No. 75664-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

JORDYNN SCOTT,

Appellant,

vs

John or Jane Doe, Director of the Department of Licensing, a subdivision of the State of Washington, in his/her official Capacity and John and/or Jane Doe, unidentified Swinomish Tribal Police Officers and General Authority Police Officers pursuant To RCW 10.92 in their official capacity and all tribal police officers involved in the seizure and forfeiture of automobiles owned by non Native Americans as individuals

Defendants.

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PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS FOR DIVISION ONE

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2. Does Indian sovereignty relieve a state court or federal court from jurisdiction to adjudicate a tort lawsuit and determine whether a tribal employee acted in excess of his authority under Tenneco Oil v. Sac and Fox Tribe of Indians of Oklahoma 725 F2d 572 (10th Cir. 1984)?

3. Was Scott entitled to injunctive relief against the Department as unrelated to the adjudication of issues involving Indian sovereignty. Scott's claim for injunctive relief is predicted upon non compliance with CR 82.5. Scott as lawful owner of her SUV has standing to challenge the Department's action in violating its own protocols and CR 82.5. The Department's violation of law denied Scott her right to a judicial determination by a Superior Court as to the authority of the tribal judgment to change title before any action reflecting a change of ownership could go forward. Because Scott's lawsuit against the Department compelled the Department to change its policy and reinvigorate enforcement of CR 82.5

against Indian tribes circumvention of the CR 82.5, Scott has already prevailed and the Department's concession does not make the issue of injunctive relief moot; see Washington State Communications Access Project v. Regal Cinemas, Inc. 173 Wa. App. 174 (2013) at 205. Rather than Scott lacking standing to challenge the Department's action, the Department lacks standing under Smith Plumbing v. Aetna Casualty 149 Arizona 524, 527, 720 P.2d 499 (1986); White Mountain Apache Tribe v. Smith Plumbing Company 856 F2d 1301 (1988) to assert Indian sovereignty as a basis to defeat Scott's suit for an injunction against the Department. Lastly, severance of Washington's injunction suit against the Department is required under Aungst v. Brennan Construction Company, Inc. 95 Wn2d 439 (1981).

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A. IDENTITY OF PETITIONER

JORDYNN SCOTT asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

A copy of the decision is in the Appendix at pages 1-17. A copy of the order denying the motion to reconsider is attached as Appendix 2.

C. ISSUES PRESENTED FOR REVIEW

1. Does Lewis v. Clarke, 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017) eradicate Indian sovereignty as a defense to a tort lawsuit brought against a tribal employee in his individual capacity in state court? If so, is the tribal employee, here a tribal police officer, who is sued entitled to qualified good faith immunity held accountable for violation of clearly established rights --the standard for non tribal police officer liability for torts committed in the course of employment?

2. Does Indian sovereignty relieve a state court or federal court from jurisdiction to adjudicate a tort lawsuit and determine whether a tribal employee acted in excess of his authority under Tenneco Oil v. Sac and Fox Tribe of Indians of Oklahoma 725 F2d 572 (10th Cir. 1984)?

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Department's concession does not make the issue of injunctive relief moot; see Washington State Communications Access Project v. Regal Cinemas, Inc. 173 Wa. App. 174 (2013) at 205. Rather than Scott lacking standing to challenge the Department's action, the Department lacks standing under Smith Plumbing v. Aetna Casualty 149 Arizona 524, 527, 720 P.2d 499 (1986); White Mountain Apache Tribe v. Smith Plumbing Company 856 F2d 1301 (1988) to assert Indian sovereignty as a basis to defeat Scott's suit for an injunction against the Department. Lastly, severance of Washington's injunction suit against the Department is required under Aungst v. Brennan Construction Company, Inc. 95 Wn2d 439 (1981).

D. STATEMENT OF THE CASE

The recitation of facts by the Court of Appeals is correct. However, the Court of Appeals' opinion did not address how the Swinomish tribal court order of forfeiture of Ms. Scott's SUV was used to effectuate a change in ownership.[1]

Reference to the Clerk's Papers in Scott v. Director CP 00140 shows a Department of Licensing form Release of Interest which bears the signature of Joseph Bailey, Swinomish Police Department. The transfer in Scott shows Scott's SUV was taken to Berglund Jones auction place in Bellingham where a new Certificate of Title was issued to Mario Nolasco. The documentation submitted to the Department includes the Swinomish Tribal Judgment of Forfeiture. The transfer paperwork leads to the conclusion that Joseph Bailey, a Swinomish Tribal police officer, transported or drove Scott's SUV to the Berglund Jones

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[1] Under Washington law, there could be no legal valid change of ownership because the foreign tribal judgment was not approved in a CR 82.5 filing. Such a filing would have produced a ruling determining whether the Swinomish Tribal Court judgment had subject matter and personal jurisdiction of the non Native American or his property.

Auction place presented the Swinomish Tribal forfeiture judgment, signed the transfer paperwork and pocketed for the Swinomish tribe the money paid by Nolasco to purchase Scott's SUV.

Another factual point note referenced in the court's opinion is the fact that the Superior Court dismissal of the case on CR 19 (b) eliminated Scott's motion to amend her complaint to add the purchaser Mario Nolasco on the theory he never received legal title to Scott's SUV. This is what happened in Wilson v. Doe, 2016 WL 1221655, on appeal to the 9th Circuit of Appeals in Cause No. 16-35320 where the United States District Court dismissed Wilson's conversion tort lawsuit against Horton's Towing for conversion, holding that Wilson had to bring such claim in tribal court. Wilson, like Scott, had the right under Aungst v. Roberts Construction 95 Wn2d 439 (1981) to have her tort claim against the Swinomish tribal police officers involved in the seizure of her SUV automobile carved out from other claims subject to CR 19 (b) dismissal because of Indian sovereignty.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This case meets the criteria for review under RAP 13.4 (3) and (4). This case presents a matter of first impression, which will have a significant effect on the conduct of tort litigation against tribal employees acting within the scope of their employment. Heretofore tort litigants have had lawsuits against tribal employees in their individual capacities dismissed based upon Indian sovereignty.

This case presents the question of whether Jordynn Scott's tort lawsuit

against unidentified tribal police officers in their individual capacities is viable under Lewis v. Clarke 137 S. Ct. 1285, 197 L.Ed2d 631 (2017) and, if so, does this tort lawsuit survive a CR 19 (b) motion to dismiss because of Indian sovereignty? The short answer is yes. Lewis v. Clarke makes Jordynn Scott's tort lawsuit against tribal police officers in their individual capacity immune from the defense of Indian sovereignty, which is the substantive basis for the Attorney General seeking dismissal in this case under Cr 19 (b). The immunity of tort lawsuit against tribal employees acting in their individual capacity to the defense of tribal sovereignty under Lewis v. Clarke makes the Swinomish Tribe not a necessary or indispensable party to Ms. Scott's tort lawsuit against the tribal police officers in their individual capacity.[2]

Lewis v. Clarke should be interpreted to license Washington tort law application to all actions taken by tribal employees in their individual capacity without limitation, that is, if the action of the tribal employees was tortious under state law and federal law, the tortfeasor is subject to Washington state jurisdiction.

Here, Jordynn Scott's s tort lawsuit against the Swinomish police officers in their individual capacities or against purchasers of the forfeited automobile

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[2] Lewis v. Clarke was announced on April 17, 2017 well into the litigation. Its impact was raised for the first time in oral argument. As mentioned, in Scott's view it makes her tort suit against the tribal officers in their individual capacity immune to the defense of Indian sovereignty. The Court of Appeals disagrees and reinstates Indian sovereignty as a defense because the lawsuit seeks to establish officer liability for an ongoing practice authorized by the tribe citing Cook v. AVI Casino Enters Inc. 548 F.3d 718 (9th Cir. 2008) and Pearson v. Director 2016 WL 3386798. Scott maintains those cases have been overruled sib siliento by Lewis V. Clarke.

such as Mr. Nolasco is not affected by Indian sovereignty, Lewis v. Clarke, supra. This case is controlled by Aungst v. Brennan Construction Company, Inc. 95 Wn2d 439 (1981). Aungst sets out the parse out rule which obligates the trial court to act as a gate keeper and allow otherwise viable legal proceedings to move forward and only dismiss those claims barred by Indian sovereignty.

This court should grant review and reverse the Court of Appeals and remand the case to proceed to trial against the tribal officers in their individual capacities if their identity can be ascertained and well as Mario Nolasco, who received a Certificate of Title to Ms. Scott's SUV when he purchased the SUV at public auction.

