No. 75670-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

CANDEE WASHINGTON, and
all other persons similarly

Appellant,

vs

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

Respondents.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

Table of Cases

Statutes and Rules

A. IDENTITY OF PETITIONER

Candee Washington 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 in the 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)?
3. Was Washington entitled to injunctive relief against the Department as unrelated to the adjudication of issues involving Indian sovereignty. Washington's claim for injunctive relief is predicted upon non compliance with CR 82.5. Washington 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 Washington 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 Washington'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, Washington 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 Washington 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 Washington 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 CASE

The recitation of facts by the Court of Appeals is generally correct. What is left out of the Court of Appeals opinion is recognition that Candee Washington did not know the identity of the Swinomish tribal Washington state empowered police officers, who seized her SUV automobile. Also omitted from the Court of Appeals' opinion is the fact that when counsel requested a public disclosure of the identities of the Swinomish tribal state qualified police officers under RCW 10.92, the Swinomish tribe refused to release the identities of its police officers involved in the seizure of Ms. Washington SUV asserting its sovereign immunity as a basis for its action. Also omitted is recognition that Candee Washington moved for a Writ of Attachment against Hudson Insurance company, the company listed by the Swinomish Tribe as the insurer of its tribal police officers with the Washington Department of Enterprise Services in its RCW 10.92 application to qualify its police officers was Washington State officers; see RCW 10.92.020. Skagit County Superior Court Judge David Needy orally granted Ms. Washington's motion for a Writ of Attachment because of the Swinomish tribe's

refusal to disclose the identities of the tribal officers involved. Before Washington could present a written Writ of Attachment order, the case was dismissed when the Washington Attorney General moved for dismissal under CR 19 and obtained a dismissal of all claims before another Skagit County Superior Court Judge Susan Cooke. [1]

This factual procedure history establishes that Ms. Washington's tort claim against the unidentified Swinomish tribal police officers who seized her SUV against the Hudson Insurance Company on a theory of quasi in rem jurisdiction was perfected in this record. Candee Washington could establish that her SUV was taken by uniformed Swinomish Tribal police officers and, if the seizure was tortious, recover from the tribal police officers' coverage under the Hudson Insurance policy coverage for tribal police for tortious conduct. [2]

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[1] Whatcom County Superior Court practice assigns one judge to each civil case. That same judge presides over trial and hears all pretrial motions. Skagit County practice is different with civil motions decided by a judge whose identity is deliberately withheld until the last minute. Also unlike Whatcom County, Skagit practice also prohibits written reconsideration motion and briefs.

[2] The motion to remand the case for factual determination portion of the opinion, see pages 15-17, relates to the fact that the Swinomish Tribe receives funding for its governmental operations pursuant to a Self Determination Contract governed by 25 USC 5321. Under 25 USC 5321© (3) (a), contracts of insurance must have a complete waiver of sovereign immunity for matters covered by the insurance policy. If the Hudson insurance policy covering the Swinomish tribal police is governed by 25 USC 5321© (3) (a), then financial recovery up to the limits of the insurance policy is authorized without the interposition of the defense of Indian sovereignty pursuant 25 USC 5321© (3) (a). The result reached is the same as reached in Lewis v. Clark as interpreted by petitioner as to tort lawsuits brought against tribal employees in their individual capacity but the authority for that result is by federal statute. It makes sense that any insurance policy covering tribal employees for torts would have such a waiver since without it, before Lewis v. Clark, the tribe could assert Indian sovereignty as a complete defense to the alleged tortious conduct of the tribal employee. The insurance policy would never have to pay out; e.g. Young v. Duenas 164 Wa. App. 434, 262 P.3d 837 (2011) tribal security immune completely upon showing of tribal employee status and acting as tribal

