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Washington State Supreme Court

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Ronald R. Carpenter
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No. 92458-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Jordynn Scott,

Appellant,

v.

John or Jane Doe, Director of the Department of Licensing, a subdivision of the State of Washington, in his/her official capacity and the State of Washington and Peters Towing, a Washington Corporation 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 tribal police officers involved in the seizure and forfeiture of automobiles owned by Non Native American as individuals,

Respondents.

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
FOR WHATCOM COUNTY

HONORABLE RAQUEL MONTOYA-LEWIS

BRIEF OF APPELLANT

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Even if there was no waiver by the Tribe, tribal sovereign immunity does not protect individual police officers whose conduct caused the illegal seizure and forfeiture of plaintiff's vehicle, because they exceeded their authority whether acting as tribal officers or as Washington peace officers.

Finally, even if the court determines that immunity precludes all other relief requested, at a minimum the court should grant injunctive and declaratory relief so that the Department of Licensing ceases its practice of transferring vehicle title based on void forfeiture judgments.

I. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the motion of the Director of the Department of Licensing to dismiss the case pursuant to CR 19 for failure to join as an indispensable party the Swinomish Indian Tribe.
2. The trial court erred in denying appellant's motion for an injunction and for costs and attorney fees.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Swinomish Nation by seeking and obtaining certification of its tribal police officers as General Authority Washington State Police Officers pursuant to RCW 10.92 made a limited waiver of its sovereign immunity up to the monetary limits of the insurance purchased to qualify for the state grant of authority under the statute and rendered its officers subject to lawsuit to the same extent as all other General Authority Washington State Police Officers; RCW 10.92.020 2 (a) (ii).
2. Regardless of whether the Swinomish Nation asserts its sovereignty and reneges on its commitment under RCW 10.92, its tribal officers are liable to suit in their individual capacities under *Pistol v. Garcia* 791 F3d 1104 (9th Cir. June 30, 2015) and *Maxwell v. County of San Diego*, 697 F3d 941 (9th Cir. 2012) because they acted in excess of their authority.
3. Even if the case should have been dismissed pursuant to CR 19, nevertheless the court should have restrained the Department of Licensing from transferring title on Certificates of Ownership based upon tribal court order of forfeiture of motor vehicles owned by non tribal members and awarded reasonable attorney fees and costs pursuant to 42 USC 1983, 1988 and *Ex Parte Young* 209 US 123 (1908).

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III. STATEMENT OF THE CASE

1. Statement of the Facts

On or about November 6, 2013, unknown Swinomish Police Officers seized for forfeiture Jordynn Scott's vehicle, a 2005 Nissan Xterra, in Skagit County, Washington. Jordynn Scott is not a Native American. The basis for the forfeiture was that the vehicle was used to transport marijuana and heroin in violation of the Swinomish Nation Drug Code; see CP 38. The Swinomish Indian Tribal Community Drug Code allows forfeiture of an automobile found to contain any amount, however minuscule, of an unlawful controlled substance. The Swinomish Drug Code also allows forfeiture if a passenger is in possession of an illegal narcotic drug. The owner's lack of knowledge that a passenger is in unlawful possession of a narcotic is not a defense to the forfeiture of the automobile under Swinomish law. The full text of the Title 4- Criminal Code Chapter 10-Offenses Involving Controlled Substances of Swinomish Nation can be found at CP 110-115.

Subsequently, the Swinomish Indian Tribal Community filed a forfeiture action against the 2005 Nissan Xterra in Swinomish Tribal Court and notified petitioner of the action by certified mail sent to her at her Department of Licensing address according to the Department of Licensing. Ms. Scott made no written or other appearance in the Swinomish Tribal Court.

It appears that on February 3, 2014 Jordan Wallace, Prosecuting Attorney for the Swinomish Indian Tribal Community presented a motion to forfeit the 2005 Nissan Xterra and Findings and Conclusions to the Swinomish Indian Tribal Court. On March

18, 2014, M. Pouley, Tribal Court Judge of the Swinomish Indian Tribal Community, granted the motion to forfeit the motor vehicle. CP 38,39.

On August 2, 2014 the Nissan Xterra was sold at auction through Berglund & Jones, a dealer or auctioneer in Bellingham, Washington, CP 37. The form Odometer Disclosure/Title Extension Statement Release of Interest, CP 00040 was signed by Duane Berglund, the dealer, and Joseph Bailey, Swinomish Police. Another document entitled Vehicular Dealer Temporary Permit Certificate of Fact for Address Verification bears the signature of someone from Berglund & Jones Dealer, CP 37. By virtue of this document, legal title was transferred to Mario A. Nolasco of 2406 Nevada Street, Bellingham, Washington 98229, presumably the cash buyer at the auction.

On the same day, Berglund & Jones and /or agents of the Swinomish Indian Tribal Community Police Department presented the forms found at CP 33-43, including the Swinomish Tribal Court order of forfeiture of Judge Pouley to the Washington State Department of Licensing. As a consequence thereof, the Department of Licensing amended the Certificate of Title and transferred ownership of Scott's Xterra vehicle to Mario A. Nolasco of 2406 Nevada Street, Bellingham, Washington 98229; see CP 37.

