IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, STATE OF FLORIDA

THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Appellant,

Case No. 3D16-2826
L.T. Case No. 2016-CA-21856

vs.

LEWIS TEIN, P.L., GUY LEWIS AND MICHAEL TEIN,

Appellees.

Appeal from non-final order rendered by the Circuit Court of the 11th Judicial Circuit Miami-Dade County, Florida in Case No. 2016-CA-21856

APPELLANT THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA'S REPLY BRIEF

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

Affirming the Circuit Court's holding that the Tribe waived tribal sovereign immunity in this lawsuit requires the Court to accept one of two premises:

(1) that the prior holding of this Court in *Bermudez* – which found a limited waiver of tribal sovereign immunity on a narrow discovery dispute – constitutes a broad waiver such that Plaintiffs can, over four years later, bring a lawsuit against the Tribe unrelated to that discovery dispute; or,

(2) that alleged bad faith litigation conduct by an Indian tribe in a prior lawsuit constitutes a waiver of tribal sovereign immunity for subsequent lawsuits.

A finding in support of either scenario runs contrary to well-established precedents construing the doctrine of tribal sovereign immunity.

First, this is not the *Bermudez* case, and this Court's holding in *Bermudez* went no further than the facts of that case. In their answer brief, Plaintiffs argue that *Bermudez* found a broad waiver of tribal sovereign immunity. Those arguments are unavailing, however, given the narrow holding of *Bermudez*, which affirmed a trial court order finding "a limited waiver of tribal sovereign immunity." Not only are Plaintiffs' arguments contrary to the *Bermudez* holding, they are contrary to Plaintiffs' own arguments in that proceeding, in which Plaintiffs insisted there had only been a limited waiver of immunity. Furthermore, that lawsuit ended in May 2013, almost four years ago. The inquiry on waiver of sovereign immunity should end there. Finally, the Circuit Court recently dismissed with prejudice the malicious prosecution claim that Plaintiffs' premised on

Bermudez. Accordingly, even under Plaintiffs' broad and incorrect reading of *Bermudez*, there is no connection between *Bermudez* and Plaintiffs' lawsuit.

Second, the Tribe's conduct in prior litigation does not waive sovereign immunity in this newly filed case. Cutting through the rhetoric in their brief, Plaintiffs do not cite to a single court – in any jurisdiction – that has found that the filing of a lawsuit by an Indian tribe results in a waiver of tribal sovereign immunity for future suits against that tribe, even if based on the same facts and involving the same parties. This is no surprise, as the U.S. Supreme Court has found that an initial lawsuit does not expose a tribe to future claims. *See Okla. Tax. Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991). Moreover, Congress, not the courts, must create any new exceptions to tribal sovereign immunity. *See Mich. v. Bay Mills Indian Cmty*, 134 S. Ct. 2024, 2031 (2014). As the Circuit Court's Order is an unprecedented departure from the well-established tenets of tribal sovereign immunity, this Court should reverse.

I. In *Bermudez* this Court Upheld the Trial Court's finding of a "Limited Waiver of Tribal Sovereign Immunity" for Purposes of a Narrow Discovery Dispute.

Plaintiffs' argument that this Court's holding in *Bermudez* constitutes a broad waiver of sovereign immunity for Plaintiffs' current lawsuit is refuted by: (a) Plaintiffs' own argument to the trial court in *Bermudez*; (b) the *Bermudez* trial court's order finding of only a limited waiver; (c) Plaintiffs' arguments to this

Court in *Bermudez*; and, (d) this Court's narrow opinion in *Bermudez* affirming the trial court's order.