The other major legal component in the case was the announcement just before oral argument in the Court of Appeals of the landmark Indian law decision of the United State Supreme Court in Lewis v. Clarke, 137 S. Ct. 1285, 197 L.Ed2d 631 (2017). Its impact discussed in a footnote 5 at page 11 of the Court of Appeals opinion, "Lewis is distinguishable because Washington's primary argument goes to tribal authority for an ongoing practice, not that the tribe should be liable for isolated negligence." Petitioner Washington's quick reply is that any tribal employee enforcing an ongoing practice of tribal government authorized by tribal ordinance, which is violates clearly established rights, is actionable against the tribal employee in his individual capacity where only monetary damages are sought. Injunctive relief against the tribe is barred by sovereign immunity but suits for monetary damages against the tribal employee in his individual capacity is authorized under Lewis v. Clarke.

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

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employee; accord Cook v. AVI Casino Enters Inc. 548 F.3d 718 (9th Cir. 2008), tribal employees who get fellow employee intoxicated and then put behind wheel not liable to other motorist hit and killed shortly thereafter by the intoxicated tribal employee in a traffic accident. Inquiry to the Secretary of the Interior and Senate Committee on Indian Affairs as to whether the Swinomish Insurance with Hudson is constrained by 25 USC 5321 (c) (3) (a) has not produced a response. Attached as Appendix is the letter of inquiry to the Secretary of the Interior.

employees in their individual capacities dismissed based upon Indian sovereignty.

This case presents the question of whether Candee Washington'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 Candee Washington'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. Washington's tort lawsuit against the tribal police officers in their individual capacity.[3]

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.

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[3] 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 Washington'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. Washington maintains those cases have been overruled sib siliento by Lewis V. Clarke.

Here, Candee Washington's quasi in rem tort lawsuit against Hudson Insurance 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 or against Hudson Insurance, their insurer on a tort theory of quasi in rem jurisdiction.

F. ARGUMENT

1. Lewis v. Clarke137 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?

Lewis v. Clarke, supra, is a unanimous decision of the United States Supreme Court holding that a citizen can sue a tribal employee in his individual capacity for tortious conduct.

This court exempts from tort liability tribal employees sued in the their individual capacity if the tribal police officer employee is enforcing an ordinance enacted by the tribe. This court distinguishes Lewis v. Clarke as a isolated negligence action against Clarke arising from a tort committed by Clarke on an

interstate highway within the State of Connecticut; see footnote 5, slip opinion at 11.

The authority for this interpretation of the impact of Lewis v. Clarke is Pearson v. Director of Department of Licensing; see footnote 3, Slip Opinion page 6. Cook v. AVI Casino Enters. Inc. is also cited as authority at Slip Opinion 11. Pearson is predicted on the continued viability of Cook v. AVI Casino Enters Inc. 548 F.3d 718 (9th Cir. 2008). Pearson cites AVI Casino; see Pearson v. Director 2016 WL 338679. A shepardization of Cook v. AVI Casino reveals that it is called into question by Maxwell v. County of San Diego 708 F3d 1075 (9th Cir, 2015) which this court distinguishes because "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 Pistol v. Garcia 791 F3d 1104, 1113 -14 (the Cir. 2015) do not apply; see Slip Opinion at 11.

A careful examination of Cook v. AVI Casino reveals the tragic events as follows:

> Christopher Cook seeks relief because employees of Avi Casino gave an intoxicated fellow employee free drinks, then drove her to her car; she drove her car into Cook minutes later.[1] Andrea Christensen *721 ("Christensen"), a cocktail waitress at Avi Casino, attended a nighttime birthday party at the casino for another employee. Defendants Ian Dodd and Debra Purbaugh were among the casino employees at the party, during which Dodd, the on-duty manager, announced that drinks were "on the house." Christensen was off-duty, and Purbaugh served her alcoholic beverages after she was obviously intoxicated.
> Defendants let Christensen board a casino-run shuttle bus to the employee parking lot so that she could drive home. Christensen headed north on Aztec Road, which was located within the Fort Mojave reservation. Leading to the tragic accident. Cook was

> driving his motorcycle southbound on the same road; he was heading home after visiting his mother-in-law. Minutes after leaving the parking lot, Christensen swerved across the centerline and hit Cook's motorcycle.[2] Cook suffered catastrophic injuries, including the loss of his left leg, resulting in more than $1,000,000 in medical expenses. Christensen pled guilty to aggravated assault and driving under the influence and was sentenced to four years in Arizona prison. She is not a party to this appeal.

