, the Viejas Band waived its more expansive sovereign immunity, and accepted the more limited liability set forth in section 13863. (*Id.*)

In reply, the Viejas Band explained that the Maxwells were incorrect, for at least three reasons: first, only Congress, not any state legislature, may pass a law that would abrogate an Indian tribe's sovereign immunity; second, section 13863 *extends* the immunity applicable to the Viejas Band rather than *limiting* its scope; and third, an Indian tribe may only waive its sovereign immunity by an express waiver,

and the Viejas Band has *never* entered into any agreement that expressly waived its protection. (CR 19.)

In the end, the district court granted the Viejas Band's motion. (1 ER 56-58.) The district court noted that the Maxwells had the burden of establishing that subject matter jurisdiction existed; and, while they had *alleged* the Viejas Band had entered into a mutual aid agreement that contained an express waiver of its immunity (a point which the Viejas Band adamantly denied), the Maxwells had failed to submit any *evidence* of such an agreement. (1 ER 57.) As a result, the district court concluded the Maxwells failed to meet their burden of proof, and dismissed the Viejas Band from the case. (1 ER 57-58.)

B. <u>The First Amended Complaint, Naming Avi and Felber.</u>

Several months later, the Maxwells submitted a motion for leave to file a First Amended Complaint, which, for the first time, named Avi and Felber as individual defendants. (CR 37, 56.) When the district court ultimately afforded the Maxwells leave to amend (CR 51), Avi and Felber filed a motion to dismiss on the basis that the doctrine of sovereign immunity also extended to their conduct in this case as a matter of law. (CR 53.)

In their opposition to the motion, the Maxwells argued that Avi and Felber were not entitled to immunity because they were not acting in their official capacity, and because they were not acting within the scope of their authority. (CR 61.) The Maxwells also submitted as exhibits several different contracts in which they contended the Viejas Band (and, by extension, Avi and Felber) had expressly waived its (their) immunity. (*Id.*) The Maxwells relied most heavily on a mutual aid agreement, and again contended that Health and Safety Code section 13863 abrogated the Viejas Band's sovereign immunity. (CR 61.)[2]

In reply, Avi and Felber explained that *none* of the agreements submitted by the Maxwells contained provisions that waived the Viejas Band's sovereign immunity; indeed, the mutual aid agreement expressly *retained* that protection. (CR 65.) Avi and Felber also submitted an analysis of a legislative bill confirming that the legislature's intent in enacting section 13863 was not to abrogate tribal immunity (which it had no authority to do anyway), but to enable fire departments that contract

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[2] The Maxwells also made overtures to suggest that Avi and Felber had thwarted their efforts to obtain discovery from them. (CR 61.) But those overtures were simply untrue. Avi and Felber had agreed to submit to depositions irrespective of the outcome of their motion to dismiss. (SER 7:3-23, 8:8-16.)

with Indian tribes to obtain liability insurance. (CR 65.) Finally, Avi and Felber confirmed that they were acting in their official capacity and within the scope of their authority when they responded to the 911 call as emergency medical technicians. (*Id.*)

The district court agreed with Avi and Felber that the Viejas Band did not waive its sovereign immunity by entering into a mutual aid agreement, and also agreed with their interpretation of section 13863:

> "Based on the express terms of the [mutual aid] agreement, this Court finds that Viejas Fire did not waive its sovereign immunity . . . . As to [the Maxwells'] legislative intent argument, this Court agrees with [Avi and Felber] that the California legislature's intent in passing § 13863 was not to abrogate Indian tribes' immunity from suit but, instead, was promulgated to provide fire department districts entering into such agreements with Indian tribes the opportunity to obtain liability insurance which was prohibited absent such authority . . . . (1 ER 45.)

The district court also agreed that the California legislature did not have the authority to abrogate tribal immunity, and ultimately concluded:

> "Because the agreement expressly reserves [the Viejas Band's] tribal immunity and the California legislature did not intend to abrogate [the Viejas Band's] immunity, nor could it do so even if it so intended, this Court finds that plaintiffs' arguments fail." (1 ER 45.)

Then, after concluding that Avi and Felber were acting in their official capacity and in the scope of their employment, the district court dismissed the claims against them based on sovereign immunity.[3]

V.

