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COURT OF APPEALS  
DIVISION II

11 FEB -7 AM 10:58

STATE OF WASHINGTON

BY \_\_\_\_\_  
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No. 40859-7-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

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CHRIS YOUNG as an individual person and as the Personal  
Representative of the ESTATE OF JEFFRY YOUNG,

Appellant,

v.

JOE DUENAS, Chief of Tribal Police, JOSEPH S.  
FITZPATRICK, police officer, CHRISTOPHER E. DAUSCH,  
police officer, JOHN SCRIVNER, police officer, JOHN DOE(s),  
additional police officers, and Benjamin R. Isadore, security  
officer,

Respondent.

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**APPELLANT'S REPLY BRIEF**

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Law Offices of O. Yale Lewis III, LLC  
1511 Third Avenue, Suite 1001  
Seattle, WA 98101  
Tel: (206) 223-0840  
Fax: (206) 260-1420  
E-Mail: [yale@yalelewislaw.com](mailto:yale@yalelewislaw.com)  
WSBA #: 33768

**ORIGINAL**

## I. INTRODUCTION

This court should reverse the trial court and remand for trial. State court is the forum best suited to hear the claims. Tribal court is not the proper forum because it generally lacks jurisdiction over matters of federal law and, specifically lacks jurisdiction over civil rights claims. In addition, the reality of the Puyallup Tribal Torts Claim Act failed to live up to its promise. While, in theory, the tribe has provided a limited waiver of sovereign immunity, it has not provided a neutral forum competent to hear this particular claim.

Per P.L. 280, this court has concurrent subject matter jurisdiction over the cause. It also has personal jurisdiction over the defendants. Defendants assert that they are but a proxy – a pleading artifice – for the real defendant, which is the tribe. Since the tribe has sovereign immunity, this court lacks personal jurisdiction over it. However, sovereign immunity is not at issue here.<sup>1</sup> The tribe is *not* a defendant. The complaint does not name the tribe as a defendant. Nor does it allege vicarious liability or *respondeat superior*. Plaintiff elected to *not* sue the tribe precisely because the tribe has sovereign immunity.

Thus, the real issue before the court is not sovereign immunity but *qualified* immunity. Whether an official has qualified immunity

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<sup>1</sup> Plaintiff stipulates, yet again, that the Puyallup Indian Tribe has sovereign immunity.

depends on whether 1) they acted in their official capacity, and 2) within the scope of their authority. Plaintiff stipulates that they acted in their official capacity. The issue is whether they acted within the scope of their authority.

Plaintiff asserts that the police officers were not authorized by tribal law to assault and kill a non-tribal member. In fact, a tribal police officer has almost no authority over a non-member at all. Pursuant to the residual, inherent sovereignty of an Indian tribe, a tribal police officer may detain a non-member long enough to determine his membership status, or, in exigent circumstances, including fresh pursuit, call state authorities and hold the non-member until the state authority arrives. Anything beyond that is beyond the scope of his authority.

Thus, nearly any interaction between a tribal police officer and a non-member is governed by the Constitution and the civil rights statutes. Here, the tribal police officers did more than merely determine the Decedent's tribal membership. Thus, they were acting pursuant to state law and exceeded the scope of the authority conferred by state law.

The police officer's behavior was a gross violation of Plaintiff's civil rights. When the police officers kicked the Decedent to the ground, they were using excessive force. When they proceeded to handcuff, ankle cuff, and Taser him, their conduct was more than excessive. It was

spontaneous, unprovoked, unhinged, brutality. While the tribe itself cannot be held accountable, the men themselves can be. This court should reverse the trial court and remand for trial.

## II. PRELIMINARY MATTERS

### Stipulations

1. Appellant stipulates to the dismissal of Defendant Isadore because he was not personally involved in Decedent's death.
2. Appellant stipulates to the dismissal of Defendant Duenas because he was not personally involved in Decedent's death.