Cook never sued Andrea Christensen or her other fellow Casino employees involved in getting her intoxicated in their individual capacity. It is very important to remember that Cook sued the employees of the Indian tribal corporation in their official capacity as employees of the Indian Corporation owned by the Fort Mojave Indian Tribe only. In the humble opinion of petitiioner's counsel, who, prior to the decision announced in Lewis v. Clarke, speculated that the decision of the Connecticut Supreme Court in Lewis v. Clarke would be unanimously reversed, the same observation can be made of the viability of Cook v. AVI Casino as precedent. The Cook v. AVI Casino facts come within the ambit of the class of tort cases against tribal employees, such as tribal Casino employees who get patrons or fellow employees intoxicated, and innocent persons are killed as a result thereof recognized by Lewis v. Clarke as having viable tort claims against the tribal employee in his individual capacity. There is no exegesis by the Court of Appeals in its limitation on the precedent of Lewis v. Clarke so as not to allow it to apply to this case.

Respectfully, the precedent of Lewis v. Clarke rolls over the viability of AVI Casino as precedent, as well as other cases which rely upon AVI Casino for

the result reached, such as Pearson v. Director, 2016 WL 3386798 (W. D. Wash. 2016). Candee Washington has obtained a ruling from the Court of Appeals that tort liability is not available when the tribal police officer enforces a tribal ordinance against a non Native American. The Court of Appeals has refused to rule on the merits as to whether the tribal police officers, in enforcing the tribal ordinance against the non Native American citizens, exceeded the tribe's authority. The Connecticut Supreme Court addressed the issue presented. The Connecticut Supreme Court did not refuse to rule on the plaintiff's claim that tort liability against the tribal employees was a viable claim against the tribal employee individually in Connecticut state court. The Court of Appeals refused to rule on the merits of whether the Swinomish tribal officer exceeded their authority in enforcing the Swinomish tribal ordinance against a non Nation American. Why not?

Likewise, a careful reading of Pearson reveals that Pearson sued Andrew Thorne in his individual capacity. The United States District Court judge dismissed Pearson's tort claim based upon Cook v. AVI Casino without addressing whether it makes any difference. Therefore, both Pearson v. Director, 2016 WL 3386798 (W. D. Wash. 2016) and Cook v. AVI Casino Enters Inc. 548 F.3d 718 (9th Cir. 2008) are distinguishable because such case did not address liability of tribal employees acting in their individual capacities.

Washington respectfully submits that it does make a difference. The Court of Appeals' decision makes a distinction between "normal" torts committed by

tribal employees in the course of their duties renders them liable to tort suit in their individual capacity but other types of special torts, here deprivation of Pierson's private property by forfeiture of her truck, are vulnerable to a motion to dismiss based upon Indian sovereign immunity because the tribal police officers are enforcing a law granting them authority over the nontribal members' property following the lead of Pierson v. Thorne, 2016 WL 3386798, W.D. Wash. 2016.[4]

While it is true that Lewis v. Clarke did not discuss or have the case of a tort suit in state court against a tribal employee performing work for the tribe was performing such as a tribal police officer enforcing a specific tribal law against a non tribal member, the United States Supreme Court's discussion of how immunity operates in the context of state immunity is insightful how this issue will be resolved. The high court stated:

> 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

[4] Washington's motion to remand is predicated upon the assertion, the argument, the contention that the actions of the Swinomish tribal officers - whether they committed isolated acts of negligence which this court sees as rendering them liable for ordinary acts of negligence in their individual capacities under Lewis v. Clarke, or, as here, acting in an official capacity for the tribe in enforcing its forfeiture law against nonnative Americans- are covered under the insurance policy required under 25 USC 5321 © (3) (A). This federal law requires all tribes submitting applications for a Self Determination Contract under 25 USC 5311 (1) (A) to have insurance either obtained or provided by the Secretary of the Interior conditions on the payment of federal money to pay the salaries of the tribal police officers prohibits under federal law asserting the otherwise lawful defense of Indian sovereign immunity in response to tort lawsuits against tribal employees up to the limits of the insurance policy. Until this issue is resolved, it is inequitable for the Attorney General to resist Washington's motion because it raises the likely result that if the Court of Appeals opinion of dismissal all claims is sustained, it turns out that Ms. Washington's claim was covered under the policy.

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." Larson v. Domestic and Foreign Commerce Corp.,337 U.S. 682, 687, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). 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.

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.

10Accordingly, under established sovereign immunity principles, the Gaming Authority's immunity does not, in these circumstances, bar suit against Clarke.[2]

The footnote cited states as follows:

There are, of course, personal immunity defenses distinct from sovereign immunity. E.g., Harlow v. Fitzgerald, 457 U.S. 800, 811–815, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Clarke argues for the first time before this Court that one particular form of personal immunity is available to him here—official immunity. See Westfall v. Erwin, 484 U.S. 292, 295–297, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988). That defense is not properly before us now, however, given that Clarke's motion to dismiss was based solely on tribal sovereign immunity. See Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co., 549 U.S. 443, 455, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007).

Faced with the obligation to determine on the merits the question of whether total absolute Indian sovereign immunity precludes all suits against tribal employees enforcing tribal law against nonnative Americans, this court should undertake the burden the Connecticut Supreme Court in Lewis v. Clarke embraced which was to resolve the issue presented in that case. Here the issue to

be resolved by the state court in post Lewis v. Clarke world is to rule on the state court's jurisdiction over tort lawsuits against Indian employees for actions for the most part taken on state roads inside Indian reservations when the claim is made that the Indian employee was enforcing tribal law, and not an isolated individual act of negligence.

The choices are two: 1) to reach a result which shields the Indian tribal employee from all liability upon a showing that he was enforcing tribal law, or remands the tort plaintiff's fate to the tribal court; or the alternative which is 2) to impose upon Indian tribal employees performing acts of sovereignty are to be 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.

2. Indian sovereignty does not relieve a state court or federal court from jurisdiction to adjudicate 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).

Lewis v. Clarke, 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017) has established the absolute right of a citizen to sue a tribal employee in his individual capacity in state court and obtain a verdict if the employee committed a tortious act.

Tenneco Oil v. Sac and Fox Tribe of Indians of Oklahoma 725 F2d 572 (10th Cir. 1984) is on point. Tenneco's interest was identical to Ms. Washington's. Tenneco had a lease of oil fields on Indian land. That Tenneco leasehold interest, worth millions, was being cancelled by virtue of a legislative

enactment by the Sac and Fox Tribe of Indians of Oklahoma. In Ms. Washington's case, her use interest and ownership interest in her thirty thousand dollar valued SUV was taken from her by virtue of the enactment of the Swinomish Tribal forfeiture ordinance and its enforcement against nonnative Americans.

Under the analysis of the Washington Court of Appeals, Tenneco should have been sent to tribal court by the 10th Circuit. The Court of Appeals erred in not ruling on the issue of whether the unnamed tribal police officers violated Washington's constitutional rights by their actions in aiding and abetting the enforcement of a blatantly unlawful application of Indian law to confiscate the private property of a non Native American or a corporation.