ARGUMENT

A. The District Court Correctly Dismissed the Claims Against the Viejas Band on the Basis of Sovereign Immunity.

As previewed above, the Maxwells contend that the district court erred in dismissing the Viejas Band from the case on the basis of sovereign immunity. As they argued below, the Maxwells argue here that the Viejas Band waived its immunity because it has entered into so-called mutual aid agreements, and because Health and Safety Code section 13863 supposedly operates to abrogate its sovereign immunity.

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[3] Note that the district court also subsequently dismissed Alpine Fire Department when it found that Alpine's employees were not grossly negligent in responding to the 911 call. (1 ER 28-35.) That order confirms what the Viejas Band has always believed: that its personnel, who responded along with the Alpine Fire Department, were *not* "grossly negligent," and that Ms. Maxwell-Bruce's death was caused, not by conduct of its employees, but by the fatal wound inflicted when *she was shot in the jaw by her husband.* (*See,* SER 68:4-69:8, 70:5-16, 71:13-74:25.)

Viejas now explains that the district court was absolutely correct in rejecting those arguments because: (1) only Congress, not a state legislature, may abrogate tribal immunity; (2) absent an *express* waiver, Indian tribes are immune from suit; and (3) the Viejas Band has *never* waived its sovereign immunity, expressly or otherwise.

1. Only Congress May Abrogate Tribal Immunity.

Tribal sovereign immunity is a long-established federal doctrine, and only *Congress* may abrogate the protection it affords Indian tribes. Individual states, including California, *cannot*, as a matter of law, rescind or diminish a federally-recognized Indian tribe's sovereign immunity that is based on federal law. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). The California state Legislature, then, has no authority to abrogate or limit the Viejas Band's immunity, period.

In any event, the legislative history of Health and Safety Code section 13863 makes it clear that abrogating sovereign immunity – which the California Legislature had no authority to do anyway – was not its intent in enacting that provision. As the district court concluded, the legislative history confirms that the statute (which was supported by the East County Fire Protection District and the Sycuan Band) was intended

to provide a basis for fire protection districts that enter into mutual aid agreements with Indian tribes to obtain liability insurance. (SER 23-25.)

As a result, it is indisputable that section 13863 has no effect whatsoever on the sovereign immunity of the Viejas Band, which is based on federal law.

2. Absent an Express Waiver, Indian Tribes are Immune From Suit.

According to the United States Supreme Court, it is settled that courts may *not* exercise jurisdiction over an Indian tribe, absent an effective waiver. *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172 (1977); *see also, Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) ("Suits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe . . . ."); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) (tribes are immune from suits even for commercial activities, on or off the reservation); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). Moreover, because sovereign immunity is *jurisdictional* in nature, its recognition by the courts is mandatory, not discretionary. *Puyallup Tribe*, 433 U.S. at 173.

Here, the Maxwells do not contest that the Viejas Band is a federally-recognized Indian tribe that is entitled to sovereign immunity; neither do they contest that the Viejas Fire Department is wholly owned and operated by the Viejas Band, and is therefore also protected by that immunity. (AOB 1; 2 ER 74; 1 ER 56:24-25; *see also,* SER 78-80, 82 (the Viejas Band is identified as a recognized Indian tribe on the Federal Register); SER 82 (the Viejas Fire Department is an entity of the Band and, is not incorporated or organized under the laws of any state); SER 82 (the Viejas Fire Department is wholly funded by the Viejas Band).)

The argument, then, is whether the Viejas Band has somehow waived its immunity; and, as explained below, it is abundantly clear that it has *not.*

3. The Viejas Band Has Not Waived its Sovereign Immunity.

For decades, courts have recognized that "[n]othing short of an express and unequivocal waiver can defeat the sovereign immunity of an Indian nation." *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379 (8th Cir. 1985); *see also, Santa Clara Pueblo*, 436 U.S. at 58 (a waiver of sovereign immunity may not be implied, but must be unequivocally expressed).

Here, the Viejas Band has *never* waived its sovereign immunity. At the time of the shooting, it had informally agreed to respond to emergency calls from neighboring communities, upon request. (SER 82; 1 ER 56.) In doing so, the Viejas Band did nothing – express, unequivocal, or otherwise – to waive its immunity. (*See,* SER 82.)

The Viejas Band entered into its *first* "mutual aid agreement" with Alpine Fire Department *several years* after the shooting at issue here took place. (SER 38, 41-44.) Moreover, that agreement contains a provision that expressly *retains* the Viejas Band's sovereign immunity. (SER 43.)