### Clarifications

Appellant clarifies a statement at oral argument before the trial court regarding intent: appellant does not contend that defendants intentionally *killed* Decedent. However, Appellant *does* contend that defendants intentionally kicked, pig-piled, hand-cuffed, ankle-cuffed, and Tasered Decedent, which was the proximate cause of Decedent's death.

## III. STATEMENT OF THE ISSUES

### Jurisdiction

1. **Whether the Puyallup Tribal Court Offered Plaintiff a Meaningful Forum to Pursue His Claim for Damages;**
2. **Whether the Tribal Court Lacks Jurisdiction Over the Civil Rights Claims Because It Is Not a Court of General Jurisdiction and Has No Jurisdiction Over Questions of Federal Law, Including, Specifically, 42 USC 1983;**

- 3. Whether the Trial Court Should Have Asserted Its Concurrent P.L. 280 Jurisdiction Over the Puyallup Indian Reservation, including Complete Jurisdiction Over Non-Members and Non-Trust Land and Partial Jurisdiction over Members;**

Sovereign Immunity

- 4. Whether, Per the Treaty of Medicine Creek, the Tribe Is Required to Deliver Up Offenders Against the Laws of the United States;**
- 5. Whether Defendants Were Acting Under the Color of State Law When They Assaulted and Killed Decedent;**
- 6. Whether the Puyallup Indian Tribe Is the Real Party in Interest;**
- 7. Whether the Defendants Acted Outside the Scope of Their Authority When they Seized, Bound, and Killed Decedent;**
- 8. Whether Plaintiff Should Be Awarded Attorney's Fees If He Is the Prevailing Party.**

IV. ARGUMENT

Jurisdiction

- 1. The Puyallup Tribal Court Did Not Offer Plaintiff a Meaningful Forum to Pursue His Claim for Damages.**

Both sets of defendants devoted a considerable amount of briefing to the notion that this matter should be in tribal court and that Plaintiff should have availed himself of the limited waiver of sovereign immunity promised by the Puyallup Tribal Tort Claims Act. This notion suffers at least three fatal flaws. First, tribal court lacks authority over the civil rights claims. *Nevada v. Hicks*, 533 US 353, 121 S.Ct. 2304, 2315 (2001) (“[T]ribal courts cannot entertain § 1983 suits.”) Thus, forcing Plaintiff to

litigate in tribal court would be forcing him to either 1) abandon his civil rights claims or 2) litigate simultaneously in two *fora*.

Neither choice is beneficial to Plaintiff and defendants have cited no law requiring Plaintiff to make this kind of choice. In addition, jurisprudential considerations, including judicial economy and consistent fact-finding and decision-making by one jurist, counsel against simultaneous litigation in two *fora*.

The second flaw has to do with fundamental notions of equality and fair play. As the Supreme Court pointed out in *Nevada v. Hicks*, and as Isadore stated in his brief, tribal courts are not bound by the Constitution. Their laws and rules are not written down. Neither are their decisions. There is no right to a trial by jury. Frequently there is no right to an appeal. The Puyallup tribal court is no exception to this rule. While the tribal court is the appropriate forum for purely intra-mural affairs – *e.g.* disputes between tribal members arising from conduct on tribal land and addressed by tribal ordinances – it is not the appropriate forum for hearing cases such as this one.

Finally, Plaintiff tried to litigate his case in tribal court and it didn't work. Plaintiff's claims languished in tribal court for nine months. *CP 61 – 64*. The Tribal court, whether by design or by lack of competence, simply ignored Plaintiff's motions until Plaintiff lost two of

them – false arrest and false imprisonment – due to the statute of limitations. *Id.* When the court did finally hold a hearing, it was pursuant to a “Sua Sponte Motion and Order to Appear for a Pretrial Conference.” *Id.* At the pretrial conference, the court indicated its intent to dismiss the complaint based on sovereign immunity. *Id.* Clearly, tribal court was unaware of, or unconcerned with, the Puyallup Tribal Torts Claim Act. *Id.*

**2. The Tribal Court Lacks Jurisdiction Over the Civil Rights Claims Because It Is Not a Court of General Jurisdiction and Has No Jurisdiction Over Questions of Federal Law, Including, Specifically, 42 USC 1983.**

Neither set of defendants challenged Plaintiff’s assertion that tribal court lacks jurisdiction over the civil rights claims. In fact, defendant Isadore devoted several pages to the proposition that the tribal court is not subject to the Constitution. Plaintiff whole-heartedly agrees with that proposition. Therefore, tribal court cannot be the proper forum to hear the civil rights claims.