F. ARGUMENT

1. Lewis v. Clarke, 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017) eradicates Indian sovereignty as a defense to a tort lawsuit brought against a tribal employee in his individual capacity in state court. If so, is the tribal employee, here a tribal police officer, who is sued entitled to qualified good faith immunity held accountable for violation of clearly established rights --the standard for non tribal police officer liability for torts committed in the course of employment?

The Court of Appeals' analysis of the impact of Lewis v. Clarke 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017) is in error because it destroys any liability of tribal officers for tortious actions in their individual capacity as long as their actions can be characterized as enforcing some aspect of Indian law.

Lewis v. Clarke, supra, should be interpreted to presage complete state court tort jurisdiction over employees of Indian tribes when sued in their individual capacity.

The Court of Appeals exempts from tort liability tribal employees sued in their individual capacity if the tribal employee claims to be performing an action of the sovereign, in this case, enforcing a tribal forfeiture law. This is another way of saying that sovereign immunity bars a suit against a tribal officer who is acting within the scope of his employment. This is the rule that the Supreme Court rejected in Lewis v. Clarke.

The Court of Appeals attempts to confine Lewis v. Clarke to its facts as an action against Clarke arising from "isolated negligence" committed by Clarke on an interstate highway within the State of Connecticut. See this court's footnote 5, slip op. at 11. In the Court of Appeals view, Scott's' case is different because it seeks to establish officer liability for an "ongoing practice" authorized by the tribe. The Court of Appeals cites Cook v. AVI Casino Enters Inc. 548 F.3d 718 (9th Cir. 2008), and cases relying on it, such as Pearson v. Director 2016 WL 3386798. The Court of Appeals fails to recognize that the plaintiff in Cook did not sue the tribal employees who caused their fellow employee to get intoxicated and drive away in their individual capacities. He sued them as employees of the Indian Corporation owned by the Fort Mojave Indian Tribe ***only.*** Maxwell and Pistor explain why Cook's rationale simply does not apply to individual capacity suits. See Maxwell, 708 F.3d at 1088.

The Court of Appeals has made the same mistake as the Connecticut Supreme Court in Lewis v. Clarke, leading to its reversal by the United States Supreme Court. The Court of Appeals quotes the reasoning in Cook that a plaintiff cannot circumvent tribal immunity by simply naming an officer of the Tribe as a defendant. Slip op. at 11. The same rationale exactly was used by the Connecticut Supreme Court and was explicitly called out and rejected by the United States Supreme Court. "We are cognizant of the Supreme Court of Connecticut's concern that plaintiffs not circumvent tribal sovereign immunity. But here, that immunity is simply not in play. Clarke, not the Gaming Authority, is the real party in interest." 137 S Ct at 1292. [3]

The Court of Appeals' attempt to constrain Lewis v. Clarke as "distinguishable" is likely to be similarly ill fated. The Connecticut Supreme Court reasoned that Maxwell v. County of San Diego, 708 F.3d 1075 (9th Cir. 2013 and Pisor v. Garcia, 791 F3d 1104 (9th Cir. 2015) were inapposite because it involved allegations of gross negligence, not ordinary negligence. The United States Supreme Court did not adopt this reasoning. "The distinction between

[3] A careful reading of Pearson v. Director, 2016 WL 3386798, reveals that Pearson sued Andrew Thorne in his official and in his individual capacity. The United States District Court judge dismissed Pearson's tort claim based upon Cook v. AVI Casino concluding that the suit in his individual capacity was in reality a suit against the tribe. Neither the Cook court or the Pearson court ever addressed whether the distinction between official capacity and individual capacity makes any difference. Therefore, neither Pearson nor Cook may be relied upon for support of this court's decision because they did not address liability of tribal employees acting in their individual capacities. Pearson is also flawed because the United States District Court judge refused to rule whether Andrew Thorne, the Swinomish tribal officer, exceeded his authority when he aided and abetted the forfeiture of Ms. Pearson's truck.

individual- and official-capacity suits is paramount here." 137 S Ct 1292. Defendants in an official-capacity action may assert sovereign immunity. But sovereign immunity does not erect a barrier against suits to impose individual and personal liability. 137 S Ct at 1292. The Court of Appeals fails to explain how "ordinary negligence" committed by tribal employees in the course of their duties renders them liable to tort suit in their individual capacity while the conversion of Jordynn Scott's SUV does not.

This petition for review presents the same issue of Indian law as considered by Connecticut Supreme Court in Lewis v. Clark. This court should rule on the merits as to whether the tribal police officers, in enforcing the tribal ordinance against the non Native American citizens, are liable for money damages in tort if they exceed their authority and violate clearly established rights of nonnative Americans by converting their private property.

The United States Supreme Court's discussion in Lewis v. Clarke of how immunity operates in the context of state and federal sovereign immunity gives insight into how Scott's case might develop in the trial court against officers in their individual capacities. It suggests that personnel who perform tribal governmental functions, though not afforded complete Indian sovereign immunity, may be entitled to personal immunity such as the qualified immunity available to state and federal police officers. In its discussion of personal immunities in Lewis v. Clarke, the court cites Graham 473 US at 167-168:

> In ruling that Clarke was immune from this suit solely because he was acting within the scope of his employment, the court extended

> sovereign immunity for tribal employees beyond what common-law sovereign immunity principles would recognize for either state or federal employees. See, *e.g., Graham,* 473 U.S., at 167–168, 105 S.Ct. 3099. ***The protection offered by tribal sovereign immunity here is no broader than the protection offered by state or federal sovereign immunity.***

Larson v. Domestic & Foreign Commerce Corp. 337 U. S. 682 , 687 (1949) is cited in Lewis v. Clarke, Id. at 1292. A point of Larson is the following:

> The question becomes difficult and the area of controversy is entered when the suit is not one for damages but for specific relief: i.e., the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer's actions. In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when the agents' actions are restrained, the sovereign itself may, through him, be restrained. As indicated, this question does not arise because of any distinction between law and equity. ***It arises whenever suit is brought against an officer of the sovereign in which the relief sought from him is not compensation for an alleged wrong*** but, rather, the prevention or discontinuance, in rem, of the wrong. In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction. 337 U.S. at 688.

At page 9 of Slip Opinion, the Court of Appeals writes, "Such sovereign immunity extends to tribal officials acting within the scope of its authority, Wright, 159 Wn2d at 116." Then the Court of Appeals proceeds to distinguish and disregard Maxwell v. County of San Diego, supra., and Pisor v. Garcia, 791 F.3d 1104 (9th Cir. 2015), supra.

159 Wn2d at 116 provides the following concluding paragraph:

Tribal Sovereign Immunity Protects Employees of Tribal Governmental Corporations Acting in Official Capacity

Tribal sovereign immunity also protects Braman because Wright names him solely in his official capacity. *See Hardin v. White Mountain Apache Tribe,* 779 F.2d 476, 479 (9th Cir.1985) (holding tribal sovereign immunity "extends to individual tribal officials acting in their representative capacity and within the scope of their authority"). *See also Tenneco Oil Co. v. Sac & Fox Tribe of Indians,* 725 F.2d 572, 574 (10th Cir.1984); *Romanella v. Hayward,* 933 F.Supp. 163, 167 (D.Conn.1996). Of course, tribal sovereign immunity would not protect Braman from an action against him in his individual capacity. ***See Mashantucket Pequot Tribe,* 204 F.3d at 360; *White Mountain Apache Indian Tribe,* 480 P.2d at 658 (holding tribal sovereign immunity protects officers from suit in official but not individual capacity).**

Scott could not verify that Wright did not sue the tribal employees in their individual capacity but the inference is that he did not because the opinion avoids any specific discussion of individual capacity tort lawsuits and liability derivative therefrom. The above referenced citation from Wright supports petitioner's argument that she is entitled to pursue her tort claim against the Swinomish tribal police officers who seized and forfeited her SUV in their individual capacity.

Petitioner repeats that the primary relief she seeks is money damages for private property converted in the past. She is not seeking to compel the tribe to discontinue the practice of confiscation of automiles owned by non Native Americans for violation of the Swinomish Tribal Drug Code. Her request for injunctive relief is directed only against the Department of Licensing. Ms. Scott is entitled under Aungst to have her viable tort claim against the unknown tribal

police officers who seized and forfeited her SUV parsed out from the scope of CR 19 (b) and preserved in state court.

In the post Lewis v. Clarke world, a state court has a duty to rule on the state court's jurisdiction over tort lawsuits against Indian employees in their individual capacity enforcing tribal law against a nonnative American in excess of their authority.

The choices are two: 1) the Court of Appeals' result, which shields the Indian tribal employee from liability in state court when the employee is enforcing tribal law, or remands the tort plaintiff's fate to the tribal court; or 2) the better alternative, which is that Indian tribal employees enforcing tribal law are, when sued in their individual capacity, subject to the same criteria for immunity as state and federal police officers, i.e. whether they will be held accountable for violation of clearly established federal rights.