The Viejas Band also signed a "Memorandum of Understanding" relating to emergency response services for what is referred to as the "Heartland Zone." (SER 39, 48-63.) That agreement also expressly preserves the Viejas Band's sovereign immunity (SER 49), and, in any event, did not become effective until several years *after* the shooting at issue here. (SER 51, 63.)[4]

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[4] While the Maxwells mistakenly suggest that the Viejas Band concealed the existence of mutual aid agreements and concealed that it responded to off-reservation emergencies (AOB, 9), the Maxwells are just plain wrong. The Viejas Band disclosed that it responded to off-reservation emergencies in its very first court filing (1 ER 56), and the written mutual aid agreements were executed *years* after the incident (*and* they contain clauses specifically retaining the Viejas Band's immunity from third party claims, like the claims in this case). (SER 38, 43, 49, 51, 63.)

In their opposition to the motion to dismiss, the Maxwells also pointed to an "Intergovernmental Agreement" between the Viejas Band and San Diego County. That agreement is not a "mutual aid agreement," and, like the two agreements discussed above, specifically *retains* the Viejas Band's sovereign immunity. (2 ER 117 ("The Tribe does not waive any aspect of its sovereign immunity with respect to actions by third parties"; *see also, id.* ("Except as stated herein . . . no other waivers or consents to be sued, either express or implied, are granted by either party"; 2 ER 117 ("This Agreement is not intended to, and will not be construed to, confer a benefit or create any right on a third party, or the power or right to bring an action to enforce any of its terms.").)

Finally, the Maxwells directed the district court to a "Dispatching Services Agreement" between the Viejas Band and the Heartland Communications Facility Authority. Again, that contract is *not* a mutual aid agreement; plus, it too contains a provision that specifically retains the Viejas Band's immunity. (2 ER 230-231.)

Thus, *none* of the agreements that the Maxwells submitted to the district court expressly waive the sovereign immunity that protects the Viejas Band from civil liability.

Attempting to argue otherwise, the Maxwells rely on cases that, unlike this case, involve an express, unequivocal waiver. For example, in *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001), the Indian tribe entered into a construction contract in which it expressly agreed to arbitrate disputes with the contractor. *Id.*, at 414. The tribe also agreed that Oklahoma law would apply to such disputes, and that an arbitration award could be enforced "in any county having jurisdiction thereof." *Id.*, at 415-416. Based on that language, the Supreme Court concluded that the tribe knowingly waived its immunity against an arbitration claim asserted by the contractor. *Id.*, at 423. But here, the Viejas Band has never entered into any agreement containing a similar express waiver, and, as a result, the *C&L* case is inapplicable.

The Maxwells' reliance on *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974 (9th Cir. 2006) is similarly misplaced. In that case, the defendant was *not* an Indian tribe; rather, it was a separate legal entity formed by a charter that specifically adopted a "sue and be sued" clause. *Id.*, at 978. Although the entity had been formed by an Indian tribe, this Court held it was not protected by sovereign immunity, as that protection had been specifically waived. *Id.*, at 981.

Here, in contrast, it was undisputed that the Viejas Fire Department is an entity of the Viejas Band, that the Viejas Fire Department is not incorporated or organized under the laws of any state, and that it is wholly funded by the Viejas Band. (SER 82.) As a result, it was indisputable below that, unlike the *Marceau* case, the Viejas Fire Department is entitled to sovereign immunity to the same extent as the Viejas Band.

In *this* case, then, unlike the cases cited by the Maxwells, the Viejas Band has *never* taken any action to expressly or unequivocally (or even impliedly) waive its sovereign immunity. The district court, therefore, *correctly* dismissed the Viejas Band as a defendant on the basis of that immunity.

B. The District Court Correctly Dismissed Avi and Felber on the Basis of Sovereign Immunity.

The Maxwells contend that the district court erred in dismissing Avi and Felber as individual defendants, arguing that they were not sufficiently "high" tribal officials, that they were sued in their "personal" capacity rather than their official capacity, and that they were acting outside the scope of their authority. Here, Viejas explains that those arguments have no merit, and that the district court correctly concluded that Avi and Felber were entitled to sovereign immunity.

1. Tribal Immunity Extends to All Employees, Regardless of Whether They are "High" Tribal Officials.

It is absolutely settled that tribal immunity extends to agents of an Indian tribe who act in their representative capacity and within the scope of their authority. *Lineen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002); *Hardin v. White Mountain Apache Tribe,* 779 F.2d 476, 479 (9th Cir. 1985); *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983).