**3. The Trial Court Should Have Asserted Its Concurrent P.L. 280 Jurisdiction Over the Puyallup Indian Reservation, including Complete Jurisdiction Over Non-Members and Non-Trust Land and Partial Jurisdiction over Members.**

The police officer Defendants assert that P.L. 280 only confers state court jurisdiction over eight specific fields of law, including mental illness. However, this interpretation of the statute is far from the mark.

Washington's version of P.L. 280 confers subject matter jurisdiction over any cause of action arising on the Reservation between non-members, members, or non-member vs. member. *RCW 37.12.010*. The only exception to this broad rule is a cause of action arising 1) between members, and 2) on trust land. *Id.* This exception has its own exception. The state has jurisdiction, even over members on trust land, if the subject matter involves one of the eight enumerated areas of law referred to by the police officer defendants. *Id.*

Although the text of Washington's version of P.L. 280 states that the state's assertion of jurisdiction is "obligatory and binding," case law has established that it is not exclusive. Rather, it is concurrent.

The trial court should have asserted its concurrent jurisdiction over this cause for the following reasons. 1) Tribal court was not up to the task. 2) Plaintiff should be able to litigate all his claims, including the civil rights claims, in one forum.

Finally, the state / tribal balancing test comes out in favor of state-court jurisdiction. On the one hand, the state has a strong interest in regulating the conduct of state-certified peace officers and protecting the civil rights of its citizens. On the other hand, the tribe's potentially countervailing interest in self government and economic self sufficiency is scarcely implicated. Whatever a state jury decides to do to the three

officers, it will be unable to do anything to the tribe itself. A jury award against the officers will not reach the tribe. The tribe itself will be fully shielded by sovereign immunity. If the tribe wishes to pay a judgment against the officers, it may do so. If the tribe wishes to let the officers fend for themselves, it may do that as well.

**4. Per the Treaty of Medicine Creek, the Tribe Is Required to Deliver Up Offenders Against the Laws of the United States.**

Both sets of defendants appear to assert that, because Article 8 of the treaty of Medicine Creek has not been litigated in the past, it cannot be litigated now. That, of course, is silly. In our common law system, issues of law may lie dormant, possibly for centuries, until a party decides to litigate. For example, the U.S. Supreme Court did not pass judgment on its first Second Amendment case until 2008. *District of Columbia v. Heller*, 554 US 570, 128 S.Ct. 2783 (2008).

Now, apparently, is the time to litigate the meaning of the last sentence of Article 8. Plaintiff asserts that the sentence means what it says. If someone has offended the laws of the United States, the tribe may not shelter or conceal that person. Rather, the tribe shall deliver the person to the authorities for trial. The Constitution and the Civil Rights Act of 1871, codified at 42 USC 1983, are both laws of the United States.

The police officers offended these laws when they assaulted and killed the Decedent. The authority is Pierce County Superior Court.

**5. Defendants Were Acting Under the Color of State Law When They Assaulted and Killed Decedent.**

Both sets of defendants assert that defendants were acting pursuant to tribal law when they assaulted and killed Decedent and therefore their conduct was not constrained by the Constitution or 42 USC § 1983. While it is true that the tribe itself is not subject to the Constitution, the police officers themselves cannot get off so easily. When the police officers interact with non-members, they are acting under color of state law and therefore subject to the Constitution and the civil rights statutes.

The police officers were acting under the color of two very specific and well-defined sources of state law. The first was the tribal peace officer certificate issued to each officer by the Washington State Criminal Justice System. *CP 51 – CP 55*. This certificate establishes that the tribal officers went through the same training and are required to adhere to the same standards as any general authority peace officer of the state. These standards and training, of course, are a creature of state law.