2. Procedural History

On February 23, 2015, Jordynn Scott sued the Director of the Department of Licensing in Whatcom County Superior Court pursuant to 42 USC 1983 for changing her Certificate of Title without notice to her and for violation of her constitutional rights because the Swinomish Tribal Court lacked subject matter jurisdiction to forfeit her 2005 Nissan Xterra. Ms. Scott is not a Native American. She sought a declaration

that the forfeiture of her automobile for violation of Swinomish Nation Drug Code was unlawful. She also sought reasonable costs and attorney fees pursuant to 42 USC 1988 and Ex Parte Young 209 US 123 (1908); see Plaintiff's Complaint CP 3-9.

Scott named Peter's Towing as a defendant because Peters towed away Ms. Scott's Nissan Xterra at the command of unknown Swinomish Nation police officers, all of whom are General Authority Washington State Police Officers pursuant to RCW 10.92. Scott also named as defendants the unknown Swinomish Police Officers involved in the seizure of Scott's automobile in their individual capacities and in their capacity as General Authority Police Officers pursuant to RCW 10.92.¹

In its answer to the complaint the State asserted as a second affirmative defense, qualified and absolute immunity; see CP 14 and RCW 46.01.310. RCW 46.01.310 provides:

No civil suit or action may ever be commenced or prosecuted against the director, the state of Washington, any county auditor or other agents appointed by the director, any other government officer or entity, or against any other person, by reason of any act done or omitted to be done in connection with the titling or registration of vehicles or vessels while administering duties and responsibilities imposed on the director or as an agent of the director, or as a subagent of an agent of the director. This section does not bar the state of Washington or the director from bringing any action, whether civil or criminal, against any agent, nor shall it bar a county

¹ The Swinomish Indian Tribal Community Police Department is the only Indian Tribe in Washington which has sought and obtained authority under RCW 10.92 for all of its tribal police officers to act as General Authority Washington State Police Officers and thus are empowered to enforce state law against Non Native Americans. As such, said Swinomish Police Officers are insured for tortious acts while acting under color of state law; see insurance policy declaration at CP 160. Counsel spoke to the insurance issue in argument before the Superior Court; Report of Proceedings September 11, 2015, page 10, lines 22-25.

auditor or other agent of the director from bringing an action against the agent.

On May 11, 2015, Scott filed a motion for declaratory judgment asking for a declaration that the ongoing practice of the Swinomish Nation Police Department in seizing and forfeiting automobiles owned by non tribal members for violation of the Swinomish Nation Drug Code was unlawful and for an award to Scott of costs and reasonable attorney fees; see CP 18, 19. In her declaration in support of this motion, Scott listed Susan Pierson, herself and Candee Washington as examples of non Native American persons whose motor vehicles were seized and forfeited by the Swinomish Nation. Scott also listed, a Narin Sin, a non Native American whose 1999 Black Cadillac Escalade was forfeited by the Tulalip Tribe; see CP 25- 60.²

On June 24, 2015, the Director of the Department of Licensing moved to dismiss the case based upon CR 19, arguing that the Swinomish Nation was an indispensable party but could not be joined because of the tribe's sovereignty thus requiring dismissal, citing automotive Automotive United Trades Organization v. State 175 Wn2d 214, 285 P.3d52 (2012) CP 69.

On July 14, 2015 Scott moved to amend her complaint to add as an additional defendant Mario Nolasco. Mr. Nolasco is the person who purchased the Xterra through the auspices of Berglund & Jones Auctioneer. The Department of Licensing, it appears, transferred temporary title to Mr. Nolasco. Scott surmises that

² Counsel for appellant referred to these cases in his presentation to the Superior Court in oral argument on July 24, 2015, page 8, lines 18-24.

later the Department of Licensing would proceed to issue a permanent Certificate of Title to that Nissan Xterra to Mr. Nolasco. CP 125-143. Scott's cause of action against Nolasco was predicated upon the principle that the judgment of forfeiture of the Swinomish Tribal Court is a nullity and cannot accomplish transfer of legal title, which remains in Ms. Scott. Therefore, she would be entitled to a Writ of Replevin against Mr. Nolasco; see CP 131 bottom on the page; and an order from the Department of Licensing reinstating and reaffirming ownership always remained with Ms. Scott; see Declaration of William Johnston in Support of Motion to Amend Complaint to Add Additional Party, CP 128-132.

These motions were addressed in a hearing before the Honorable Raquel Montoya Lewis of the Whatcom County Superior Court on July 24, 2015. The court took the matter under advisement. The court issued a written decision containing findings denying Scott's motion for declaratory judgment and granting the Department's motion to dismiss on August 11, 2015. CP 183-185. A copy of the Superior Court's Findings are attached as Appendix 1.

Scott moved for reconsideration and submitted proposed findings that she asked the Superior Court to address, CP 197-199. A copy of plaintiff's proposed findings is attached as Appendix 2.

Scott's reconsideration motion was heard on September 11, 2015 and the Superior Court issued its written order denying reconsideration. CP 215.

IV. SUMMARY OF ARGUMENT

The following argument is the same as the argument advanced in Candee Washington v. Director of the Department of Licensing, Supreme Court Cause No. 92084-2. Both cases present the same legal issues.

There are some factual differences between the cases, which should be noted even though they are not material to the legal analysis. In the Candee Washington case, the tribal order of forfeiture includes no facts, which would have supported a decision to seize and forfeit Ms. Washington 2007 Nissan Armada under state or federal law. State and federal law allow forfeiture only if the vehicle is used as a conveyance, meaning it is used to transport drugs or delivery. When a small amount of drugs is found in possession of a passenger, this is not a legal basis for forfeiture under Washington state or federal law. Under the Swinomish Drug Code, however, the possession of even a small amount of narcotics by a passenger renders the vehicle subject to forfeiture even in the event of the owner's lack of knowledge of the passenger's unlawful possession of a small amount of drugs for personal use.

