

No. 21-11643

**United States Court of Appeals
for the Eleventh Circuit**

◆

MUSCOGEE (CREEK) NATION, et al.

Plaintiffs-Appellants.

v.

BUFORD ROLIN, et al.,

Defendants-Appellees.

◆

**On Appeal from the United States District Court
for the Middle District of Alabama, Northern Division
2:12CV1079-MHT(CSC)**

APPELLEE AUBURN UNIVERSITY'S BRIEF

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September 19, 2023

Muscogee (Creek) Nation v. Rolin, et al.

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

The undersigned certifies that the Certificate of Interested Persons contained in the Brief of Appellants Muscogee (Creek) Nation, et al., is complete, except for the following:

Boyd, David Randall – Counsel for Defendant/Appellee Auburn University

Martin Construction, Inc. – Defendant (filed for bankruptcy)

See Fed. R. App. P. 26.1; 11th Cir. R. 26.1-1, 11th Cir. R. 26.1-2(b), and 11th Cir. R. 28-1(b).

This 19th day of September, 2023.

/s/ David R. Boyd

Attorney for Defendant-Appellee Auburn
University

STATEMENT REGARDING ORAL ARGUMENT

Auburn University does not request oral argument.

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**STATEMENT OF SUBJECT-MATTER
AND APPELLATE JURISDICTION**

Appellants the Muscogee (Creek) Nation, Hickory Ground Tribal Town, and Mekko George Thompson (collectively, the “Muscogee (Creek) Nation”), sued defendants the Poarch Band of Creek Indians, individual members of the Poarch Band of Creek Indians’ Council in their official and individual capacities, the Poarch Tribal Historic Preservation Officer in his official capacity, the PCI Gaming Authority, the PCI Gaming Authority Board members in their official capacities, the United States Department of the Interior, the National Park Service, the Bureau of Indian Affairs, Martin Construction, Inc. (filed for bankruptcy), and Auburn University, *et al.* (Doc. 190-2nd Am. Compl.-Pgs 7-10, ¶¶ 11-32.)

The Muscogee (Creek) Nation asserted federal claims under the Indian Reorganization Act, 25 U.S.C. §§ 461, *et seq.*, the National Historical Preservation Act (“NHPA”), 54 U.S.C. §§ 100101, *et seq.*, the Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. § 3001, *et seq.*, the Archeological Reserves Protection Act, 16 U.S.C. §§ 470aa, *et seq.*, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*, and supplemental state law claims (promissory estoppel, outrage, unjust enrichment), among others. (Doc. 190-Pgs 45-76, ¶¶ 190-334.) The district court had federal question jurisdiction over the federal law claims and supplemental jurisdiction over the state law claims. *See* 28 U.S.C. §§ 1331, 1367; *see also* 28 U.S.C. § 1361 (action to compel federal officer to do his

duty). The District Court also had subject matter jurisdiction under several claim-specific federal statutes. *See* § 1362 (actions by Indian tribes under federal law); 25 U.S.C. § 3013 (jurisdiction over actions alleging violations of the Native American Graves Protection and Repatriation Act); 54 U.S.C. § 307105 (claim to enforce the National Historic Preservation Act).

The district court entered a final judgment dismissing all claims against all parties on March 15, 2021. (Doc. 223-Opinion; Doc. 224-Final J.) The Muscogee (Creek) Nation timely filed its notice of appeal on May 12, 2021. (Doc. 228-Not. of Appeal.) *See* 28 U.S.C. § 2107(b) (time for appealing judgments where the United States, one of its agencies, or one of its officers is a party is 60 days); Fed. R. App. P. 4(a)(1)(B) (same). This Court has appellate jurisdiction over an appeal from the final decision of the district court under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

- I. Whether the District Court properly dismissed this case.

Answer: Auburn is neutral.