The second source of law is the Interlocal Cooperation Agreement for Mutual Aid. *CP 80 – 86*. The two state parties to the agreement, the City of Tacoma and Pierce County, entered into this agreement pursuant to

two different state statutes, the Interlocal Cooperation Act, RCW 39.34 *et. seq.*, and the Washington Mutual Aid Peace Officer's Powers Act, RCW 10.93 *et. seq.* The agreement is fully enforceable in state court. *Id.*

The agreement confers a "special commission" on tribal police officers which allows the officers to exercise law enforcement authority over non-members within the exterior boundaries of the reservation. *CP 81*. The special commission is subject to two criteria: 1) the officer must be employed by the tribe and hold an unlimited tribal commission, and 2) the officer must be state-certified by the Washington Criminal Justice Training Commission. *CP 81*.

Here, the officers are employed by the tribe. There has been no allegation that the officer's tribal commissions are limited in any way. Thus, it appears to be a safe assumption that the officers have unlimited commissions. Likewise, the officers are state-certified. To conclude: the officers had authority, under state law, to exercise general law enforcement authority over non-members on the reservation.

The defendants don't specifically challenge this analysis. Rather, they appear to assert that officers had this authority but were not using it. Therefore, the court must determine if the defendants were exercising general law enforcement authority over the Decedent pursuant

to state law, or limited law enforcement authority pursuant to the residual inherent authority of the tribe.

This determination begins and ends with *Bressi*. In *Bressi*, tribal police officers set up a roadblock and detained Bressi, a non-member, within the exterior boundaries of the Reservation. *Bressi v. Ford*, 575 F.3d 891, 894 (9<sup>th</sup> Cir. 2009). The officers were certified by the Arizona Peace Officer Standards and Training Board and thereby authorized to enforce state law. Bressi brought a civil rights claim against the individual police officers and the United States under 42 USC 1983. *Id.* @ 893.<sup>2</sup> The officers brought a motion to dismiss for lack of subject matter jurisdiction under FRCP 12(b)(1).

The trial court held that the roadblock and detention were purely a matter of tribal law and granted the motion to dismiss. *Id.* at 895. The Ninth Circuit reversed, holding that the roadblock and detention were state action for purposes of 42 USC 1983. *Id.* at 897. Once the officers exceeded their tribal authority to determine the non-member's status, they were acting under state authority.

Once [the officers] departed from, or went beyond, the inquiry to establish that Bressi was not an Indian, they were acting under the color of state law. These actions established, beyond any dispute of fact, that the roadblock

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<sup>2</sup> Note: Bressi did not sue the Tribe, just the individual officers and the United States.

functioned not merely as a tribal exercise, but also as an instrument for the enforcement of state law.

*Id.* at 897.

Here, the jurisdictional facts are indistinguishable. The Puyallup tribal police officers, like the tribal police officers in *Bressi*, wear two hats every time they go on patrol. They exercise tribal authority over tribal members and state authority over non-members. When interacting with tribal members, they are bound by whatever rules and protocols may be found in tribal law. When interacting with non-members, however, they are bound by the Constitution and the civil rights statutes just like their sibling officers on the non-tribal police forces of this state.

**6. The Puyallup Indian Tribe Is *Not* the Real Party in Interest.**

Both sets of defendants assert that the Puyallup Indian Tribe is the real party in interest, that the real party in interest has sovereign immunity, and that the case, therefore, should be dismissed. Defendant Isadore proposes a three-part test to determine if a suit is really against the sovereign. If the judgment sought would: 1) expend itself on the public treasury or domain, 2) interfere with the public administration, or 3) restrain the government from acting or compel the government to act.

*Isadore* at 11.

Plaintiff accepts this test and asserts that this case passes the test with flying colors. Public Treasury, the judgment would not go against the tribe. The judgment debtors would be each individual officer. If the officers have insurance, they would, presumably, present the judgment to the insurance company. If the insurance company refused to pay, the police officers might have a claim under the Insurance Bad Faith Act. Meanwhile, Plaintiff would seek to enforce the judgment by attachment, garnishment, and any other remedy available by law.