Lastly, Scott wants to address the comments of the Court of Appeals "that Scott was not without an alternative remedy." Slip Opinion at 14. After the court announced its opinion, petitioner's counsel checked into the tort recovery available in the Swinomish Tribal Court and found Tribal Code Title 2-Tribal Government Chapter 4 Sovereign Immunity. 2-04.040 Sovereign Immunity provides as follows:

> The sovereign immunity of the Swinomish Indian Tribal Community from unconsented suit has always and shall continue to extend to acts and ommissions of its attorneys, judges, prosecutors and all of its employees in the performance and within the scope of their employment.

Ms. Scott and others in her circumstances are reasonable in reaching the conclusion that they will have no tort remedy in tribal court because under the tribal code, the officers will enjoy sovereign immunity for acts within the scope of their employment, even if they are sued in their individual capacity. This factor favors denying the Attorney General's CR 19 (b) motion. Unless changed, the Court of Appeals ruling immunizes from tort liability all tribal police officers of the Swinomish Nation for the commission of tortious acts against nonnative American citizens.

This court grant this petition and rule on, first, whether the unknown Swinomish tribal police officers who seized and forfeited Ms. Washington's SUV acted in excess of their authority and are thus liable, and second, whether in light of Lewis v. Clarke, the unknown Swinomish tribal police officers are liable for torts committed within the scope of their employment and have available to them the same qualified good faith immunity accorded Washington State and federal law enforcement officers.

The Court of Appeals' result shields the Indian tribal employee from liability in state court when the employee is sued in his individual capacity and is enforcing tribal law by dismissing the case or remanding the tort plaintiff's fate to the tribal court. The Court of Appeals' rationale is based upon the application of complete Indian sovereign immunity, which does not come into play when the tort suit is against the tribal employee in his individual capacity. The most logical deduction from the Lewis v. Clarke opinion is that tribal employees will have

available only personal immunity defenses. Individual capacity liability for tort does not implicate Indian sovereign immunity and, in this sense, the Swinomish Nation Indian tribe is not a necessary party under CR 19 (b) analysis.

The State of Washington has tort jurisdiction in this case over these unknown Swinomish police officers persons in their individual capacity or their insurer if the tribal police officers cannot be identified under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388 (1971) seeking money damages only for the tort of conversion. There is no implication of Indian sovereign immunity in a tort case, however described by the Court of Appeals, when the financial recovery coming from a successful tort suit comes from the same place. The insurance coverage available in Lewis v. Clarke for isolated tort acts pays for the liability of the tribal police officer, just like the limousine driver in Lewis v. Clarke. Presumably that is why the insurance is purchased.[4]

2. Indian sovereignty does not relieve a state court or a federal court from jurisdiction to adjudicate whether a tribal employee sued in his individual capacity acted in excess of his authority under Tenneco Oil v. Sac and Fox Tribe of Indians of Oklahoma 725 F2d 572 (10th Cir. 1984).

[4] That is what the debate is all about in the application of 25 USC 5321 (1) (A) by which the Swinomish Tribe applies for a grant --so called Self Determination Contract – to pay the salaries of the Swinomish law enforcement bureaucracy as well as other tribal governmental employees. The dispute is that petitioner says that all tribal police paid under 25 USC (1) (A) Self Determination Contract must have insurance in compliance with 25 USC 5321 (C) (3) (A) which requires a policy covering torts and expressly requires that the proceeds of the policies are available and no assertion of Indian sovereign immunity can be made to defeat tort recovery from the proceeds of the policy only. If true, access to this insurance will resolve all this controversy.

Scott adopts the argument of her sister petitioner Candee Washington Court of Appeals Cause No. 75670-2-I and incorporates it herein.

Scott does not repeat the exhaustive analysis of Tenneco Oil v. Sac and Fox Tribe of Indians of Oklahoma 725 F2d 572 (10th Cir. 1984) in Candee Washington but reads that case to provide for, in light of the announcement of Lewis v. Clarke, 137 S. Ct. 1285, 197 L. Ed2d 631 (1981) a state court can determine whether an Indian employee of an Indian tribe sued for a tort in his individual capacity exceeded his authority as a tribal employee. This means that the Washington Superior Court can, if necessary to the adjudication of the tort case against the tribal employee in his individual capacity, rule on whether the Swinomish tribal forfeiture ordinance is lawful when applied to nonnative Americans.

Scott's focuses on an issue of fact and law, which differentiates her case from Ms. Washington. The different fact is that Ms. Scott's SUV was seized on a state road inside the Swinomish reservation. This is a crucial jurisdictional fact.

In Strate v. A-1 Contractors 117 S. Ct. 1404, (1997) the United States Supreme Court held that when accident occurred on a portion of public highway maintained by the state under federally granted right-of-way over Indian reservation land, tribal courts could not entertain civil action against allegedly negligent driver and driver's employer, neither of whom was a member of tribe, absent a statute or treaty authorizing tribe to govern conduct of nonmembers on highway in question. Washington's SUV was seized in the parking lot of the

Swinomish Casino. Ms. Scott's SUV was seized on a state road inside the Swinomish Indian reservation.

Strate v. A-1 Contractors is on point for Ms. Scott. If the Swinomish tribe lacks jurisdiction to adjudicate a civil tort suit involving non Native Americans who operate motor vehicles on state roads inside an Indian reservation, a fortiori, the Swinomish Indian tribe lacks authority to entertain a forfeiture action in which the motor vehicle owned by the non Native American is seized on a state road inside an Indian reservation. The question of how the Swinomish tribal court can entertain a civil action of forfeiture against Ms. Scott's SUV under Strate v. A-1 Contractors should be addressed. The Court of Appeals does denominate the Swinomish forfeiture action as civil, see footnote 3, Slip Opinion.

The fact that Ms. Scott's case involves a seizure of her SUV on a Washington state road makes Scott on all fours with Tenneco Oil because the third jurisdictional ground alleged and approved of in Tenneco Oil was preemption by operation of federal regulation. Here, the analogy is that Washington jurisdiction for civil tort litigation on state roads inside Indian reservation preempts any tribal claim to have civil jurisdiction over a non Indian is established by Strate v. A-1 Contractors.

The other crucial new fact developed is the discovery that, apparently civil torts suits against tribal employees are not permitted in Swinomish Tribal Court. In its constitution, the Swinomish forbid suits against employees of the tribe; see Title 2, 2-04.040 so there is no option for tort recovery through tribal court in tort

suit against a tribal police officer and on to federal court; see Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians, 2017 WL 1505329 (W.D. Mich. Northern Division April 27, 2017. But see footnote 2 whch emphasizes Lesperance did not sue tribal employees in their individual capacity.

The absence of any remedy in tribal court for tort recovery presages a judicial ruling that Lewis v. Clark intends unfettered state court tort civil jurisdiction over tribal employees sued in their individual capacity. A judgment for monetary damages is sought only against the tribal employee in this individual capacity can only be paid for by insurance or the individual, as Indian sovereign immunity precludes any execution of any judgment against the tribe or a tribal corporation.

Again, petitioner repeats that her primary claim is in tort for money damages only, she has withdrawn her claim for declaratory relief, and she is entitled to severance of her tort claim under Augnst v. Roberts Construction 95 Wn2d 489 (1981).

3. Scott was entitled to injunctive relief against the Department as unrelated to the adjudication of issues involving Indian sovereignty. Scott's claim for injunctive relief is predicted upon non compliance with CR 82.5. Scott as lawful owner of her SUV has standing to challenge the Department's action in violating its own protocols and CR 82.5. The Department's violation of law denied Scott her right to a judicial determination by a Superior Court as to the authority of the tribal judgment to change title before any action reflecting a change of ownership could go forward. Because Scott's lawsuit against the Department compelled the Department to change its policy and reinvigorate enforcement of CR 82.5 against Indian tribes circumvention of the CR 82.5, Scott has already prevailed and the Department's concession does not make the issue of injunctive relief moot; see Washington State Communications Access Project v. Regal

> Cinemas, Inc. 173 Wa. App. 174 (2013) at 205. Rather than Scott lacking standing to challenge the Department's action, the Department lacks standing under Smith Plumbing v. Aetna Casualty 149 Arizona 524, 527, 720 P.2d 499 (1986); White Mountain Apache Tribe v. Smith Plumbing Company 856 F2d 1301 (1988) to assert Indian sovereignty as a basis to defeat Scott's suit for an injunction against the Department. Lastly, severance of Washington's injunction suit against the Department is required under Aungst v. Brennan Construction Company, Inc. 95 Wn2d 439 (1981).