In fact, as recently as 2008, this Court issued a unanimous decision confirming that tribal immunity extends to employees (whether they are "high" officials or not) who act within the scope of their employment. In *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008), this Court held that a restaurant manager and a bartender who were employed by an Indian tribe, and who were accused of over-serving alcohol to a patron who was later involved in a car accident with the plaintiff, were protected by sovereign immunity, and were therefore immune from suit. *Id.,* at 720-721, 726-727.

This Court reasoned that the sovereign entity is the "real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officers are nominal defendants," and that such immunity cannot be thwarted by simply

naming employees of the sovereign as defendants. *Id.*, at 727, *citing, Regents of the University of California v. Doe*, 519 U.S. 425, 429 (1997); *see also, Frazier v. Turning Stone Casino*, 254 F.Supp. 2d 295, 307-310 (N.D.N.Y. 2003).

The Maxwells attempt to avoid the application of the *Cook* opinion by noting that the drunk driver, who was also employed by the tribe, but who was obviously not acting within the scope of her employment at the time, was not immune from liability. (AOB at p. 25.) But that argument has no merit whatsoever, as the drunk driver was attending a party at the tribe's casino on her own time, and the parties to that case did not even attempt to argue that she was somehow acting as an agent of the tribe. *Cook,* 548 F.3d at 720-721, 726-727.[5]

Here, it is indisputable that Avi and Felber were employed by the Viejas Band as emergency medical technicians, and that they were acting as agents of the tribe when they responded to the 911 call. (2 ER 74, 78, 82.) Thus, the immunity of the Viejas Band extends to them as well.

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[5] The Maxwells also rely on *Turner v. Martire* 82 Cal.App.4th 1042 (2000) to argue that immunity only applies to high tribal officials. (AOB, 22.) There, the court concluded that a tribal police officer who physically assaulted the plaintiffs for no apparent reason acted for personal reasons, *not* as an officer of the tribe. *Id.,* at 1045. The case has no application here.

2. Avi and Felber Were Acting in Their Official Capacity.

The Maxwells cannot circumvent the application of tribal immunity by simply alleging (with no factual basis) that Avi and Felber were somehow acting in their "individual" or "personal" capacity. A point that is essential here – which the Maxwells fail to appreciate – is that tribal immunity extends to officials who are sued in their individual capacity. *Hardin,* 779 F.2d. at 478-479; *see also, Romanella v. Hayward*, 933 F.Supp. 163, 167-168 (D. Conn. 1996); *Great Western Casinos, Inc. v. Morongo Band of Mission Indians* 74 Cal.App.4th 1407, 1422 (1999) (holding that immunity extended to the tribe's individual agents, its law firm, and its general counsel).

Moreover, a sovereign's immunity does not turn on the form of judicial process or the remedy sought, but upon the essential nature and effect of the proceeding. *Idaho v. Coeur d' Alene Tribe*, 521 U.S. 261, 269-270 (1997). The Maxwells cannot control whether tribal employees are protected by sovereign immunity by pleading around that protection.

It is clear, then, that unlike the drunk driver in the *Cook* case, who was liable for the torts she committed in her free time, Avi and Felber – who acted only in their capacity as emergency medical technicians – are entitled to sovereign immunity.

3. All of the Actions Taken by Avi and Felber Were Within the Scope of Their Authority.

It is clear that employees of a tribe are immune from liability for actions that directly relate to the performance of their job duties. *Cook,* 548 F.3d at 727. For example, in *Romanella v. Hayward,* 933 F.Supp. 163, a district court determined that individual defendants who were responsible for maintaining a casino parking lot were immune from negligence claims asserted by an employee who slipped and fell in the parking lot. *Id.*, at 165, 167-168.

The court reasoned that, because the individual defendants were responsible for maintaining the parking lot, the negligence claims against them "directly related to their performance of their official duties," and the plaintiff could not reasonably assert that they were acting outside the scope of their authority. *Id.* at 168.; *see also*, *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 644 (1999) (holding that tribal agents were immune from liability for failing to provide adequate security to casino patrons, and concluding that providing such security fell within their official duties).