In the Scott case, the record of the tribal forfeiture shows only that drugs (marijuana and heroin) were found in the Xterra. The record is silent as to the amount. There may have been a factual basis for the Swinomish Police officers to forfeit the Xterra under state law. If so, the Swinomish Nation Police Department would receive 90% of the value of the vehicle if sold, with 10% of the purchase price to be paid to the Washington State Treasurer. RCW 69.50.505 (9)(a).

But the Swinomish Tribe does not treat the forfeiture as one occurring under state law when vehicles owned by non tribal members are seized and forfeited by the Swinomish Police Department in its tribal court. In the case of Ms. Scott's whose Xterra was sold to Mr. Mario Nolasco, the Swinomish Police Department pockets the entire sum and the Washington State Treasurer never receives the 10% required to be paid each year by all Washington State Police Agencies which forfeit property for violation of the drug laws.

A procedural difference is that in the Candee Washington case, the Superior Court made no findings and simply issued an order granting the Department's motion to dismiss without explanation. Here in Scott, the Superior Court rendered a detailed opinion and made numerous findings and explained what the court's legal analysis was rested on, albeit without addressing or mentioning the proposed findings submitted by Scott. The Superior Court's decision rested primarily on *Mudarri v. State* 147 Wa. App. 590, 605, 196 P.3d 153 (Div. 2, 2008) cited in Findings 7,8,9. These findings became the focus of argument before the Superior Court when Scott's motion for reconsideration was argued. Scott objected that *Mudarri* is limited to an application of CR 19 in contract cases in which all parties to the contract are indispensable parties as a matter of law; see argument of Scott, Report of Proceedings September 11, 2015, page 4, lines 9-22. Scott argued that her case involved tortious conduct, not contract law, and the controlling case was *Aungst v. Roberts Construction*, 95 Wn2d 439, 625 P.2d 167 (1981). Scott argued that the court should follow *Aungst* and shape relief to preserve otherwise viable lawsuits.

Scott offered to abandon her request for declaratory judgment and instead only seek an injunction against the Department of Licensing, Report of Proceedings, September 11, 2015, page 5, lines 1-11. Scott maintained also that she was entitled to sue the unknown tribal police in their individual capacity under *Pistol v. Garcia* 791 F.3d 1104 (9th Cir. June 30, 2015). She requested that the Superior Court address the application of *Pistol v. Garcia*; Report of Proceedings, September 11, 2015, page 16, lines 20, 21.

In summary, because the Whatcom County Superior Court rendered a written decision in Scott and allowed oral argument of the motion to reconsider, which Skagit County Superior Court does not permit per local rule, the Scott case shows more discussion of the legal principles than the Candee Washington case.

Both cases present the question of whether RCW 10.92 will function. The Superior Court's decision rests on the acceptance of the Department's argument that the Swinomish Tribe has sovereignty and has exercised it to defeat any lawsuit against tribal officers, all of whom have been certified as General Authority Washington State Police Officers. The Swinomish Tribe waived its sovereignty up to the limits of insurance that it purchased when its officers were certified as General Authority Washington State Police Officers pursuant to RCW 10.92.020 (2) (a) (ii). RCW 10.92 was intended to allow a lawsuit for violation of civil rights to be brought against a Swinomish Indian Nation police officer who acts in his official capacity as a General Authority Washington State Police Officer pursuant to RCW 10.92. The

only limitation is that the monetary award cannot exceed the limits of the insurance policy.

Even if RCW 10.92 does not operate as a waiver of the Swinomish Tribe's sovereign immunity, the Tribe is not an indispensable party because its sovereign immunity does not protect tribal officers as individuals from suit in state court for acting outside of the scope of their authority.

Even if the Tribe and its unnamed officers are immune from this suit, the Department of Licensing is not. The Department has allowed, and continues to allow, certificates of title to be registered on the basis of tribal court judgments of forfeiture against non Indians. Such tribal court judgments are void for lack of subject matter jurisdiction. The court should enjoin the Director of the Department from transferring ownership of Certificates of Title based upon presentation of Indian tribal court orders of forfeiture and award petitioner costs and attorney fees.

Petitioner Appellant urges the court to grant direct review and reverse the decision of the Superior Court because the dismissal under CR 19 is inequitable. There has been a limited waiver of the Swinomish Tribe's sovereign immunity to the extent that the Swinomish Tribe has accepted the benefits of having its officers certified as Washington peace officers and has insured them. In addition, regardless of whether the Swinomish Indian Nation has waived its sovereign immunity, its police officers are liable to suit in their individual capacities under *Pistol v. Garcia* 791 F.3d 1104 (9th Cir. June 30, 2015) and *Maxwell v. County of San Diego*, 697 F3d 941 (9th Cir. 2012) because they acted in excess of their authority.