STATEMENT OF THE CASE

The Nature of the Case

This case involves a dispute between the Muscogee (Creek) Nation, Hickory Ground Tribal Town, and Mekko George Thompson (collectively, the “Muscogee (Creek) Nation”), on one side, and the Poarch Band of Creek Indians and the U.S. Department of the Interior, *et al.*, on the other side, about historically significant Native American land and cultural items. (Doc. 190-Pgs 45-80, ¶¶ 190-334 & Prayer for Relief; Pgs. 13-20, ¶¶ 43-72.) The land in dispute is located near Wetumpka, Alabama, and is called Hickory Ground. (*Id.* at Pg 13, ¶¶ 43-45.) The cultural items include Native American remains, funerary objects, and other artifacts and materials. (*Id.* at Pg 28, ¶ 104.)

“At Poarch’s direction, archaeologists affiliated with Auburn University conducted a phase III excavation of the Hickory Ground Site.” (*Id.* at Pg 28, ¶ 101.) “Auburn is listed as a Defendant solely to the extent that this Court enters orders concerning the possession, custody, control, or relocation of the cultural items at issue.” (*Id.* at Pg 12, ¶ 42.) However this Court decides this case, Auburn University stands ready to cooperate and facilitate any relief ordered by this Court or the District Court. (Doc. 194-Auburn’s Ans. to 2d Am. Compl.-Pg 2, ¶ 42.)

**i. Statement of the Course of Proceedings
and Disposition in the Court Below**

On December 12, 2012, the Muscogee (Creek) Nation sued the Poarch Band of Creek Indians, the PCI Gaming Authority, the U.S. Department of the Interior, et al., and Auburn University. (Doc. 1-Compl.-Pgs 1-2.) On March 9, 2020, the Muscogee (Creek) Nation filed the operative complaint—the second amended complaint—against the Poarch Band of Creek Indians, the PCI Gaming Authority, the U.S. Department of the Interior, et al., and Auburn University. (Doc. 190-Pgs 7-10, ¶¶ 11-32.) The Muscogee (Creek) Nation, et al., asserted federal claims under the Indian Reorganization Act (“IRA”), 25 U.S.C. §§ 461, *et seq.*, the National Historical Preservation Act (“NHPA”), 54 U.S.C. §§ 100101, *et seq.*, the Native American Graves Protection and Repatriation Act of 1990 (“NAGPRA”), 25 U.S.C. § 3001, *et seq.*, the Archeological Reserves Protection Act (“ARPA”), 16 U.S.C. §§ 470aa, *et seq.*, the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb, *et seq.*, and supplemental state law claims (promissory estoppel, outrage, unjust enrichment), among others. (*Id.* at Pgs 45-76, ¶¶ 190-334.)

With respect to Auburn University, the second amended complaint alleges that archaeologists affiliated with Auburn excavated Native American remains and cultural items and retains possession of the same:

- “At Poarch’s direction, archaeologists affiliated with Auburn University conducted a phase III excavation of the Hickory Ground Site.” (*Id.* at Pg 28, ¶ 101.)

- “Auburn receives federal funds and, on information and belief, exercised, and continues to exercise, possession or control over remains and cultural items that Auburn excavated from Hickory Ground.” (*Id.* at Pg 12, ¶ 42.)
- “Auburn is listed as a Defendant solely to the extent that this Court enters orders concerning the possession, custody, control, or relocation of the cultural items at issue.” (*Id.*)

The second amended complaint seeks injunctive relief to have Auburn cooperate in whatever relief is ultimately determined to be appropriate. *See* (Doc. 190-Pg 58, ¶ 261; Pgs 63-64, ¶ 282; Pg 79, Prayer for Relief (d)(ii)).

The Poarch Band of Creek Indians, the U.S. Department of the Interior, and all the remaining defendants, except Auburn University, filed motions to dismiss under Rules 12(b)(1) and 12(b)(6). (Docs. 199 & 200; Docs. 201 & 202; Docs. 204 & 205.) In lieu of a motion to dismiss, Auburn filed an answer to the second amended complaint denying any violations of statutes and stated its willingness to cooperate and facilitate whatever relief the District Court might order, if any:

Auburn reaffirms its willingness to cooperate with and facilitate whatever relief measures may be ordered by this Court. Because the nature and scope of any such potential relief is unknown at this time, however, Auburn reserves its right to be heard in connection with any remedial requirements affecting or potentially affecting it that may be considered by the Court. Auburn denies the necessity of any injunction as to it.