Petitioner's counsel notes that this argument is a replication of the argument made in Ms. Washington's petition for review.

The facts detailed hereinbefore are very relevant to the resolution of the issue of whether Ms. Scott's suit for injunctive relief against the Department should have been permitted to go forward. Adjudication of whether an injunction ought issue against the Department only requires adjudication that the Department has not enforced CR 82.5 as required by their protocols and Washington law.

Washington courts should not defer by way of comity, or CR 19 (B) in this case based upon Indian sovereign immunity because employees of Indian tribes violated and aided and abetted the violation of CR 82.5 to transfer title. The egregious illegality of this action was accomplished with the specific intention to avoid the Superior Court judgment, which would follow.

The violation of CR 82.5 by the Swinomish tribal police officers, especially because the officers engaged in the practice were certified and empowered with Washington law enforcement authority, gives Washington courts jurisdiction and the responsibility to adjudicate this issue as to the consequences of violation of Washington law, regardless of impact upon Indian sovereign

immunity. The Attorney General's CR 19 (b) dismissal motion comes with the price of abrogating this state's own sovereignty.

In oral argument, the court asked this question of the Attorney General:

> The tribal court order however was not registered as a foreign judgment nor was it reviewed pursuant to CR82, so why is the Department entitled to rely on that order to issue title?

The Assistant Attorney General answered:

> In this situation, it did come to the Department's attention that some satellite contract offices were not aware of the policy requiring the domestication of foreign orders, however, this – what you look to here is the nature of the relief that was sought.

The court followed up with this question:

> If the relief sought were simply to stop the Department of Licensing from honoring the order, why would the Tribe be an indispensable party?

The Assistant Attorney General answered:

> In that particular situation, the – if the specific relief were solely an injunction against the Department, my initial response is that would be moot. The Department is enforcing the, they are aware of it, they have reinforced it, it's unnecessary, and frankly these plaintiffs don't have standing to seek that prospective injunctive relief against the Department of Licensing.

Mootness is not supported by Washington State Communications Access Project v. Regal Cinemas, Inc. 173 Wa. App. 174 (2013). That was a case in which Regal was alleged to have violated the Public Accommodations Act by not accommodating deaf patrons. Regal claimed its voluntary use of written captions after the commencement of litigation mooted out the claim for declaratory relief. This court rejected this mootness claim stating:

> Voluntary cessation does not moot a case or controversy unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' "Mootness, like other questions of justiciability, is a question of law reviewed de novo. 173 Wa. App. at 204.

The record in the companion case of Candee Washington was developed by the Department to obtain relief from a discovery request for the names and addresses of all motor vehicle owners whose Certificate of Title was transferred by presentation of a Indian tribal court judgment of forfeiture. It demonstrates that the issue is not moot. Because of the fact that the Department has not digitized its motor vehicle transfer records, the Department has no factual basis to contest Scott's claim that all of the Indian tribes besides the Swinomish, such as the Lummi and the Tulalip tribes, and others have been transferring Certificate of Title of motor vehicles by directly presenting tribal orders of forfeiture to the Department.

When the Assistant Attorney General stated in oral argument. " In this situation, it did come to the Department's attention that some satellite contract offices were not aware of the policy requiring the domestication of foreign orders," she was speculating as best.

The Assistant Attorney General's knowledge of the misfeasance of the Department came only as a result of Ms. Washington and Ms. Scott's lawsuit. The record shows that even with respect to how many cars the Swinomish has presented forfeiture orders to change title to automobiles, the Department is

uninformed because the Swinomish Tribe refuses to release any information it has on the basis of Indian sovereign immunity.

For these reasons, Scott's asserts that the Department has not discharged its heavy burden of showing no reasonable expectation that the Department will not repeat its alleged wrongs; Communications Access Project v. Regal Cinemas, Inc. 173 Wa. App. at 205.

At a minimum, this court should reconsider and reverse and grant summary judgment to Jordynn Scott on this issue of injunctive relief or, in the alternative, remand for trial on the issue of injunctive relief. The court should direct the trial court to consider the issue of the injunction solely because of non compliance with CR 82.5 and Department protocols.

Petitioner urges this court to grant review because of the precedent of Strate v. A-1 Contractors. The matter of whether tribal courts have civil jurisdiction over non Indians for acts taking place on state roads inside Indian reservations has already been decided. Washington's sovereignty has been violated by the action of the Swinomish tribe to assert civil jurisdiction in its courts over automobiles owned by non Native Americans and operated on state roads inside the Swinomish reservation. The Attorney General's position of asserting that the Swinomish Nation is a necessary party and thus Ms. Scott's tort claim for conversion of her property on a state road against those responsible in their individual capacity must fail further diminishes Washington sovereignty. To the same effect is the Attorney General's defense of Cook v. AVI Casino, which

truncates Washington sovereignty by limiting the jurisdiction of Washington courts for torts committed in the State of Washington against tribal employees in their individual capacity only to isolated acts of negligence, rather than full jurisdiction to adjudicate all tort actions.

Petitioner asserts that she should prevail under Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma 725 F.2d 572 (10th Cir. 1984). Tenneco and Scott's interests are identical -- the right to private property. Both Tenneco and Scott's interests were threatened by the enactment of tribal legislation seeking to confiscate their private property interest. Respectfully, Scott is entitled to a ruling from this court as to whether the Swinomish tribal police officers exceeded their authority in enforcing the Swinomish Tribe's forfeiture law against nonnative Americans and thus illegally converted Scott's SUV.

This court should address the issue of the legality of the Swinomish tribal ordinance because it is necessary to adjudicate the tort claim which Scott has a right to pursue in state court. The fact that the tribal police officers were enforcing a tribal ordinance no longer gives the tribal employees the right to a dismissal. Lewis v. Clarke crossed the Rubicon in establishing the right to sue an Indian employee in his individually capacity in state court. The fact that the tribal employee was enforcing tribal law or has another claim of immunity, those immunities will be comparable to those in place in the federal system- meaning that the tribal police officers will have available the personal immunity of qualified good faith.

G. ATTORNEY FEES

Petitioner requests an award of attorney fees if she prevails for the reasons asserted in her appeal brief which include recovery under 42 USC 1983, 1988 against the Director for illegal transfer of her title as well as recovery for bad faith. Scott asserts that the Attorney General is disingenuously raising the issue of Indian sovereignty to insulate itself from tort liability, and now supports limiting Washington sovereignty to granting its judiciary only jurisdiction to adjudicate isolated acts of negligence against tribal employees sued in their individual capacity. Petitioner also asserts that the common fund theory supports an award of attorney fees. If Ms. Scott is successful in litigation, she will pave the way for recovery for other nonnative Americans whose automobiles have been confiscated by the Swinomish tribe's police officers.

H. CONCLUSION

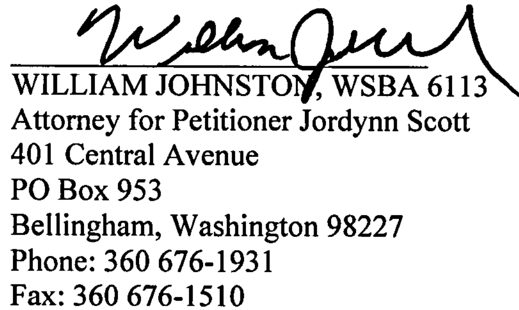
The entire affair of the enforcement of tribal forfeiture ordinances against nonnative Americans is an offensive use of Indian sovereignty. Lungren v. Upper Skagit Indian Tribe v. Lungren, 187 Wn2d 857 (2017). Rather than protecting the integrity of the tribal authority structure from infringement, this is a ploy designed to prevail in a civil case and obtain a financial benefit when all agree the tribe would lose the civil suit on the merits. Just as it was decided in Upper Skagit Indian Tribe v. Lungren that Indian sovereignty did not frustrate the power of the Washington courts to adjudicate a quiet title action so here, likewise, Indian

sovereign immunity should not frustrate the power of the Washington courts to adjudicate a claim of conversion by illegal forfeiture.

Respectfully all of the equities apply here in favor of the nonnative Americans whose automobiles are seized and forfeited by tribal officers exceeding their authority, ninety nine per cent of which were seized on state roads inside Indian reservations.

This court should grant review because citizens need to know there is redress in state courts for torts committed against nonnative Americans. For this reason, this case meets the criteria of RAP 13.4 (b) (3) and (4).