A. In *Bermudez* Plaintiffs argued to the trial court that any waiver was limited to the narrow discovery dispute.

Plaintiffs' position in this appeal is contrary to the arguments they made to the trial court in *Bermudez*. At that time, Plaintiffs understood and argued to the trial court that any waiver would be limited to the issues surrounding Mr. Roman's disclosure of checks. In briefing, Plaintiffs argued that Mr. Roman "waived sovereign immunity as to the subject matter of his action." (A-386) (Lewis Tein, P.L.'s Brief in Opposition to Motion to Quash in *Bermudez* Trial Court). Plaintiffs then specified that the subject matter of the action was "the checks and check stubs." (*Id.*) Plaintiffs also stated that the facts before the trial court were "no different" than the facts at issue in *Knox v. U.S. Dep't. of the Interior*, 4:09-cv-162, 2012 WL 465685 (D. Idaho Feb. 13, 2012). (A-387). The facts that were "no different" in *Knox* concerned three tribal officials who submitted declarations in support of an amicus brief, and the court found that "while the filing of these documents *did not waive the Tribe's sovereign immunity generally*, it did waive the right of [the three tribal officials] to resist a deposition[] on the *limited* topics covered in their declarations." *See id*. at *1 (emphasis added). At the *Bermudez* trial court hearing, Mr. Tein, continued to cite *Knox* and argued its direct applicability to *Bermudez*. (A-408-09 at 19:3-8).

B. In *Bermudez* the trial court found only a limited waiver of tribal sovereign immunity.

Plaintiffs assert that the Tribe mischaracterized the trial court's finding in *Bermudez*. But the trial court's order speaks for itself. In its order, the trial court in *Bermudez* found that "Mr. Roman gave a *limited waiver of sovereign immunity* by disclosing checks and check stubs to plaintiffs' counsel." (A-304) (Order on Mr. Roman's Discovery Motion) (emphasis added). At the hearing on Mr. Roman's motion to quash and for protective order, the trial court, in fact, repeatedly acknowledged the limitation of waiver, finding that turning over checks "resulted in a limited waiver of sovereign immunity. So to that extent, I'm going to overrule [Mr. Roman's] immunity objection." (A-420 at 30:11-16) (Transcript of Hearing on Mr. Roman's Discovery Motions). The trial court further clarified that "there is a limited issue here and I am limiting the scope of discovery…[to] the actions of turning those checks over." (*Id.* at 30:2-5). After the trial court found a limited waiver, Mr. Tein sought to avoid confusion over the limited import of the holding and reiterated that he would like "to make clear that the issue that [the trial court] is ruling on is Mr. Roman's subpoena….So the only thing that [the trial court] is ruling on today…is so it's a narrow issue for the – the narrow issue for the Third DCA is Bernie Roman's emergency motion." (A-423 at 33:11-21). The trial court agreed with Mr. Tein on the limited scope of its ruling. (*Id.* at 33:22) ("Court: All right.").

C. In *Bermudez* Plaintiffs argued to this Court that any waiver was limited to the narrow discovery dispute.

Just as Mr. Tein had argued to the Trial Court, Mr. Lewis argued to this Court that Mr. Roman gave only "a limited waiver, as the trial court found here, by voluntarily disclosing the checks and check stubs." (A-432) (Brief in Opposition to Writ of Certiorari to this Court). Specifically, in reciting the underlying facts, Mr. Lewis stated: "After hearing argument, the Circuit Court rejected Mr. Roman's claim of absolute sovereign immunity and found a limited waiver, thus permitting his deposition." (A-437). Like in the trial court, Mr. Lewis also extensively cited *Knox* to this Court, stating that it was "dispositive" and "indistinguishable from the present case." (A-440-43). Finally, Mr. Lewis asserted Mr. Roman's actions were "no different" than those actions of the three tribal officials in *Knox*, whose actions "did not waive sovereign immunity generally" but did constitute a waiver "limited to the topics covered in their declarations." (A-441). Indeed, Mr. Lewis noted that, like *Knox*, Mr. Roman gave "a limited waiver as to the issues raised by disclosing the checks and the motion to disqualify." (A-442).