(Doc. 194-Auburn’s Ans.-Pg 3.)

On March 15, 2021, the District Court entered its opinion and judgment, holding that: (1) tribal sovereign immunity barred this action against the Poarch Band of Creek Indians, et al.; and (2) complete relief could not be granted in this case without the Poarch Band of Creek Indians as a party, and thus, Rule 19, Fed. R. Civ. P., required dismissal of the entire case. (Doc. 223-Opinion-Pgs 14-25, 25-32.) The Muscogee (Creek) Nation appealed. (Doc. 228-Not. of Appeal.)

ii. Statement of the Facts

At the request of the Poarch Band of Creek Indians, archaeologists affiliated with Auburn University excavated Native American remains and cultural items from a burial site at Hickory Ground near Wetumpka, Alabama. (Doc.-190; Pg 28, ¶ 101; Pg 31, ¶¶ 117-119.) Auburn has possession of certain of these historical items. (*Id.* at Pg 12, ¶ 42; Doc.-194-Auburn’s Ans., Ex. 1-Ltr. (describing items from Hickory Ground in Auburn’s possession)).

The Muscogee (Creek) Nation disputes the Poarch Band of Creek Indians’ removal of remains and cultural artifacts from Hickory Ground and the United States Department of the Interior’s taking of Hickory Ground into trust for the benefit of the Poarch Band of Creek Indians, among other things. (Doc. 190-Pgs 45-76, ¶¶ 190-334; Pg 45, ¶ 191.) This case involves the United States Department of the Interior and multiple entities and individuals. (*Id.* at Pgs 7-10, ¶ 11-32.) The Muscogee (Creek) Nation listed Auburn as a defendant “solely to the extent that this

Court enters orders concerning the possession, custody, control, or relocation of the cultural items at issue.” (*Id.* at Pg 12, ¶ 42.)

iii. Standard of Review

“We review de novo the district court’s grant of a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction” *Georgia Ass’n of Latino Elected Offs., Inc. v. Gwinnett Cnty. Bd. of Registration & Elections*, 36 F.4th 1100, 1112 (11th Cir. 2022). “We review dismissal for failure to join an indispensable party for abuse of discretion.” *Laker Airways, Inc. v. Brit. Airways, PLC*, 182 F.3d 843, 847 (11th Cir. 1999).

SUMMARY OF THE ARGUMENT

Auburn University takes no position on the correctness of the District Court’s judgment dismissing the case. Auburn reaffirms that it will cooperate as to any relief ordered by this Court or the District Court.

ARGUMENT AND CITATIONS OF AUTHORITY

Auburn is neutral in this case. Auburn takes no position on the correctness of the District Court's dismissal of this case or the arguments made by the fine attorneys for the distinguished parties in this case.

Auburn reaffirms its willingness to cooperate with and facilitate whatever relief measures may be ordered by this Court or the District Court. While the Muscogee (Creek) Nation asserts that Auburn violated NAGPRA and ARPA, *see* Appellants' Br. at 46, Auburn has yet to be heard on the merits of these or any other claim because the District Court dismissed the case before any hearing on the merits. (Doc. 223-Pgs 33-34.) If this Court remands the case and the merits of the claims are heard, the nature and scope of any such potential relief is unknown at this time. Auburn reserves its right to be heard in connection with any alleged duties, alleged breaches, and remedies affecting, or potentially affecting, it. (Doc. 194-Auburn's Ans.-Pg 3.)

CONCLUSION

Auburn remains neutral in this case.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, the undersigned counsel certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief contains 1,262 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 11th Cir. R. 32-4.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 in Times New Roman, font size 14.

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CERTIFICATE OF SERVICE

I certify that, on September 19, 2023, the foregoing was filed using the Court's CM/ECF system, which will serve notice on all counsel of record.

Respectfully submitted,

/s/ David R. Boyd

Of Counsel