Respectfully submitted this 11th day of October, 2017



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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2017 JUN 26 AM 9:34

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JORDYNN SCOTT, Appellant, v. JOHN or JANE DOE, director of the Department of Licensing, a subdivision of the State of Washington, in his/her official capacity; STATE OF WASHINGTON; PETER'S TOWING a Washington Corporation; and JOHN and/or JANE DOE, unidentified Swinomish tribal police officers and general authority police officers pursuant to chapter 10.92 RCW in their official capacity and individually, Respondents.	No. 75664-8-I DIVISION ONE UNPUBLISHED OPINION FILED: June 26, 2017

APPELWICK, J. — After losing her vehicle to the Swinomish Tribe in civil forfeiture, Scott filed this suit against the Department of Licensing and unnamed Swinomish police officers. The trial court dismissed the case under CR 19 for failure to join an indispensable party: the Tribe. We affirm.

FACTS

The facts are not disputed. Jordynn Scott is not a tribal member. The Swinomish Indian Tribal Community (Tribe), pursuant to Swinomish Tribal Code § 4-10.050, succeeded in a civil forfeiture action against her vehicle in Swinomish tribal court. She did not respond to the tribal court forfeiture proceeding. The

Appendix 1

Department of Licensing (Department) issued a new certificate of title to reflect the change in ownership.

Scott filed a complaint in Whatcom County Superior Court against John and/or Jane Doe Swinomish Tribal Police Officers, the Director of the Department of Licensing, the State of Washington, and Peter's Towing. Against the Department, she sought declaratory and injunctive relief prohibiting transfer of title based on tribal forfeiture of nonmembers' property. Against the officers, she sought declaratory and injunctive relief regarding their confiscation of private property. She also sought 42 U.S.C. § 1983 damages.

The Department moved to dismiss under CR 19 for failure to join the Tribe. The trial court granted this motion. Scott appealed directly to the Washington Supreme Court. But, the Supreme Court transferred the case to this court.

DISCUSSION

Scott's primary argument is that the trial court erred in dismissing this case under CR 19 on sovereign immunity grounds. She also seeks attorney fees.

Scott argues that the trial court erred in dismissing this case under CR 19. CR 19 addresses when the joinder of absent parties is needed for a just adjudication. Auto. United Trades Org. v. State, 175 Wn.2d 214, 221, 285 P.3d 52 (2012) (AUTO). Where the feasibility of joinder is contested, courts engage in a three step analysis. Id. Under CR 19(a), the court first determines whether absent persons are "necessary" for a just adjudication. Id. at 221-22. Next, if the

absentees are necessary, the court determines whether it is feasible to order the absentee's joinder. Id. at 222. Joinder is not feasible when tribal sovereign immunity applies. Id. Third, if joining a necessary party is not feasible, the court considers whether a party is "indispensable" under CR 19(b) such that their inability to be joined defeats the action. Id. at 222, 227.

We review a trial court's decision under CR 19 for an abuse of discretion, and review any legal determinations necessary to that decision de novo. Id. at 222. The party urging dismissal bears the burden of persuasion. Id. However, if it appears from an initial appraisal of the facts that there is an unjoined indispensable party, the burden rests with the party resisting dismissal. Id. A failure to meet that burden will result in the joinder of the party or dismissal of the action. Id.

A. Necessary Party

CR 19's first element asks whether a party is a necessary party. CR 19(a)(2). This subsection provides that an absent party is "necessary" when it "claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may (A) as a practical matter impair or impede his ability to protect that interest." Id. To decide whether this is met, we first determine whether the absent party claims a legally protected interest in the action, and second, whether the absentee's ability to protect that interest will be impaired or impeded. AUTO, 175 Wn.2d at 223.

Scott does not contest that the Tribe is a necessary party. The Tribe has a sufficient interest in the action and is a necessary party.

B. Feasible to Join

The key inquiry in this case is whether joinder of the necessary party is feasible. This question turns on whether the Tribe and its officers may assert sovereign immunity here.

In keeping with their sovereign status, it is well settled that Native American tribes enjoy the common law immunity from suit traditionally accorded to sovereign entities. Id. at 226. This protects tribes from suit absent an explicit and unequivocal waiver or abrogation. Wright v. Colville Tribal Enter. Corp., 159 Wn.2d 108, 112, 147 P.3d 1275 (2006).

Scott argues that because the tribal officers acted outside the scope of their tribal authority, the Tribe voluntarily waived sovereign immunity under RCW 10.92.020(2)(a). That statute states that tribal police officers may act as and exercise the power of other general authority Washington peace officers. Id. But, the Tribe must carry professional liability insurance that covers the officers' actions while working in their capacity as Washington peace officers. Id. And, most importantly for this case, the tribe and insurer must waive any sovereign immunity defense, up to policy limits, in actions that arise from conduct in their capacity of Washington officers:

> Each policy of insurance issued under this chapter must include a provision that the insurance shall be available to satisfy settlements or judgments arising from the tortious conduct of tribal police

> officers when acting in the capacity of a general authority Washington peace officer, and that to the extent of policy coverage neither the sovereign tribal nation nor the insurance carrier will raise a defense of sovereign immunity to preclude an action for damages under state or federal law, the determination of fault in a civil action, or the payment of a settlement or judgment arising from the tortious conduct

RCW 10.92.020(2)(a)(ii). In other words, the Tribe obtains the authority for its police to act as State officers, in exchange for waiving its sovereign immunity for that conduct, up to policy limits. See id.

Scott argues that the tribal officers' interaction with Scott and seizure of her vehicle exceeded their tribal authority over nonmembers. Therefore, she argues, the only other possible basis for the Tribe's actions must have been its authority to enforce state laws pursuant to chapter 10.92 RCW. And, if that is the case, sovereign immunity would be waived under RCW 10.92.020(2)(a)(ii) as to "conduct of tribal police officers when acting in the capacity of a general authority Washington peace officer."

Scott correctly argues that tribes generally cannot exercise criminal authority over nonmembers. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978). But, in Montana v. United States, 450 U.S. 544, 565-66, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), the United States Supreme Court held that tribes retain civil authority to regulate the conduct of nonmembers in two areas. First, they may regulate the conduct of nonmembers who enter into consensual relationships with the Tribe through commercial dealings. Id. Second, they may regulate the conduct of nonmembers on lands within their reservation when that conduct threatens or

directly affects political integrity, economic security, or the health or welfare of the tribe. Id. This second exception is at issue here.

Drug enforcement laws are actions taken to protect the health, safety, and welfare of the public. See, e.g., 21 U.S.C. § 801(1). Under the federal Controlled Substances Act[1] scheme, forfeitures are civil in nature.[2] See United States v. Ursery, 518 U.S. 267, 270-71, 274, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996). The same is true under state law. See State v. Catlett, 133 Wn.2d 355, 366-67, 945 P.2d 700 (1997). These actions are against the property. Ursery, 518 U.S. at 295-96. The tribal statute under which these vehicles were forfeited, Swinomish Tribal Code § 4-10.050, is similar. This dispute involves a forfeiture of property, with notice to the owner, based on a criminal violation of the tribal

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[1] 21 U.S.C. §§ 801-904.

[2] This distinction between civil and criminal actions was recently highlighted in a similar case in federal court. See Wilson v. Doe, No. C15-629 JCC, 2016 WL 1221655 (W.D. Wash. Mar. 29, 2016). In that case, the Lummi tribe sought forfeiture of Wilson's vehicle after discovering marijuana inside while on the Lummi reservation. See id. at *3. Wilson was not Native American. See id. at *2. Wilson challenged the Lummi tribe's authority to forfeit a nonmember's vehicle, and cited Oliphant for support. Id. at *3. The federal court noted that, because forfeiture was a civil matter, Oliphant did not bar the tribe's authority to forfeit the vehicle of a nonmember. Id.

A similar question was presented in Pearson v. Dir. of the Dep't of Licensing, No. C15-0731 JCC, 2016 WL 3386798 (W.D. Wash. June 20, 2016). Pearson, who was not part of the Swinomish tribe, was pulled over on the Swinomish reservation by a Swinomish officer. Id. at *3. The Tribe obtained forfeiture after discovering drugs in the vehicle. Id. at *1. Pearson filed suit for damages and declaratory relief against the Department and named Swinomish officers. Id. at *2. The court granted a named Swinomish officer's motion for summary judgment. Id. at *5. It held that, because the suit against the named Swinomish officer questioned the Tribe's jurisdiction over Pearson, sovereign immunity barred the suit. Id. at *4.

drug code. We conclude it is an in rem civil proceeding concerning the health or welfare of the Tribe.