D. In *Bermudez* this Court affirmed the trial court's finding of a limited waiver of tribal sovereign immunity.

On appeal, the only issue before this Court in *Bermudez* was whether the trial court – in making a determination that there had been a "limited waiver of

sovereign immunity" – correctly decided the narrow discovery dispute. Specifically, this Court stated: "It is our task to determine ***only*** whether the trial court departed from the essential requirements of law by denying Mr. Roman's Motion for Protective Order and to Quash." *See Miccosukee Tribe of Indians of Fla. v. Bermudez*, 92 So. 3d 232, 234 (Fla. 3d DCA 2012) (emphasis added). In its opinion upholding the trial court's finding of a limited waiver, this Court cited *Knox* with approval, and noted that it was "not persuaded" by Mr. Roman's efforts to distinguish *Knox*. *Id*. at 234. Nothing in the *Bermudez* opinion indicates that this Court sought to broaden the waiver found by the trial court.

Contrary to their prior representations to this Court and to the trial court in *Bermudez,* Plaintiffs now contend that *Bermudez* created a broad waiver of tribal sovereign immunity that would subject the Tribe to a separate lawsuit brought four years later. This is directly contrary to the narrow holding in *Bermudez* and applicable law. A waiver of tribal sovereign immunity is to be construed narrowly and in favor of the Tribe.[1] *See* Initial Brief 26-27; *see also MMMG, LLC v. Seminole Tribe of Fla., Inc.*, 196 So.3d 438 (4th DCA 2016) (overruling

[1] Plaintiffs cite *Mass. v. Wampanoag Tribe*, 98 F. Supp. 3d 55 (D. Mass. 2015) for the proposition that a tribe cannot invoke sovereign immunity if a prior court decision found waiver. *Wampanoag*, however, is a contractual waiver case, as it involved a dispute over tribal land and the court was bound by a prior decision which found that the settlement agreement voluntarily entered into by the tribe created "a waiver of immunity with respect to the use of . . . all of the Tribe's land." *Id.* at 64.

contractual waiver of tribal sovereign immunity because, among other reasons, provisions must be construed "liberally in favor of…tribes, so ambiguous provisions should be interpreted to their benefit."). Accordingly, this Court's holding should be construed no broader than its plain terms.

Plaintiffs' lengthy recitation of the supposed merits of their claims does not change the conclusion that the Tribe has done nothing to waive tribal sovereign immunity for purposes of this lawsuit. This is a new lawsuit. This is not the *Bermudez* case. *Bermudez* stands only for the proposition that conduct *in that lawsuit* waived tribal sovereign immunity regarding a narrow discovery issue *in that lawsuit*. Plaintiffs have repeatedly admitted that *Bermudez* is over. (*See, e.g.*, A-24 at ¶ 54) And Plaintiffs' allegation that the Tribe did not fully comply with its narrow discovery obligations in *Bermudez* does not create a far-reaching waiver of sovereign immunity for subsequently filed tort claims, especially where *Bermudez*, including the Tribe's discovery obligations, has long since ended in Plaintiffs' favor. *Id.* Moreover, since this appeal was filed, the Circuit Court dismissed with prejudice Plaintiffs' malicious prosecution claim premised on the *Bermudez* case. (A-455) (Order on Defendants' Motion to Dismiss). Thus, the tenuous connection between Plaintiffs' lawsuit and *Bermudez* no longer exists.

II. There is No Precedent to Support Plaintiffs' Argument That Alleged Bad Conduct Waives Tribal Sovereign Immunity for Future Lawsuits.

A. Litigation conduct, absent an express statement, does not constitute a waiver of tribal sovereign immunity.

In the Circuit Court, Plaintiffs failed to even acknowledge the existence of the U.S. Supreme Court's decision in *Citizen Band*. *See* 498 U.S. at 509; (A-201-22). In their answer brief to this Court, Plaintiffs acknowledge the decision, but their attempts to distinguish the case fail.

In *Citizen Band*, the U.S. Supreme Court, in no uncertain terms, held that an Indian tribe "did not waive its sovereign immunity by filing an action for injunctive relief" and that "a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe." *Citizen Band*, 498 U.S. at 509. Plaintiffs' argument that *Citizen Band* applies only to lawsuits in which Indian tribes seek to "defend their sovereign immunity," *see* Opp. at 26, has no foundation in *Citizen Band*, or the lower court decisions construing its holding.