V. INTRODUCTION

This case first presents the question of whether Indian Tribes possess authority under the second exception of *Montana v. United States*, 450 U. S. 544, 101 S. Ct. 1245, 67 L.Ed2d 493 (1981) to forfeit automobiles owned by non Native Americans pursuant to a tribal drug forfeiture ordinance. The answer is no. *Miners Electric v. Creek Nation*, 464 F. Supp. 2d 1130 (2006) is a correct statement of federal law. While *Miners Electric* was reversed by the 10th Circuit at 505 F.3d 1007 on Indian sovereignty grounds, the legal analysis of the United States District Judge H. Dale Cook in *Miners Electric* on whether tribal courts have subject matter jurisdiction to forfeit non Native American's automobile for violation of tribal drug forfeiture laws remains sound. Appellant embraces and adopts its reasoning.

Next, if the Swinomish Tribe lacks the authority to seize and forfeit the automobiles of non Native Americans for violating the tribe's drug forfeiture law, yet Swinomish Indian Tribe police officers carry out such seizures, are the tribal RCW 10.92 police officers liable to suit for the illegal confiscation of the automobile? So far the answer the trial courts have given is no. They are wrong.

Underpinning plaintiff's claims for damages is the legal principle that the Swinomish Nation lacks authority to enforce its tribal drug forfeiture code against non tribal members. The Department argued that Scott's lawsuit requires the court to declare that the Swinomish Nation lacks authority to enforce its drug laws against nonnative Americans, thereby making the Tribe

an indispensable party to a lawsuit against the police officers in their official capacity as RCW 10.92 officers and as individuals. The Swinomish Tribe's sovereignty is implicated, the Department argues, by any declaration, injunction or legal ruling which addresses whether an Indian tribe has subject matter jurisdiction to forfeit an automobile owned by a non tribal member for violating the tribes' drug forfeiture law; see argument of Department Report of Proceedings, September 11, 2015, page 12, lines 22-25, page 13.

Here and in the companion case of Candee Washington, police officers of the Swinomish Indian Nation seized and forfeited under the tribal drug code automobiles owned by non Native Americans. In both cases, the Swinomish Nation presented its order of forfeiture to the Department of Licensing and the Department in response thereto transferred ownership of the Certificate of Title of the Motor Vehicle.

Because the Department quickly moved for and obtained an order of dismissal under CR 19, Ms. Scott's lawsuit against the Director of the Department for illegal transfer of ownership of her 2005 Nissan Xterra and her action for damages against the unknown officers who seized her SUV was suffocated before it could properly begin. The dismissal of the lawsuit in response to the Department's CR 19 motion and argument creates a precedential log jam where persons in a similar situation will not be allowed to pursue lawsuits against unknown Swinomish Nation police officers for actions taken by such officers

when acting under color of state law. This state of affairs nullifies the intention of the legislature in passing RCW 10.92.020 (2) (a) (ii).

The resolution of these issues has broad impact as illustrated by this case, and the Candee Washington case, and others such as Pierson v. Director of the Department of Licensing, *supra*.

In yet another case, a truck owned by Curtis Wilson, a non Native American, was seized by Lummi Nation police officers off reservation in Bellingham, Washington and held by the Lummi Tribe for forfeiture for about five months before its return. Wilson sued the Lummi police officer involved individually for conversion. Originally filed in Whatcom County Superior Court against the Lummi police officer individually in Cause No. 14-202821-7, the case was removed to federal court and assigned to Judge John Coughenour and assigned Cause No. 2:15 –cv-00629-JCC. The United States Attorney General certified that Gates was acting at all times as a federal employee within the scope of his employment as per Federal Tort Claims Act 28 U. S. C. A. 2679, known as the Westfall Act. The Westfall Act “accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties.” *Osborn v. Haley*, 549 U.S. 225, 229, 127 S.Ct. 881, 166 L.Ed.2d 819 (2007) (citing 28 U.S.C. § 2679(b)(1)). “When a federal employee is sued for wrongful or negligent conduct, the Act empowers the Attorney General to certify that the employee ‘was acting within the scope of his office or employment at the time of the incident out of which the claim arose.’ Upon the

Attorney General's certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee.” Id. at 229–30, 127 S.Ct. 881 (quoting 28 U.S.C. § 2679(d)(1), (2)).

A motion for summary judgment declaring that the Lummi Nation has no authority to seize and forfeit automobiles owned by non tribal members is presently under consideration before Judge John Coughenour in the United States District Court for the Western District of Washington. Under FTCA, there is no right to a jury trial. Unlike the Curtis Wilson case, here there are state law issues: the exposure of the insurers under RCW 10.92 and the liability of the Department of Licensing.

VI. ARGUMENT

1. The court erred in concluding that RCW 10.92 does not operate as a waiver of sovereign immunity. A correct exercise of statutory construction of RCW 10.92 shows that it operates as a limited waiver by the Tribe of sovereign immunity, only to the extent of its insurance policies purchased by the Swinomish Nation as a condition for receiving state certification of its tribal officers as Washington state law enforcement officers and only in circumstances where tribal officers commit torts when acting in the capacity of a general authority Washington peace officer. The unnamed tribal officers could not have been legitimately acting in any other capacity than as a general authority Washington peace officer when they seized plaintiff’s SUV.

It is a cardinal principle of statutory construction that when a legislative body enacts a statute, it intends that the statute will work, not fail. King v. Burwell, 135 S. Ct. 2480, 576 U.S. ____ (2015), (June 25, 2015):

A fair reading of legislation demands a fair understanding of the legislative plan. Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter....