Scott cites Miner Electric, Inc. v. Muscogee (Creek) Nation, 464 F. Supp. 2d 1130 (N.D. Okla. 2006), rev'd 505 F.3d 1007 (10th Cir. 2003), as a correct application of Montana's second exception to tribal civil forfeiture authority. Miner was not a tribe member. Id. at 1132. Muscogee tribal police discovered drugs in Miner's vehicle while it was parked at the Muscogee casino. Id. at 1133. The Muscogee police succeeded in a forfeiture proceeding against the vehicle in tribal court. Id. The federal district court held that the forfeiture was invalid, because the Muscogee police had no authority to forfeit property that belongs to nonmembers. Id. at 1137. Scott urges us to adopt the Miner district court's reasoning that the Tribe exceeded its authority, and as a result may not assert sovereign immunity.

But, Miner was reversed on appeal. See Miner Elec., Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007, 1012 (10th Cir. 2007). As Scott acknowledges, the appellate court rejected the trial court's reasoning as an overly narrow conception of sovereign immunity. Id. The appellate court held that the applicable authority "does not stand for the proposition . . . that an Indian tribe cannot invoke its sovereign immunity from suit in an action that challenges the limits of the tribe's authority over non-Indians." Id. Because the appellate court held that sovereign immunity barred suit against the Muscogee, it explicitly declined to address whether the tribe had authority to seize nonmembers'

property. Id. Therefore, we decline to adopt the reasoning from the federal district court when that decision was reversed on sovereignty grounds.

Scott also cites Bressi v. Ford, 575 F.3d 891 (9th Cir. 2009) for her argument that the Miner trial court's analysis regarding tribal authority was sound, and the officers here were not acting under tribal law. In Bressi, tribal officers stopped a nonmember at a roadblock on an Arizona state highway that ran through the reservation. Id. at 893-94. Bressi refused to present his identification, because he alleged the stop was unconstitutional. Id. at 894. So, the officers handcuffed him and cited him for failure to provide a license and failure to follow an officer's order. Id. The tribal officers had authority to enforce state law, so they eventually cited him for two state law violations arising from his failure to cooperate. Id. Bressi brought a lawsuit arguing that the officers acted outside their tribal law authority and did not meet constitutional standards for roadblocks. See id. at 895. The court held that the roadblock and initial stop were lawful, but the officers acted outside the scope of their tribal authority. Id. at 897. Rather, it held that they instead acted under state authority, because they quickly realized Bressi was not impaired, but nevertheless treated his refusal to cooperate as a state law violation. Id.

But, Bressi is critically different because it involved tribal officers writing a criminal citation for a violation of state law. Id. at 894. They were obviously acting in a state officer capacity, because they cited Bressi for violation of state

law. See id. But, Scott's forfeiture order was based purely on tribal law. And, it was an in rem forfeiture proceeding, not a purely criminal matter like Bressi.

Scott has not established that state laws were implicated in the forfeiture. She has not established that the officers were acting in the capacity of Washington state peace officers, rather than tribal officers. Absent that, she has not established that statutory immunity waiver applied.

But, Scott argues that even if the RCW 10.92.020 waiver does not apply, the officers may not assert sovereign immunity because they acted outside of the scope of their authority. Whether tribal sovereign immunity applies is a question of federal law. AUTO, 175 Wn.2d at 226. Such sovereign immunity extends to tribal officials acting within the scope of their authority. Wright, 159 Wn.2d at 116.

Scott also cites Maxwell v. County of San Diego, 708 F.3d 1075 (9th Cir. 2013) and Pistor v. Garcia, 791 F.3d 1104, 1113-14 (9th Cir. 2015) for her argument that, irrespective of whether they were acting as Washington peace officers, the officers acted outside of their authority and sovereign immunity is therefore not available. In Maxwell, the court found that tribal paramedics named in the suit could not assert sovereign immunity in a suit arising out of an emergency response, because the damages sought were not from the tribe itself, but from the individuals. 697 F.3d at 1081, 1089. In Pistor, the court cited Maxwell, and found that sovereign immunity did not apply in a suit against tribal

gaming officers in their individual capacities who seized the plaintiffs after they won large amounts of money. 791 F.3d at 1108-09, 1113-14.

But, both Maxwell and Pistor involved actions in response to isolated scenarios.[3] Maxwell, 697 F.3d at 1081; Pistor, 791 at 1108-09. To that end, both courts explicitly noted that sovereign immunity did not apply because the remedy sought would not restrain the Tribe from acting, but rather merely compensate the plaintiffs for their injury. Maxwell, 697 F.3d at 1088; Pistor, 791 at 1114. At issue in Maxwell was the negligent conduct of individuals responding to a specific emergency. 708 F.3d at 1080-81. At issue in Pistor was isolated conduct of individuals, constituting acts of intimidation and punishment of a group of highly successful gamblers. 791 F.3d 1108-09. Neither requested relief such that a Tribe's policies or programmatic practices should be enjoined.

But, here the crux of Scott's argument is that the tribe's ongoing practice of seizing and forfeiting nonmembers' vehicles should be enjoined. And, a plaintiff cannot circumvent tribal immunity by simply naming an officer of the Tribe as a defendant, rather than the sovereign entity. Cook v. AVI Casino Enters., Inc., 548 F.3d 718, 727 (9th Cir. 2008). This is for obvious reasons. If

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[3] Scott also cites Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma, 725 F.2d 572 (10th Cir. 1984) for further support of this argument. There, the court held that a gas company seeking to invalidate tribal ordinances could maintain a suit against named officials. Id. at 574-75. It reasoned that, when a plaintiff alleges that an officer acted outside the scope of his authority, sovereign immunity is not implicated. Id. at 574. But, like Maxwell and Pistor, Tenneco involved named officers. Id. And, the court reasoned that the presence of federal question jurisdiction was key to its holding that the suit may proceed. Id. at 575. Neither of these concerns are present in Scott's case.

the opposite were true, a plaintiff challenging a sovereign's authority could simply name an officer of the sovereign to completely avoid the principles underlying sovereign immunity. See id. Scott challenges the Tribe's outright authority to forfeit vehicles of nonmembers. The lawsuit does not concern an isolated act by individuals, but rather the Tribe's ongoing authority to engage in a specific practice. Maxwell and Pistor do not apply.[4]

Scott contends that upholding the trial court will render ineffective RCW 10.92.020(2)(a)(ii)'s sovereign immunity waiver. We disagree. The waiver would retain vitality when tribal officers are enforcing Washington state law, acting in the capacity of a State peace officer.

We hold that Scott has not demonstrated that the officers were acting as State peace officers. Therefore, the waiver of sovereign immunity in RCW

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[4] At oral argument, Scott stressed that another case, Lewis v. Clarke, ___ U.S. ___, 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017), establishes that the officers here may be sued individually. In Lewis, the court held that a tribal employee could not assert sovereign immunity in the following circumstance:

> This is a negligence action arising from a tort committed by Clarke on an interstate highway within the State of Connecticut. The suit is brought against a tribal employee operating a vehicle within the scope of his employment but on state lands, and the judgment will not operate against the Tribe. This is not a suit against Clarke in his official capacity. It is simply a suit against Clarke to recover for his personal actions, which "will not require action by the sovereign or disturb the sovereign's property."

Id. at 1292 (quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949)). Lewis is distinguishable, because Scott's primary argument goes to tribal authority for an ongoing practice, not that the tribe should be liable for isolated negligence.

10.92.020(2)(a)(ii) does not apply.[5] No other exception to sovereign immunity applies, and the Tribe and its officers are therefore immune from this suit. Joinder is not feasible.

C. Indispensable party

Scott argues that, even if the court determines that joinder is not feasible as to the tribe and its officers due to sovereign immunity, the suit should proceed against the Department.

This inquiry is heavily influenced by the facts and circumstances of the individual case. AUTO, 175 Wn.2d at 229. The court must determine whether, "in equity and good conscience," the action should proceed among the parties before it, or be dismissed. CR 19(b). The factors to be considered are:

> (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id.

These factors weigh in favor of dismissal. First, the prejudice to the Tribe would be substantial. In effect, Scott seeks a pronouncement that tribes may not

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[5] Scott also argues that the case should nevertheless proceed, because the Tribe's RCW 10.92.020(2)(a) insurers are not protected by sovereign immunity. She cites Smith Plumbing v. Aetna Casualty, 149 Ariz. 524, 527, 720 P.2d 499 (1986), where the Arizona Supreme Court held that an insurer was not entitled to assert a Tribe's sovereign immunity. But, even if this were a correct statement of Washington law, she has not established that the tribe is not a necessary party in a proceeding to establish that its officers acted under Washington law and not tribal law.

pursue asset forfeiture against nonmembers. Any such decision would have a substantial effect on tribal policy, and the health and welfare of the tribe. Scott urges the court to allow the suit to go forward against the Department alone, and enjoin the department from changing vehicle titles based on tribal forfeiture.[6] But, such a decision would still prejudice the Tribe. Although such an injunction would limit only the Department's conduct, it would nevertheless prevent the Tribe from obtaining or selling vehicles via forfeiture. As a result, this factor weighs in favor of dismissal.