In fact, the cases cited by Plaintiffs underscore why their analysis of *Citizens Band* is incorrect. *See* Opp. at 23. For example, in *Elem. Indian Colony v. Ceiba Legal*, the Indian tribe alleged RICO claims in a complaint that had no connection to "defending the tribe's sovereignty." No. C 16-03081, 2017 WL 467839 (N.D. Cal. Feb. 2, 2017). The court granted a motion to dismiss the complaint. After

dismissal, but in that same lawsuit, the tribe tried to invoke immunity to prevent a motion for attorneys' fees. *Id.* But the court relied on *Citizen Band* to find that the tribe's "arguments are inapposite because this is a motion for attorneys' fees, ***not a counterclaim***." *Id.* (emphasis added). Thus, authority cited by Plaintiffs confirms that *Citizen Band* would bar claims on sovereign immunity grounds, even when the Tribe did not file suit to "defend their sovereign immunity."[2]

Another case that drives home the meaning of *Citizen Band* is *Beecher v. Mohegan Tribe*, 918 A.2d 880 (Conn. 2007); *see* Initial Brief 12-14. Plaintiffs try to distinguish *Beecher*, but to no avail. First, Plaintiffs provide no persuasive explanation for their reference to *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982). Opp. at 27. That opinion clearly states that counterclaims for "wrongful or malicious prosecution" are "not one[s] arising out of the same transaction or occurrence," and, thus, are barred by tribal sovereign immunity. *Id.* at 1345 n. 15; *see also E.E.O.C. v. First Nat'l. Bank*, 614 F.2d 1004, 1008 (5th Cir.

[2] Plaintiffs seek to distinguish the numerous courts that hold that prior litigation conduct does not waive sovereign immunity by claiming that those cases did not involve "intentional off-reservation torts." Opp. at 27. The Tribe cited numerous cases where immunity barred intentional torts against Indian tribes. Initial Brief at 19-20. In contrast, Plaintiffs cite no authority that distinguishes torts committed off-reservation, and it would be inappropriate to recognize a new exception here. *See Bay Mills*, 134 S. Ct. at 2037. Plaintiffs next try to argue that, unlike in *Furry* and *Miller*, Plaintiffs did not "venture[] into the Tribe's sovereignty". Opp. at 30. But for many years Plaintiffs voluntarily served as well-compensated counsel for the Tribe, thus "venturing" into the Tribe's sovereignty. (A-1 at ¶ 1).

1980). In dicta, *Jicarilla* merely noted that malicious prosecution claims, while not arising out of the same transaction or occurrence, "might well be premature before determination of the Tribe's suit," even if sovereign immunity did not apply. *Id.*

Second, Plaintiffs argue that the malicious prosecution claim in *Beecher* is "beyond frivolous." This jump to the merits of the malicious prosecution claim in *Beecher* is not only absent from the text of the opinion, but also irrelevant to whether a "clear, explicit and unmistakable waiver exists."

Third, Plaintiffs plainly misread the reference "'to enforcement of state criminal laws'" in *Beecher*. Opp. at 27. Plaintiffs contend that they are enforcing state criminal laws here and *Beecher* creates an exception for enforcement of state criminal laws. That distinction, in dicta, references *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), a case regarding enforcement of state laws by a state official. Plaintiffs cannot plausibly assert that their malicious prosecution claims are tantamount to a claim brought by a state officer.

B. The cases relied on by the Plaintiffs in support of the Circuit Court's Order do not stand for the propositions cited.

Plaintiffs contend that the Circuit Court's Order has endless precedential support. Opp. at 20-25. None of the cases Plaintiffs cite, however, actually stand for the proposition Plaintiffs assert. Rather, in each instance, these cases underscore that litigation conduct, standing alone, cannot create a waiver of tribal sovereign immunity.

1. In Rupp, affirmatively inviting counterclaims and consenting to adjudication of an equitable right waived tribal sovereign immunity, not bad faith conduct.