Underpinning the Department's motion to dismiss under CR 19 is a claim of the absolute sovereign immunity of the Swinomish Tribal Community. The plain language of the statute, however, shows that The Swinomish Tribe clearly waived its immunity to a limited extent, that is, up to the limits of its insurance and to the extent its tribal officers commit torts when acting in the capacity of a general authority Washington peace officer. The Swinomish Tribe has accepted the benefits of the statute by securing the State of Washington's recognition and authority to act as general authority Washington peace officers under RCW 10.92.020(2). A general authority Washington peace officer is an officer authorized to enforce the criminal and traffic laws of the state of Washington generally. RCW 10.92.010(1). The State's recognition and authority is subject to the Tribe, as a sovereign tribal nation, submitting proof of professional liability insurance for its peace officers under RCW 10.92.020(2)(a):

(2) A tribal police officer may exercise the powers of law enforcement of a general authority Washington peace officer under this section, subject to the following:

(a) The appropriate sovereign tribal nation shall submit to the department of enterprise services proof of public liability and property damage insurance for vehicles operated by the peace officers and police professional liability insurance from a company licensed to sell insurance in the state. For purposes of determining adequacy of insurance liability, the sovereign tribal government must submit with the proof of liability insurance a copy of the interlocal agreement between the sovereign tribal government and the local governments that have shared jurisdiction under

this chapter where such an agreement has been reached pursuant to subsection (10) of this section.

By agreeing to the terms of the statute, the Tribe waived sovereign immunity for the acts of its officers when they are acting as Washington peace officers. If the statute does not act as a waiver, it will not work. It will be a nullity. One who is injured by a tribal officer acting with the powers of a Washington peace officer will have no recourse. Obviously the legislature contemplated that tribal officers who are allowed to act with police power equivalent to an officer of the Washington State Patrol will sometimes act tortiously, just as officers of the Washington State Patrol sometimes do. The legislature wanted to ensure that before tribal officers were allowed to act with Washington police powers, there would be an insurance policy available for settlements or judgments. Plaintiff has brought a suit, which may result in a settlement or judgment. By dismissing the suit, the court has frustrated the clear intent of the legislature.

And the court's ruling not only frustrates plaintiff Jordynn Scott's suit, it implies that RCW 10.92 is entirely ineffective against any non Indian plaintiff who attempts to bring suit against a tribal officer for torts committed in the capacity of a Washington peace officer. The court's ruling adopts the Department of Licensing's syllogism: (1) whenever a tribal officer is sued in state court for a tort committed as a peace officer, the Tribe needs to be joined because its interests are implicated; (2) the Tribe is immune and therefore cannot be joined; therefore (3) the case must be dismissed. This is erroneous reasoning. It cannot stand if the statute is to be effective. The statute plainly states 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).

Dismissing a tort claim against the Swinomish Nation police officer because the tribe is immune and cannot be joined eviscerates RCW 10.92.030 (ii).

2. Even if RCW 10.92 does not operate as a waiver of the Tribe’s sovereign immunity, the Tribe is not an indispensable party because its sovereign immunity does not protect tribal officers from suit in state court for acting outside of the scope of the inherent authority of the Tribe.

Pistol v. Garcia 791 F.3d 1104 (9th Cir. June 30, 2015) and *Maxwell v. County of San Diego*, 697 F3d 941 (9th Cir. 2012) hold that tribal police officers are liable to suit in their individual capacities if they acted in excess of their authority.

While the Tribe undisputedly has sovereign immunity to the extent it is not waived, its immunity is a personal defense, i.e. personal to the Tribe. The plaintiff has not sued the Tribe. The plaintiff is suing unnamed tribal officers individually and in their capacity of RCW 10.92 General Authority Washington Peace Officers, and if the Swinomish Tribe refuses to disclose their identities, their insurers, who have been identified; see CP 130. The sovereign immunity of the Tribe does not serve as a defense for the insurance company that has insured the officers. See *Smith Plumbing v. Aetna Casualty*, 149 Ariz. 524 (1986). The court stated:

Aetna argued that it is immune from action by Smith because it is entitled to assert its principal's sovereign immunity. The Court of Appeals rejected this argument, and we approve its ruling. Generally, a surety may assert any defense available to its principal. *Spear v. Industrial Comm'n.*, 114 *Ariz.* 601, 562 P.2d 1099 (App.1977). One exception to this rule is where a principal takes advantage of a personal defense. Personal defenses “are ordinarily of such a character that the principal, as he chooses, may insist upon them or not.” 74 *Am.Jur.2d Suretyship* § 104 (1974). The Tribe may choose to waive its sovereign immunity. *White Mountain Apache Indian Tribe v. Shelley*, 107 *Ariz.* 4, 7, 480 P.2d 654, 657 (1971). Because the Tribe has the power either to insist upon or to waive its sovereign immunity, that immunity is considered a personal defense not available to the Tribe's surety. See 74 *Am.Jur.2d Suretyship* § 109.

Smith was a wholesale plumbing supply company, which sold supplies to another plumbing contractor, G. S. D. Plumbing, which in turn sold the supplies to White Mountain Apache Development Enterprise for use on a housing project. White Mountain Apache Development Enterprise was arguably an arm of the tribe and possessor of sovereignty. White Mountain purchased a bond from Aetna covering all persons and entities, which supplied material or labor on the project. The bond provided that the Tribe would indemnify Aetna for any monies paid out by Aetna.