Second, there is little opportunity to fashion relief that would limit prejudice to the Tribe. The core of Scott's claim is that the Tribe's asset forfeiture practices against nonmembers must be enjoined. The relief that Scott seeks would necessarily prejudice the Tribe.

Third, a judgment against the Department alone, at best, could enjoin it from issuing titles based on tribal court judgments against nonmembers. But,

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[6] Relatedly, Scott also claims that the Department violated its own protocol in changing the title based on a foreign (here, tribal) judgment, without first registering that judgment in superior court. She notes that, in a letter regarding another non-Tribe member's vehicle, the Department stated that its protocol is to register foreign judgments in superior court before seeking a change of title pursuant to that judgment. But, she claims the Department is not following this procedure.

Even if the sovereign immunity discussion above does not also bar this argument, Scott fails to identify the available relief that would be adequate. She does not identify what her cause of action against the Department for any monetary damages would be, if one even exists. Scott fails to identify the relief that this court could provide in response to this argument. It is not grounds for reversal.

this would not guarantee that the forfeitures themselves stopped. A judgment in the absence of the Tribe would not be adequate.

Finally, Scott was not without an alternate remedy. She could have contested the original forfeiture proceeding in tribal court. She did not. That proceeding was the most logical place to challenge the Tribe's authority to seek forfeiture of her property. Instead, she now pursues a tort claim, after the fact, alleging that the Tribe had no jurisdiction to take her property in the first place, even though she did not contest the Tribe's action when she had the original opportunity to do so.

This is in stark contrast to a case like AUTO, which Scott cites in arguing that dismissal would be inequitable. There, a trade group sought to invalidate state compacts with tribes regarding fuel taxes. 172 Wn.2d at 220-21. The court found that dismissal under CR 19 was not warranted, in part because there was no alternative remedy available that could have addressed the validity of the compacts. Id. at 232-33. Challenging the validity of the compacts in state court was literally the only possible way for the trade group to obtain relief. Id. at 232. The posture of Scott's claim is different. She did not challenge the forfeiture when she had the initial opportunity in tribal court.

Because the validity of the Tribe's practices are central to this case, and because an alternative remedy was available to Scott, we hold that the Tribe was an indispensable party, and the action may not proceed without it. The trial court properly dismissed this case on CR 19 grounds.

Scott is not entitled to relief. Her request for attorney fees is denied.

We affirm.

Appelwick, J.

WE CONCUR:

Trickey, ACJ

Cox, J.

FILED
9/12/2017
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JORDYNN SCOTT,

Appellant,

v.

JOHN or JANE DOE, director of the Department of Licensing, a subdivision of the State of Washington, in his/her official capacity; STATE OF WASHINGTON; PETER'S TOWING, a Washington Corporation; and JOHN and/or JANE DOE, unidentified Swinomish tribal police officers and general authority police officers pursuant to chapter 10.92 RCW in their official capacity and individually,

Respondents.

No. 75664-8-I

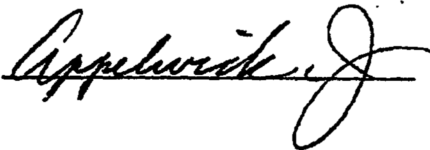
DIVISION ONE

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



Appendix 2

June 13, 2017

Secretary of the Interior
Department of the Interior
1849 C Street, N. W.
Washington D. C. 20240

Re: Matter of Insurance required under 25 USC 5321 © (3) (A)

Dear Mr. Secretary:

I am writing this letter on behalf of a number of clients who have had their tort lawsuits against tribal police officers in their individual capacity dismissed based upon the assertion of the defense of Indian sovereign immunity by lawyers representing these tribal defendants who are paid by the Hudson Insurance Company and/or its subsidiaries, Alliant Insurance and Alliant Specialty Insurance Companies doing business as Tribal First. The facts of these cases are set forth in the attached appendix. I am writing to ask about the role of your office in insuring that these insurance carriers comply with federal law, and in the hope that you can answer some specific questions about the policies.

The Swinomish Tribe in Washington State receives money from the federal government in a Self Determination Contract pursuant to 25 USC 5321. Receipt of the money by the Swinomish Tribe obligates the tribe and the United States government to enforce 25 USC 5321 (c) (3) (A) which provides;

> (3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits

Appendix 3

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> of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

I contend this provision is intended to preclude the defense of sovereign immunity so that tort victims- whether victims of assault over conversion of property like those whose cars were illegally forfeited- can have ready access to insurance.

A check of the public records concerning insurance compliance by the Swinomish Tribe with Washington State law shows that in 2015, 2016 and 2017 the Swinomish Tribe submitted a Certificate of Liability Insurance listing Hudson Insurance Company policy number 25054 as covering the liability of its police officers. The Certificate of Liability Insurance references tort coverage. The Swinomish tribe submitted an excess insurance policy issued by the Lexington Insurance Company and it specifically covers liability for law enforcement.

My questions to you are as follows:

1. Was the Hudson Insurance policy number 25054 obtained or provided for by the Secretary pursuant to 25 USC 5321 (c) (3) (A)?
2. If so, does this policy cover liability of tribal police officers of the Swinomish tribe for tort liability?
3. If so, does this Hudson Insurance policy number 25054 preclude attorneys hired by Hudson from raising the defense of Indian sovereign immunity when they defend a tort claim against a Swinomish tribal police officer in his individual capacity?

If the answer to the above three questions is yes, your Department should say so and take action to force Hudson to desist from its practice of allowing the attorneys it hires under this policy to raise the defense of Indian sovereign immunity. That is what Hudson is doing.

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My contention is that all of the cases I have brought against the tribal police officers in their individual capacity were improperly dismissed because of the assertion of the defense of Indian sovereign immunity. I believe 25 USC 5321 is the funding source for Indian Tribal operations, specifically the operations of the tribal police force and tribal court systems and the police officers, and court officials. With the exception of the Curtis Wilson case, all of my clients had claims against tribal police officers of the Swinomish Indian tribe. My theory of liability is based upon 25 USC 5321 (c) (3) (A). If the Swinomish tribe applied for a Self Determination Contract to operate its tribal governmental functions, specifically its police services, then the Hudson Insurance policy purchased was required by federal law to waive the defense of Indian sovereign immunity up to the limits of the policy for actions covered under the insurance policy.

25 USC 5321 (c) (3) (A) provides that a policy "obtained or provided by the Secretary" must contain a waiver of the defense of Indian sovereign immunity:

Liability insurance; waiver of defense

> (3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

The public policy of the United States reflected in this statute is to ensure that all tribal operations funded by the federal government under this statute are insured by a carrier that will make compensation available to

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tort victims without interposing the bar of sovereign immunity, under the same standards as any other governmental employee sued for a tort committed either within or outside the scope of employment.

My reading of the law is that 25 USC 5321 (c) (3) (A) was a quid pro quo for the Self Determination Contract funding of the tribes' operations. The United States provides the money and either pays directly or indirectly the cost of the insurance policy required to be purchased and this policy is available to cover torts committed by tribal employees acting within or without of their scope of employment. Those claims covered by the policy are to be defended under state and federal rules and no interposition of the defense of Indian sovereignty is permitted.

Because the statute identifies the Secretary of the Interior as the entity that obtains or provides the insurance policy, I assume your office has the responsibility to review the adequacy of the coverage and ensure that the policy complies on an ongoing basis with the statute. 25 USC 5321 (a) (C) (1) and (2) provides:

> Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this chapter. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act.
> (2) In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned economic enterprises as defined in section 1452 of this title, except that, for the purposes of this subsection, such enterprises may include non-profit corporations.

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Does your office have copies of the insurance policies in your files? Do you have a regular system for reviewing coverage to make sure the policies comply with federal law? I ask this because I have learned that the Washington State Department of Enterprises Services, with a similar responsibility to insure insurance compliance of tribal police as Washington State law enforcement officers, does not have copies of the policies and does not have a regular system for reviewing compliance. That office has only received two insurance policies from the Swinomish Indian tribe in ten years. One insurance policy was submitted in 2009 which had no waiver of Indian sovereignty provision written into the policy. A Lexington Insurance policy was submitted in 2016 by the Swinomish. Lexington was a general commercial policy with coverage for law enforcement liability and provided additional excess coverage over the limits of the Hudson primary policy that has never been submitted to the Department to Enterprise Services.