Plaintiffs incorrectly argue that in *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995), the court held that the bad faith litigation conduct of the tribe waived tribal sovereign immunity.[3] Opp. at 21-22. To the contrary, the Eighth Circuit held that the tribe affirmatively waived sovereign immunity as to counterclaims to determine equitable interest in land for two reasons – neither reason has anything to do with bad faith conduct. It was only the after tribe had affirmatively waived immunity *in that case* that the tribe in *Rupp* sought to ***revoke*** its waiver, which could not be done, in part, because of its bad faith conduct.

The Indian tribe in *Rupp* asserted claims to determine equitable interests in land, and, in writing, affirmatively invited the defendants to assert any interests they held in those lands in response. *Id.* The court stated that "commencement of a lawsuit by itself does not . . . operate as a waiver of tribal immunity with respect to compulsory counterclaims." *Id*. However, because the tribe provided to the court a written statement that "***affirmatively requested the district court to order the defendants to assert any claims in the disputed lands***," the court found there had been an "unequivocal consent to any counterclaims." *Rupp*, 45 F.3d at 1244

[3] In addition to *Bermudez*, the Circuit Court relied primarily on *Rupp* in finding a waiver of tribal sovereign immunity.

(emphasis added). Also, the tribe, by filing an equitable claim for land, the *Rupp* court found it had consented to equitable determination of its interest in the land – i.e., the substance of the defendants' counterclaims. *Id.* at 1245.

Notably, Plaintiffs flatly ignore these facts, instead, arguing solely that the *Rupp* court found that the "a tribe had waived its sovereign immunity by filing suit to resolve a property dispute." Opp. at 21. Plaintiffs' reading of *Rupp* – that the mere filing of a lawsuit combined with bad faith conduct waives tribal sovereign immunity for future lawsuits – simply cannot be squared with the facts of the case and the Eighth Circuit's actual holding.

It was only after the *Rupp* court dismissed the tribe's complaint as a discovery sanction that the Indian tribe sought to ***revoke*** its express waiver of tribal sovereign immunity. *Id.* This is where Plaintiffs' reliance on an out-of-context block quote from *Rupp* comes into play. After the Eighth Circuit already affirmed waiver on two grounds, it further found that the "discovery sanction does not operate to revoke the Tribe's waiver of sovereign immunity" because it would "effectively encourage[] the Tribe's flagrant disrespect of the court's authority and orders." *Id.* at 1246; *see* Opp. at 22. After dispatching the tribe's attempt to revoke waiver, the Eighth Circuit reiterated that it was not bad faith that created waiver; instead, "the Tribe waived its sovereign immunity to counterclaims ***because it clearly and unequivocally consented to suit***." *Id.* (emphasis added).

The Eighth Circuit has clarified its own holding and separately held that "[t]he [*Rupp*] court concluded that the tribe's explicit request that the defendants assert their claims was an unequivocal consent to such counterclaims." *Rosebud Sioux Tribe v. Val-U Const. Co.*, 50 F.3d 560, 563 (8th Cir. 1995). Likewise, other courts repeatedly read *Rupp* the same way.[4] These cases demonstrate that the Circuit Court's reliance on *Rupp* was in error.

2. Not a single case cited by Plaintiffs supports their argument that litigation conduct in one lawsuit waives sovereign immunity in future lawsuits.

Perhaps no Court of Appeals has been more strident than the Ninth Circuit in holding that a tribe does not waive sovereign immunity to counterclaims, let alone subsequent suits, by filing a lawsuit. *See McClendon v. U.S.*, 885 F.2d 627, 630 (9th Cir. 1989) ("Thus, a tribe's waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts."). In spite of this precedent, Plaintiffs rely

[4] *See Ute Indian Tribe v. Utah*, 790 F.3d 1000, 1011 (10th Cir. 2015) (citing *Rupp* and holding that "[b]y now the point is plain," that, unlike *Rupp*, the plaintiff has not "ever received an invitation" to file counterclaims); *Flandreau Santee Sioux Tribe v. Gerlach*, 162 F. Supp. 3d 888, 897 (D.S.D. 2016) (noting that *Rupp* "found that language explicitly requesting" counterclaims "was an unequivocal consent to counterclaims."); *accord Tohono O'odham Nation v. Ducey*, 174 F. Supp. 3d 1194, 1203 (D. Ariz. 2016); *Oneida Tribe v. Vill. of Hobart*, 500 F. Supp. 2d 1143, 1150 (E.D. Wis. 2007); *accord Tunica-Biloxi Tribe v. Blalock*, 23 So. 3d 1041, 1047 (La. App. 3 Cir. 2009).