3. Washington was entitled to injunctive relief against the Department as unrelated to the adjudication of issues involving Indian sovereignty. Washington's claim for injunctive relief is predicted upon non compliance with CR 82.5. Washington 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 Washington 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 Washington'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, Washington 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 Washington 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 Washington 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).

The facts relating to just how the Swinomish Tribe's police transferred title to itself in the case of Ms. Washington are very relevant to the resolution of the issue of whether Ms. Washington's suit for injunctive relief against the Department should have been permitted to go forward. Because the presentation of the change of title paperwork in Washington's case was accomplished by Swinomish tribal police who, very significantly, have a commission to enforce Washington laws and have taken an oath to do so, the tribal police and the Swinomish should take no benefit from its transgression of Washington laws. The Court of Appeals has held that the sovereign interest of the Swinomish tribe requires CR 19 (b) dismissal because Swinomish tribal court must first consider whether the Swinomish legislature has authority to impose a draconian drug forfeiture law upon non Native Americans. 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. Even if Indian sovereignty is implicated and the resolution of the dispute requires involving other parties like the Department or those persons who purchased the automobiles confiscated by the Swinomish at public auction, Washington courts should not defer by way of comity, or CR 19 (B) in this case based upon Indian sovereign immunity because the Swinomish tribal police officers, certified as

Washington state law enforcement officer, violated and aided and abetted the violation of CR 82.5 to transfer title.

The egregious and illegality of this action was accomplished with the specific intention to avoid the Superior Court judgment which would follow, determining whether the Swinomish forfeiture law and the tribal court judgment had subject matter and personal jurisdiction of Ms. Washington's SUV. In this CR 82.5 proceeding, the Superior Court is faced with a decision making choice; i.e. 1) adopted the scholarly opinion of Judge H. Dale Cook in Miners Electric v. Muscogee (Creek) Nation vacated by the 10th Circuit on other grounds, 505 F.3d 1002 (10th Cir. 2-17) or 2) provide a legal rationale supporting the conclusion that the Indian tribes do in fact have lawful authority to forfeit automobiles owned by none Native Americans, which would be the antithesis of the opinion of H. Dale Cook. The entire Indian tribe authority structure, the courts, the prosecutors and the police, which are also Washington state police, were involved in this conscious choice of action by Indian tribal authorities to evade Washington CR 82.5 and profit from it.[5]

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

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[5] 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 is an abrogation of Washington sovereignty motivated to secure the absolution of all state employees and the State itself for civil liability for its action or its acquiescence in the manipulation of Washington state laws by tribal police officers certified to enforce Washington law.

> 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 perceptive injunctive relief against the Department of Licensing.

Mootness argument 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. The Court of Appeals rejected this mootness claim.

The record in this case developed by the Department to obtain relief from discovery request for the names and addresses of all moot vehicle owners whose

Certificate of Title was transferred by presentation of a Indian Tribal Court judgment of forfeiture of the automobile meets the standard under Communications Access Project v. Regal Cinemas, Inc. 173 Wa. App. 174 (2013). Because of the fact that the Department has not digitized its motor vehicle transfer records, the Department has no factual basis to contest Washington'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; argument of Attorney General at oral argument before the Court of Appeals.

The Assistant Attorney General's knowledge of the misfeasance of the Department's Mount Vernon office came as a result of Ms. Washington 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 uniformed because the Swinomish Tribe refuses to release any information they have on the basis of Indian sovereign immunity.

For these reasons, Washington asserts that the Department has not discharged their 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. 174 (2013) at 205.

At a minimum, this court should reconsider and reverse and direct that summary judgment on this issue of the injunction has been met 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.

G. ATTORNEY FEES

Petitioner requests an award of attorney fees if she prevails for the reasons asserted in her appeal brief at pages 26-28 which include recovery under 42 USC 1983, 1988 against the Director for illegal transfer of her title as well as recovery for bad faith. Washington 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. Washington 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.