Moreover, simply alleging that an employee of a tribe has committed some tort is insufficient to establish that the employee acted beyond the scope of his or her authority. *See*, *Frazier,* 254 F.Supp.2d at

310; *Trudgeon,* 71 Cal.App.4th at 644 (so long as an employee's actions do not conflict with his authority, they are actions of the sovereign, "whether or not they are tortious under general law"). Here, while the Maxwells have alleged that Avi and Felber committed various torts, they have *not* alleged that either Avi or Felber engaged in any conduct that was not directly related to their duties. (2 ER 78.)

Finally, in their Opening Brief, the Maxwells cite *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989) to argue that Avi and Felber acted "in concert" with County employees who violated federal law, and that they therefore acted outside the scope of their authority. But the *Evans* opinion is irrelevant. In that case, this Court allowed the action to proceed under the doctrine set forth in *Ex Parte Young*, 209 U.S. 123, 159-160 (1907), which protects against future violations of the law by state officials. *See, Evans,* 869 F.2d at 1348, n.9. But federal courts "cannot award retrospective relief, designed to remedy past violations of federal law" under that doctrine. *Idaho v. Coeur d' Alene Tribe*, 521 U.S. at 288. Here, the Maxwells' claims are not based upon future violations; the Maxwells seek damages for past actions, and the *Evans* opinion has no effect on the scope of immunity afforded to Avi and Felber.

In the end, while the Maxwells *allege* that Avi and Felber acted outside the scope of their authority, those allegations are obviously nothing more than a fiction aimed at avoiding the application of sovereign immunity. Indeed, seeking to impose liability on the Alpine Fire Department, which is not affiliated with an Indian tribe, the Maxwells make the opposite allegation that its employees *were* acting within the scope of their employment. (2 ER 74.) But it is clear that the *substance* of the factual allegations in the Complaint establish that Avi and Felber engaged in no conduct that exceeded the scope of their authority as emergency medical technicians. (2 ER 78.)

VI.

CONCLUSION

In entering its orders dismissing the claims alleged against the Viejas Band, Avi, and Felber, the district court correctly determined that the doctrine of sovereign immunity insulated them from liability. The district court was also correct in determining that the Viejas Band has never waived its immunity, and that the Band's immunity extends to the conduct of Avi and Felber– who acted in their official capacity and within the scope of their authority in providing emergency services.

For those reasons, and for all of the reasons stated above, Viejas respectfully requests that this Court *affirm* the district court's orders of dismissal.

Dated: March 16, 2011

HIGGS, FLETCHER & MACK LLP

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federally recognized Indian
tribe, erroneously sued as
"Viejas Fire Department," and
its firefighters, BRADLEY AVI
and JEREMY FELBER

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32-1, I certify that this Appellees' Answering Brief is proportionately spaced, using Times New Roman typeface, 14 point, and contains 4,599 words.

Dated: March 16, 2011

HIGGS, FLETCHER & MACK LLP

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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.*, Docket Number 10-56706. The appellants in the related appeal are the individual San Diego County officers who were sued by the Maxwells based upon their role in the death of Ms. Maxwell-Bruce, and their treatment of the Maxwell family. A motion for summary judgment brought by individual officers on the basis of qualified immunity was denied, and the officers have appealed that ruling.

Dated: March 16, 2011

HIGGS, FLETCHER & MACK LLP

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9th Circuit Case Number(s) Docket No. 10-56671

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Signature (use "s/" format) s/ Phillip C. Samouris

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Signature (use "s/" format)

Docket No. 10-56671

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JIM MAXWELL and KAY MAXWELL, individually and as guardians of Trevor Allen Bruce and Kelton Tanner Bruce; et al.,

Plaintiffs-Appellants,

vs.

COUNTY OF SAN DIEGO; VIEJAS FIRE DEPARTMENT; BRADLEY AVI; JEREMY FELBER; et al.,

Defendants-Appellees.

On Appeal from the United States District Court
For The Southern District of California
Civil Case No. 3:07-cv-02385-JAH-WMC
The Honorable John A. Houston, Judge

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PROOF OF SERVICE

I, CELESTE L. REISING, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within-entitled action; my business address is 401 West "A" Street, Suite 2600, San Diego, California 92101-7913.

On March 16, 2011, I served the within documents, with all exhibits (if any):

SUPPLEMENTAL EXCERPTS OF THE RECORD
VOLUME 1 OF 1, PAGES 1-82

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. A copy of the transmission report issued by the transmitting facsimile machine is attached hereto.

☑ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 16, 2011, at San Diego, California.

Celeste L. Reising

CELESTE L. REISING