The court held that Indian sovereignty was not impacted by requiring the surety to pay Smith the money owed. The same kind of monetary interest is involved here, and was likewise involved in the CR 19 case cited by Department of Licensing, *Automotive Trade Union Organization v. Department of Licensing*, 175 *Wash.2d* 214 (2014)—and that case affirmed denial of the CR 19 motion to dismiss sought by Department of Licensing in that case as an inequitable result. To dismiss in the present case would also result in inequity, plaintiff's loss of her

car to the tribal police in violation of her rights under federal law. Federal law makes clear that a tribe does not have jurisdiction to forfeit a car belonging to a non-Indian as discussed more fully infra.

The insurance carriers for the Tribe under RCW 10.92, Hudson and Lexington Insurance Companies, are in the same situation as Aetna while plaintiff and other tort victims are in the position of Smith. Allowing this suit to proceed to trial would permit plaintiff to be compensated by the Hudson and Lexington insurance policies purchased by the Swinomish Tribe for coverage under RCW 10.92. If plaintiff succeeds in obtaining that result at trial, the payment of money by the Hudson and Lexington insurance policies would have even less impact upon the Tribe than was the case in Smith. There is no indemnification arrangement between the insurer and the Tribe as there was in Smith.

The fact that the Swinomish Tribe freely entered into RCW 10.92 makes this case even stronger than the facts in Smith for allowing suit to proceed against the tribal officers. Plaintiff intends to proceed against the officers by means of a writ of attachment against the Hudson and Lexington insurance policies. Plaintiff's legal theory of proceeding against the insurance policies under RCW 10.92 is an expeditious and uncomplicated solution to the problem of how the State can allow tribal officers to act as Washington peace officers while still assuring that non Indians have the right to be compensated for those officers' torts, the same as if they were suing an officer of the Washington State Patrol. In no way does Washington's lawsuit against the unnamed tribal and RCW 10.92

law enforcement officers or their insurers threaten tribal sovereignty. Because the defense of sovereign immunity is personal to the Tribe, the court should not extend it to the Tribe's insurers.

The Smith Plumbing v. Aetna scenario is repeated in Unique v. Gila River et al, 138 Ariz 378, 674 P.2d 1376 Ariz. App. Div. 1 (1983). This time Unique delivered \$177,000 of fertilizer and sued to get paid. The court found that the tribal corporation had waived immunity when the tribe voted to allow it to enter into sue and be sued contracts with suppliers such as Unique. This constitutes a waiver of sovereignty. The same kind of language was found to be a waiver of immunity in Nameagon Development Company v. Bois Forte Reservation Housing Authority 517 F.2d 508 (1975).

This court should follow White Mountain Apache Tribe v. Shelley, Superior Court Judge and Magini, 107 Ariz. 4 (1971). Magini made a contract with Fort Apache Timber Company referred to as FATCO in the opinion. Magini sued the White Mountain Tribe and FATCO as well as Barry DeRose, General Counsel, and Hai Butler, General Manager, of FATCO. The Arizona Supreme Court ruled that the tribe and its commercial subsidiary FATCO were immune from suit as were DeRose and Butler in their capacity as representatives of the Tribe and FATCO but the case was allowed to proceed against DeRose and Butler individually. The Arizona court concluded:

It is the opinion of this court that petitioners DeRose and Butler, as officers of FATCO, are entitled to executive immunity for their actions on behalf of FATCO which are within the scope of their respective duties as general counsel and general manager of

FATCO. They are not immune from being sued individually, however, for any actions in excess of their duties as general counsel and general manager, respectively.

Petitioners' request for special action relief is granted to the extent that the superior court is prohibited from exercising further jurisdiction over FATCO. It is denied, however, to the extent that the Superior Court may assume jurisdiction over petitioners DeRose and Butler for the purpose of determining if they acted in excess of their official duties as alleged by respondent Magini.

The same result should obtain here. Suit should proceed against the Swinomish Police Officers who were involved in the seizure of plaintiff's Xterra as individuals, and the insurance companies who insure them.

The Department of Licensing argues that the officer who seized plaintiff's vehicle was acting as a Swinomish Police Officer only, and not as a Washington peace officer. This argument is a defense that could be asserted at trial by the unknown Swinomish Police Officers or their insurance companies. Arguably at best for the Department, it is a jury question; see Romero v. Pedersen 5 F3d 547, (10th Cir. 1993) for criteria. On the face of the record as it presently exists, however, the law supports the opposite conclusion—that the Swinomish Tribe's police officers were acting as Washington peace officers. This is because—and this point of law is as yet undisputed by any party hereto--seizing a non-Indian's vehicle was beyond any tribal officer's power, just as forfeiting a non-Indian's vehicle is beyond the jurisdiction of a tribal court.