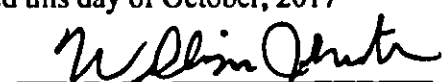
H. CONCLUSION

Unidentified tribal police officers, also qualified to exercise Washington state law enforcement authority, seized Ms. Washington's SUV by enforcing an

unlawful tribal forfeiture ordinance. Even if the tribal forfeiture code is not a criminal statute, civil jurisdiction over non native Americans is without precedent; Strate v. A-1 Contractors, supra. Lewis v. Clarke has resolved the question of Indian sovereignty providing tribal employees complete immunity if they are sued in their individual capacity. The purpose of individual capacity as opposed to official capacity is that all citizens are accountable for violation of law, including civil tort law. There is no exception from liability for the commission a tort in a tort suit against the torfeasor in his individual capacity.

All of these considerations qualify this case for review under RAP 13.4 (b) (3) and (4).

Respectfully submitted this 11th day of October, 2017



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CANDEE WASHINGTON, and all other persons similarly situated,	)	No. 75670-2-I
Appellant,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
DIRECTOR OF THE DEPARTMENT OF LICENSING, a subdivision of the State of Washington, in his/her official capacity; 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 all tribal police officers involved in the seizure and forfeiture of automobiles owned by non-Native Americans as individuals,	)	
Respondents.	)	FILED: June 26, 2017

APPELWICK, J. — After losing her vehicle to the Swinomish Tribe in civil forfeiture, Washington 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. Candee Washington 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

Appendix I

Swinomish tribal court.[1] She did not contest the tribal court forfeiture proceeding. The Department of Licensing (Department) issued a new certificate of title to reflect the change in ownership.

Washington filed a class action complaint in Skagit County Superior Court against John and/or Jane Doe Swinomish Tribal police officers and the Director of the Department of Licensing. She requested certification of two classes, one class whose property has been seized by the Tribe, and one class whose property has been seized by other tribes. Against the Department, she sought a judgment for every certificate of ownership "changed based upon presentation of an Indian order of forfeiture." And, against the unnamed officers, she sought a judgment and 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. Washington appealed directly to the Washington Supreme Court. But, the Supreme Court transferred the case to this court.

DISCUSSION

Washington makes three arguments. First, her primary argument is that the trial court erred in dismissing this case under CR 19 on sovereign immunity grounds. Second, in a motion to modify a commissioner's order, Washington

[1] Washington notes that the Swinomish law is less favorable to claimants in forfeiture proceedings than Washington law. She notes that it allows forfeiture of a vehicle if even an occupant of the vehicle possesses a controlled substance, and there is no good faith exception for an unwitting owner. And, here the order of forfeiture noted that the vehicle merely contained occupants who possessed heroin and its paraphernalia, not that Washington herself possessed or distributed the heroin and paraphernalia.

argues that this case should be remanded to the trial court for factual development. Third, Washington seeks attorney fees.

I. CR 19 Joinder

Washington 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.

Washington 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).

Washington 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.

Washington argues that the tribal officers' interaction with Washington 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."

Washington 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[2] scheme, forfeitures are civil in nature.[3] See United

[2] 21 U.S.C. §§ 801-904.

[3] 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

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

Washington 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. Washington 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.

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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.

But, Miner was reversed on appeal. See Miner Elec., Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007, 1012 (10th Cir. 2007). As Washington 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.

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

Washington 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, Washington 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.

Washington 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. 708 F.3d at 1080-81, 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.[4] 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

[4] Washington 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 Washington's case.

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 Washington'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 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. Washington 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.[5]

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[5] At oral argument, Washington 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,

Washington 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 Washington has not demonstrated that the officers were acting as State peace officers. Therefore, the waiver of sovereign immunity in RCW 10.92.020(2)(a)(ii) does not apply.[6] 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

Washington 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,

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because Washington's primary argument goes to tribal authority for an ongoing practice, not that the tribe should be liable for isolated negligence.