on a litany of Ninth Circuit cases to suggest there is precedential support for their argument that prior litigation conduct waives tribal sovereign immunity for future lawsuits. Opp. at 23-25. But reading these cases in the manner Plaintiffs suggest would be to accept that these Ninth Circuit courts have rejected their own still-intact holding. *See, e.g.*, *Lewis v. Norton*, 424 F.3d 959, 962 (9th Cir. 2005) (upholding *McClendon's* holding that a tribe's prior suit did not subject it to suit on same subject-matter).

Fortunately, however, squaring Plaintiffs' synopses of these Ninth Circuit decisions with *McClendon* and *Norton* is unnecessary. Not one case cited by the Plaintiffs stands for the proposition that a tribe, by filing a lawsuit, opens itself up to future lawsuits brought by the party it sued in the initial lawsuit[5]:

- *In Re White.* After an Indian tribe submitted a claim in Chapter 11 bankruptcy, the Ninth Circuit affirmed that the Indian tribe could not use sovereign immunity to bar its involvement after the case converted to a Chapter 7 bankruptcy because "conversion does not constitute the commencement of a new case for purposes of sovereign immunity." 139 F.3d 1268, 1272-73 (9th Cir. 1998). In contrast, Plaintiffs have filed a new, separate lawsuit.
- *Cal. Valley Miwok Tribe v. Cal. Gambling Control Comm'n*. An Indian tribe was found to have waived sovereign immunity because "[w]hen an Indian tribe initiates a lawsuit as a plaintiff, it consents to the jurisdiction of

[5] Plaintiffs also cite to *Knox* and *Ceiba Legal.* Previously in this brief, the Tribe explained *Knox's* true import, even citing to Plaintiffs' prior and inconsistent summary of *Knox* to this Court, *see* Section I(A), *supra*, and also explained why *Ceiba Legal* hurts, not helps, Plaintiffs' argument, *see* Section II(A), *supra*,

the court to adjudicate the law" *in that case*. No. D068909, 2016 WL 3448362, *7 (Cal. Ct. App. June 16, 2016). Here the Tribe did not file suit.

- *U.S. v. State of Ore.* The Ninth Circuit found that, in addition to contractually consenting to resolve the issue in federal court, an Indian tribe waived sovereign immunity for purposes of a case by *intervening in that case*. 657 F.2d 1009, 1015-16 (9th Cir. 1981). Here, the Tribe has not consented by contract to resolve Plaintiffs' claims, nor is it an intervenor in this case.

- *U.S. v. James*. The Ninth Circuit affirmed a narrow waiver, quashing a subpoena seeking more documents from the Indian tribe after that tribe had already produced certain documents. 980 F.2d 1314, 1320 (9th Cir. 1992). Here, the Tribe produced no documents in this case prior to waiving tribal sovereign immunity. Plaintiffs cited *James* to this Court in *Bermudez* and argued it was consistent with *Knox* and the limited waiver in *Bermudez.* (A-440)

- *U.S. v. Snowden*. Indian tribe raised sovereign immunity in that case only after it had already complied with a subpoena and expressly disclaimed that sovereign immunity was applicable. 879 F. Supp. 1054, 1057 (D. Ore. 1995) (holding that "compliance with the court's Order for production cannot be construed as a waiver," but for the express disclaimer).

As each of these cases relate to *the same case*, they are of no import here.

CONCLUSION

For these reasons and the reasons set forth in the Tribe's Initial Brief, the Circuit Court's Order should be reversed and the case dismissed with prejudice.

Respectfully submitted this 9th day of March 2017.

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CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing Reply Brief of Appellant complies with the font requirements of Rule 9.210.

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