The authority of tribal police over non Indians contacted in Indian Country is severely limited. When the Swinomish officers contacted plaintiff, if they were acting only as tribal officers, they were obligated to determine if she was an

Indian before they exercised police power over her. This point of law is illustrated in Bressi v. Ford, 575 F3d 891, 9th Cir. 2009). The 9th Circuit reversed and ordered to trial a 42 USC 1983 action involving a stop of a non tribal member (Bressi) at a tribal roadblock of a state highway inside an Indian reservation. Bressi was later arrested by the tribal police. The tribal police had state certification. They conceded that they acted under color of law when they arrested Bressi but not before, at the roadblock. Reversing the District Court grant of summary judgment of Bressi's 42 USC 1983 action against the tribal police officers, the court commented on the authority of tribal officers over non tribal members in contacts in Indian Country as follows:

In the absence of some form of state authorization, however, tribal officers have no inherent power to arrest and book non-Indian violators. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). This limitation has led to obvious practical difficulties. For example, a tribal officer who observes a vehicle violating tribal law on a state highway has no way of knowing whether the driver is an Indian or non-Indian. The solution is to permit the officer to stop the vehicle and to determine first whether or not the driver is an Indian. In order to permit tribal officers to exercise their legitimate tribal authority, therefore, it has been held not to violate a non-Indian's rights when tribal officers stop him or her long enough to ascertain that he or she is, in fact, not an Indian. See Schmuck, 850 P.2d at 1337. If the violator turns out to be a non-Indian, the tribal officer may detain the violator and deliver him or her to state or federal authorities. Id.; see Strate, 520 U.S. at 456 n. 11, 117 S.Ct. 1404. This rule permitting tribal authority over non-Indians on a public right-of-way is thus a concession to the need for legitimate tribal law enforcement against Indians in Indian country, including the state highways. The amount of intrusion or inconvenience to the non-Indian motorist is relatively minor, and is justified by the tribal law enforcement interest. Ordinarily, there must be some suspicion that a tribal law is being violated, probably by erratic driving or speeding, to cause a stop, and the amount of time it

takes to determine that the violator is not an Indian is not great. If it is apparent that a state or federal law has been violated, the officer may detain the non-Indian for a reasonable time in order to turn him or her over to state or federal authorities. *Id.*

The intrusion and inconvenience becomes significantly greater, however, when a roadblock is placed across a state highway. The tribe has no general power of exclusion on the right-of-way. All vehicles are stopped, with no suspicion required. The likelihood is substantial that a great proportion of those stopped will be non-Indians not subject to tribal criminal jurisdiction. Yet the tribe does have a legitimate purpose in stopping all vehicles with Indian operators to check for violations of tribal drunken-driving and safety laws, and other violations for which roadblocks are authorized by tribal law.⁶

We conclude that a roadblock on a public right-of-way within tribal territory, established on tribal authority, is permissible only to the extent that the suspicionless stop of non-Indians is limited to the amount of time, and the nature of inquiry, that can establish whether or not they are Indians. When obvious violations, such as alcohol impairment, are found, detention on tribal authority for delivery to state officers is authorized. But inquiry going beyond Indian or non-Indian status, or including searches for evidence of crime, are not authorized on purely tribal authority in the case of non-Indians.

Bressi cites Schmuck, a case from this State. *State v. Schmuck*, 121 Wash.2d 373, 850 P.2d 1332 (1993). Schmuck's sequel, *State v. Eriksen*, 172 Wn.2d 506, 259 P.3d 1079 (2011) provides further insight into the limitations upon tribal officers when they are acting solely as tribal officers in encounters with non Indians.

In the present case, the contact between tribal police and Ms. Scott and their investigation of her for the commission of criminal acts was only lawful because the Swinomish Nation police officers have state law enforcement authority pursuant to RCW 10.92. A state officer may seize vehicles suspected of containing drugs only under limited circumstances that the record does not show

to exist in Jordynn Scott's case. A state officer may not seek an order of forfeiture for a motor vehicle owned by a non Native American from a tribal court, nor may such officer accept the forfeited vehicle for official use, because the tribal court lacks subject matter jurisdiction to forfeit a vehicle owned by a non Indian.

If the officers were only enforcing tribal law, as the Department of Licensing maintains, they were acting beyond their inherent authority and may not assert sovereign immunity, a defense personal to the Tribe. In such a case the Tribe's sovereign interests are not implicated and the Tribe is not an indispensable party. This is the rule of Tenneco Oil Company v. The Sac and Fox Tribe of Indians of Oklahoma, 725 F.2d 572 (10th Cir. 1984) where the court stated:

The situation (where there is tribal immunity) is different, however, when the law under which the official acted is being questioned. State of Wisconsin v. Baker, 464 F.Supp2. 1377 (W.D. Wis.). When the complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628. If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit. Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess. As the Larson Court stated of cases involving unconstitutional statutes: " "[T]he conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign."

Under the Tenneco rule, purely tribal police officers who are not empowered to act as state police pursuant to RCW 10.92, are liable and do

not get the protection of tribal immunity if they exceed their jurisdiction. Miners Electric v. Creek Nation, 464 F. Supp. 2d 1130 (2006) is a correct statement of federal law on the issue of whether an Indian Tribe possesses authority under the second exception of Montana v. United States, supra, to forfeit automobiles owned by non tribal members for violation of tribal drug forfeiture ordinances. The Tribe has sovereign immunity but its officers do not when they act beyond their powers. The test for loss of tribal immunity set forth in Tenneco is at odds with a dismissal under CR 19 for failure to join an indispensable party.

Zaubrecher v. Succession of David, 2015 WL 8330562, a December 9, 2015 decision of the Court of Appeal of Louisiana, 3rd Circuit is recent decision following the rule of Tenneco Oil Company and Pistol v. Garcia, supra, Maxwell v. County of San Diego, supra. In Zaubrecher, Lee David frequented a Casino owned by the Tunica Biloxi Tribe at 5:30 pm and was asked to leave the Casino because of his intoxication twelve hours later at 6 a.m. David was escorted to his car from the Casino by two security guards. Once in his vehicle, Mr. David drove off and within five miles of the Casino collided with another car killing himself and the other motorist, Blake Zaubrecher.