[6] Washington 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.

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, Washington seeks a pronouncement that tribes may not pursue asset forfeiture against nonmembers. Any such decision would have a substantial effect on tribal policy, and the health and welfare of the tribe. Washington 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.[7] But, such a decision would still prejudice the Tribe. Although such an injunction would limit only the Department's conduct, it would

[7] Relatedly, Washington 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, Washington fails to identify the available relief that would be adequate. Her only cause of action for damages made in the complaint is against the tribal officials. And, the Director would have no authority to actually return the vehicle to her possession, because doing so would require an action against the Tribe in superior court, where the same sovereign immunity barriers would be present. Washington fails to identify the relief that this court could provide in response to this argument. It is not grounds for reversal.

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 Washington's claim is that the Tribe's asset forfeiture practices against nonmembers must be enjoined. The relief that Washington 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, this would not guarantee that the forfeitures themselves stopped. A judgment in the absence of the Tribe would not be adequate.

Finally, Washington 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, that Washington 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 Washington'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 Washington, 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.

II. Motion to Modify

Washington has filed a motion to modify a commissioner's ruling that denied remand. The original motion to remand sought remand in order to give Washington an opportunity to factually develop whether the Tribe is in compliance with the federal Indian Self Determination Act (ISDA).[8] The ISDA permits Native American tribes to contract with the Secretary of the Interior to furnish services previously administered by the federal government. Evans v. McKay, 869 F.2d 1341, 1346 (9th Cir. 1989). The ISDA further vests the Secretary with discretion to require any tribe requesting such a contract to obtain adequate liability insurance. Id. And, if a tribe enters into any such "self-determination contracts," the insurance carrier must waive its rights to use sovereign immunity as a defense, up to the policy limits. 25 U.S.C. § 5321(c)(3)(A).

[8] 25 U.S.C. §§ 5301-5423.

Washington did not raise this argument below. But, she brought a motion to remand so that she could engage in further fact finding that would indicate whether the ISDA waiver of sovereign immunity might apply. A commissioner of this court treated this motion as a motion to add additional evidence under RAP 9.11, and denied the relief sought on the grounds that Washington did not satisfy the RAP 9.11 requirements. Washington then filed a motion to modify the commissioner's ruling. Washington argues that the motion to modify should be granted and remand is necessary, because if the case is not remanded, an entire pool of tort victims—non-Tribe members whose assets are seized by tribes—will have no legal remedy.

Washington makes a conclusory statement that she has satisfied the RAP 9.11 elements. But, she does not establish that RAP 9.11 has in fact been satisfied. To provide additional evidence under RAP 9.11(a), a party must satisfy the following six elements;

> (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

Most notably, RAP 9.11(a)(3) has not been satisfied here. Washington states that her failure to raise this federal claim below is due to her attorney being "unaware" of 25.U.S.C. § 5321(c)(3)(A). Thus, it appears that Washington's new theory regarding the ISDA is a result of counsel discovering a federal statute,

after dismissal below, that might tend to support her argument against sovereign immunity.

Because Washington does not establish that all six elements of RAP 9.11 have been met, we deny the motion. And, because RAP 9.11 has not been satisfied, we need not wade into the complex substantive federal questions raised about the construction and applicability of 25 U.S.C. § 5321(c)(3)(A).

The resolution of this motion does not affect the preceding analysis on the merits of the appeal. Washington's motion to modify is denied.

III. Attorney Fees

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

We affirm.

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

CANDEE WASHINGTON, and all other persons similarly situated, Appellant, v. DIRECTOR OF THE DEPARTMENT OF LICENSING, a subdivision of the State of Washington, in his/her official capacity; 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 all tribal police officers involved in the seizure and forfeiture of automobiles owned by non-Native Americans as individuals, Respondents.	No. 75670-2-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:

Appelwick, J.

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]

[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

[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.