The Washington State statute, RCW 10.92.020 (2) (a) (ii), requires that the waiver of Indian sovereignty be written into the insurance policy itself. The statute provides:

> (ii) Each policy of insurance issued under this chapter must include a provision that the insurance shall be available to satisfy settlements or judgments arising from the tortious conduct of tribal police officers when acting in the capacity of a general authority Washington peace officer, and
> that to the extent of policy coverage neither the sovereign tribal nation nor the insurance carrier will raise a defense of sovereign immunity to preclude an action for damages under state or federal law, the determination of fault in a civil action, or the payment of a settlement or judgment arising from the tortious conduct.[1]

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[1] The Washington Attorney General prevailed in Pierson's mandamus action in the Washington Supreme Court where its construction of RCW 10.92.020 (2) (a) (ii) reserved

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Even now, the State Department of Enterprise Services does not possess a copy of the Hudson insurance policy. My objective is to get Hudson to produce a copy of its policy and to respond to the question of whether the policy was purchased under 25 USC 5321 (c) (3) (A) and is therefore required to be compliant with its waiver provision. So far Hudson has refused to respond to these inquiries. Hudson professes not to know the source of the funds that pays Hudson's premiums. I assume your office, as the entity responsible for obtaining or providing the liability insurance, is aware of how much money is being spent and whether the premium is commensurate with the amounts paid out. It is fair to ask how many cases are out there in which attorneys, hired and paid by Hudson and its affiliates to defend tribal members covered for tort liability under the Hudson policy, have raised the defense of Indian sovereign immunity as a way to get the tort claim dismissed, notwithstanding the federal law requiring that the defense be waived. I suggest it would be appropriate for your office to take an interest in this question and to investigate the premiums charged by Hudson Insurance Company and its affiliates to make sure the government is not being overcharged for coverage when the risk of liability is very low due to the assertion of the defense of sovereign immunity. For almost three years I have lost every tort case I have filed involving tribal officers as a result of the assertion of the defense of Indian sovereign immunity. I have to conclude that attorneys hired by Hudson were allowed to assert that defense in violation of 25 USC 5321 (c) (3) (A).

It is important to recognize that Lewis v. Clarke, __ U.S. _____ April 25, 2017, 2017 WL 1447161 has definitely settled the question of whether a

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to the tribe and its agents and presumably its insurance companies the right and option to contest cases on the basis that the tort was committed in furtherance of tribal law. The Washington Attorney General argued that 25 USC 5321 (c) (3) (A) was irrelevant, a position adopted by the Washington State Commissioner; see attached ruling of Commissioner of Washington Supreme Court. The Washington Supreme Court declined review.

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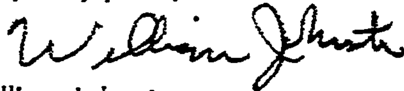
tort lawsuit against a tribal employee acting within the scope of his employment can be sued in state court for a tort. The defense of Indian sovereign immunity does not protect that tribal employee against a suit brought against him in his individual capacity.

We have a procedure in Washington where parties can write to our Attorney General and get an official interpretation of a statute. If such a comparable procedure exists in the federal system, please consider my inquiry as asking for an official interpretation.

Thanking you in advance for your response to my inquiries, I remain,

Very truly yours,



William Johnston

WJ:bj
Enclos: above stated
Cc: Washington Attorney General; William Spencer and Thomas Nedderman

APPENDIX

In Pearson v. Thorne, 2016 WL 3386798, W.D. Wash. 2016, the district court dismissed Pierson's[2] tort claim against Swinomish tribal police officer Andrew Thorne in his individual capacity in response to Thorne's motion to

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[2] The Pearson in Pearson v. Thorne is a mistake. Her actual name is Susan Pierson.

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dismiss the tort claim on the basis of Indian sovereign immunity. Swinomish Tribal police, who are certified as Washington State police officers under RCW 10.92 arrested Pierson, a non Native American, for driving with a suspended license and possession of drugs and paraphernalia on a state road inside the Swinomish reservation. After acquiring a state search warrant, the tribal officers searched her truck and found controlled substances. Based upon this information, the Swinomish tribe commenced forfeiture proceedings against the truck in tribal court. Pierson's tort suit against Thorne in state court was removed to federal court and dismissed. I have been told by attorney Thomas Nedderman of Seattle that he was paid by Hudson to defend tribal officer Andrew Thorne in this case.

In Curtis Wilson v. Horton's Towing, 2016 WL 1221655, W.D. Wash, 2016, on appeal to the United States Court of Appeals for the 9th Circuit 16-35320, Wilson's tort suit against Lummi tribal police officer Gates in his individual capacity and Horton's Towing was dismissed in part because of the implications of Indian sovereign immunity. Wilson, a non Native American, was stopped for a traffic infraction by a Lummi police officer on a state road inside the Lummi Reservation. Wilson appeared to be intoxicated and a search of the truck revealed about five pounds of marijuana. The Washington State Patrol was summoned. Wilson was arrested for DUI and his truck was impounded by the Washington State trooper and towed by Horton's Towing to its yard in Bellingham, a city that is outside the reservation. The next day, the truck was seized when Gates, who traveled to Bellingham, served a forfeiture notice upon Horton's Towing, who released Wilson's truck to Gates. Wilson's lawsuit against Gates and Horton's Towing was dismissed based upon variations of the defense of Indian sovereign immunity. Wilson has appealed the decision to the 9th Circuit where the case is pending.

In addition to Hudson's attorneys raising the defense of Indian sovereign immunity in the Pierson and Wilson cases, the Attorney General of Washington has obtained dismissal of two other tort cases against Swinomish tribal police officers in Candee Washington v. Director,

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Department of Licensing et al, Court of Appeals Cause No. 75670-2-I, and Jordynn Scott v. Department of Licensing and unnamed Swinomish Tribal police officers in their official and individual capacities, Washington Court of Appeals No. 75664-8-I. Candee Washington's expensive SUV was seized by tribal police officers because two occupants of the SUV possessed narcotics. Neither Ms. Washington nor her companions were arrested on the night the SUV was seized. Because Ms. Washington did not know the identities of the Swinomish tribal police officers who seized her SUV, I asked the tribe to give me the names of the tribal police officers involved. The Swinomish Tribe asserted Indian sovereign immunity and refused to divulge the names of the officers involved. I then moved for a writ of attachment against the Hudson policy directly, intending to pursue a quasi in rem tort action against Hudson. On May 15, 2015, Skagit County Superior Court Judge Dave Needy orally granted Washington's writ of attachment motion. Before I could present the order and pursue the quasi in rem action against Hudson, the Attorney General successfully obtained a dismissal of the action pursuant to CR 19 (b).

Lawyers representing Hudson Insurance which insures the Swinomish tribe have taken the position expressed in the letter attached in the Lafferty case, Lafferty v. Liu, Whatcom County Cause No. 17-2- 00360-0 removed to federal district for the western district of Washington, cause number 2-17-CV-00749-RSM.

This position mirrors the position taken by the Washington State Attorney General. The only briefing dealing with this subject is found in the Candee Washington. The position of the Washington State Attorney General can be found in his response to Ms. Washington's motion to remand in Candee Washington pages 8-11. My position is stated in my reply brief at pages 8 through 16. The position of Hudson is first, that it does not know if the policy was subject to 25 USC 5321 © (3) (A) but if it was, there was not coverage for the reasons put forth in the letter.

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I also have enclosed a transcript of the oral argument in the Candee Washington v. Director, Department of Licensing et al, Court of Appeals Cause No. 75670-2-I, and Jordynn Scott v. Department of Licensing and unnamed Swinomish Tribal police officers in their official and individual capacities, Washington Court of Appeals No. 75664-8-I which took place on May 31, 2017 before Washington State Court of Appeals for Division One in Seattle.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JORDYNN SCOTT,	)	No. 75664-8-I
Appellant,	)	
vs	)	
John or Jane Doe, Director of the Department of Licensing, a subdivision of the State of Washington, in his/her official Capacity and John and/or Jane Doe, unidentified Swinomish Tribal Police Officers and General Authority Police Officers pursuant To RCW 10.92 in their official capacity and all tribal police officers involved in the seizure and forfeiture of automobiles owned by non Native Americans as individuals	)	DECLARATION OF SERVICE
Defendants.	)	

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2017 OCT 11 PM 3:18

I, WILLIAM JOHNSTON, do hereby declare under the laws of the State of Washington that the following is true and correct:

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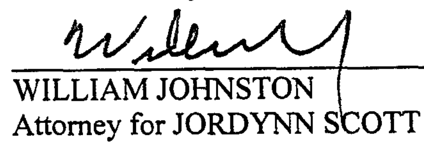
1. I am attorney for the petitioner JORDYNN SCOTT in this case;
2. I served a copy of petition to review on the Office of the Attorney General in Bellingham on October 11, 2017.

Dated this 11th day of October, 2017



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