Public Administration. The ability of the Puyallup Indian Tribe to administer its public programs, including the police department, would scarcely be affected by any judgment against an individual officer. The tribe could still hire, promote, train, and fire police officers. If the tribe chooses to believe that its officers did no wrong and there is nothing to learn from this case, it need not revise its training or procedures. If on the other hand, it determined that something should be done differently, it is free to pursue that course as well.

Individual tribal employees get sued all the time, just like employees of other governments, and public administration continues. There is no reason to believe that this particular lawsuit will affect public administration any more or less than any other private suit between individuals.

Restraint or Compulsion. Plaintiff is not seeking an injunction or a writ of mandamus. As the police officer Defendants point out, the only relief that Plaintiff seeks is monetary. The Puyallup Indian tribe is free to do whatever it wishes before or after this matter is completed. For example, it may adopt a more aggressive policy on the use of Tasers and ankle cuffs or it may adopt a more conservative one. In Plaintiff's mind, this case casts a black shadow of doubt on the competency and training of the Puyallup tribal police force. Defendants are free to see a large colorful rainbow.

**7. Defendants Acted Outside the Scope of Their Authority When they Seized, Bound, and Killed Decedent.**

Both sets of defendants assert that the officers acted within the scope of their authority when they detained and killed Decedent. However, Decedent did not abandon his civil rights when he wandered onto the Reservation. As a non-member, his civil rights were as intact on the reservation as they were off the reservation. The police officers violated his civil rights when they used excessive force. The use of excessive force is, obviously, outside the scope of their authority. Plaintiff's expert has reviewed the existing reports and determined that the officers used excessive force and acted outside the scope of their authority.

CP 57. This is all the evidence this court needs to reverse the trial court on the standard of review for a motion to dismiss.

**8. Plaintiff Should Be Awarded Attorney's Fees If He Is the Prevailing Party**

If this court reverses the trial court, then Plaintiff has prevailed and is entitled to attorney's fees under 42 USC 1988.

V. CONCLUSION

This court should reverse the trial court and remand for trial. Decedent has suffered a grave and irreparable injury when the tribal police officers bound and killed him. Although the court cannot raise Decedent from the dead, it can at least see that he gets a fair trial, in a neutral forum, by a jury of his peers and that the issue of Decedent's civil rights will be first and foremost. The trial court should be directed to exercise its concurrent PL 280 jurisdiction over the reservation and give the Decedent his day in court.



Attorney for Chris Young

O. Yale Lewis III  
Law Offices of O. Yale Lewis III  
1511 Third Avenue, Suite 1001  
Seattle, WA 98101  
Tel: (206) 223-0840  
Fax: (206) 260-1420  
E-Mail: [yale@yalelewislaw.com](mailto:yale@yalelewislaw.com)  
WSBA 33768

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DEPUTY

**CERTIFICATE OF SERVICE**

I CERTIFY that I served the foregoing document on the following parties at the following addresses by e-mail and hand delivery on FEBRUARY 4, 2011:

**Parties**

**Counsel for Benjamin Isadore**

Kyme A. M. McGaw  
1700 Seventh Avenue, Suite 2100  
Seattle, WA 98101-1360  
Tel: (206) 357-8450  
E-Mail: [kamcgaw@kmcgaw.com](mailto:kamcgaw@kmcgaw.com)

**Counsel for Joe Duenas, Joseph**

**S. Fitzpatrick, Christopher E.**

**Dausch and John Scrivner**

Ann C. McCormick  
Forsberg & Umlauf, PS  
901 Fifth Avenue, Suite 1420  
Seattle, WA 98104  
Tel: (206) 689-8500  
E-Mail: [amccormick@forsberg-umlau.com](mailto:amccormick@forsberg-umlau.com)

DATED this 9<sup>th</sup> day of February, 2011.

  
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Yale Lewis