Zaubrecher's estate filed a negligence action against the three Casino employees for over service of alcohol and for taking an obviously intoxicated person to his car and compelling him to drive on the roads of

the state. The trial court dismissed the action based upon Indian sovereignty. The Court of Appeal reversed because the Casino workers were sued in their individual capacities for acting outside the scope of their authority under *Maxwell v. County of San Diego*, 697 F3d 941 (9th Cir. 2012).

Appellant repeats that the net effect of the Superior Court's order of dismissal is to eliminate the possibility of any lawsuit under RCW 10.92 against tribal police officers who have acted tortiously while acting in their capacity as Washington peace officers. Acting as Washington peace officers, these tribal police officers did not have authority to seize for forfeiture a vehicle owned by a non Native American under federal or state law. Thus, as officers authorized by state law, they acted tortiously. Acting as tribal police officers, they exceeded their powers. Either way, sovereign immunity is not available to them (or to the insurer) as a defense.

3. Even if the Tribe and its unnamed officers are immune from this suit, the Department of Licensing is not. The Department has allowed, and continues to allow, certificates of title to be registered on the basis of tribal court judgments of forfeiture against non Indians. Such tribal court judgments are void for lack of subject matter jurisdiction.

The Department of Licensing is hiding behind tribal sovereign immunity to avoid taking responsibility for its own illegal course of conduct. The record submitted by plaintiff shows beyond any doubt that the Department of Licensing routinely and unquestioningly accepts tribal

court orders of forfeiture as a basis for transferring title. This is going on even while the Department has admitted to plaintiff in correspondence that such acceptance violates the Department's own protocols. The Department's letter (through assistant attorney general counsel) to plaintiff's counsel on December 31, 2014, states that the Department's policy is to respond to a civil forfeiture notice issued by a Washington State agency, the Internal Revenue Service, or United States Customs. Tribal authorities are not on the list. The letter states, "In the instance of court orders from foreign jurisdictions, either (i) the ownership document (I.e. certificate of title) and the court order must be from the same jurisdiction, or (ii) the final court document must be filed with a Washington superior court clerk's office to be accepted by the Department." Neither of these circumstances is present here, yet the Department of Licensing throws up its hands and argues that nothing can be done. A copy of the letter is found as Appendix 4 to the Brief of Appellant Candee Washington. The Department is obligated to protect the interests of its own sovereign, the State of Washington, in ensuring lawful and orderly transfers of title that rest on valid judgments. The Department's own protocols are designed to ensure that vehicle ownership through forfeiture rests upon valid judgments. But the Department's actual practice as illustrated by this case and others is to transfer title

based on tribal court forfeiture orders that are void for lack of subject matter jurisdiction.

A suitable method for protecting the due process rights of plaintiff Jordynn Scott and other non Indians similarly situated is found in CR 82.5(c):

(c) Enforcement of Indian Tribal Court Orders, Judgments or Decrees. The superior courts of the State of Washington shall recognize, implement and enforce the orders, judgments and decrees of Indian tribal courts in matters in which either the exclusive or concurrent jurisdiction has been granted or reserved to an Indian tribal court of a federally recognized tribe under the Laws of the United States, unless the superior court finds the tribal court that rendered the order, judgment or decree (1) lacked jurisdiction over a party or the subject matter, (2) denied due process as provided by the Indian Civil Rights Act of 1968, or (3) does not reciprocally provide for recognition and implementation of orders, judgments and decrees of the superior courts of the State of Washington.

This rule dictates that a superior court will not enforce a tribal forfeiture order where there is a lack of subject matter jurisdiction. The Department of Licensing, instead of routinely and heedlessly accepting tribal forfeiture orders, should require that a Tribe proceed under this rule and apply to the superior court, with notice to the affected registered owner, when seeking a certificate of title based on an order of forfeiture. This would allow the superior court to determine, as provided by the rule, whether the tribal court that rendered the order lacked jurisdiction.

4. Dismissal under CR19 would be an inequitable resolution and should be rejected for the same reasons the court refused to dismiss

under CR 19 in *Automotive United Trades Organization v. State*, 175 Wn2d 214 (2012).

Automotive United Trades Organization v. State makes clear that relief under CR 19 should be equitable. Dismissing plaintiff's claim would be inequitable. Representatives of the Swinomish Tribe offended Washington sovereignty by bypassing CR 82.5 and thereby depriving Washington citizens of their right to a state court adjudication as to whether the Swinomish Tribal Court order of forfeiture lacked subject matter jurisdiction before said judgment could be enforced in the State of Washington. The lawyers for the Hudson and Lexington Insurance Companies can effectively defend the interest of the Swinomish Tribe.

VII. ATTORNEY FEES

Appellant seeks an award of costs and attorney fees pursuant to 42 U.S. C. 1983, 1988 against the Director of the Department of Licensing on the ground that appellant had a private property interest in her Certificate of Title which the Department changed to another person or entity without notice to her in violation of her rights under the 5th and 14th amendment. The Superior Court should have granted appellant's motion to enjoin the Director to comply with the Department's protocols and CR 82.5, which provides a notice and opportunity of Certificate of Title owner before their ownership interest in the Certificate of Title is changed. The Director deprived appellant of these rights while acting under color of state law.

Because the unknown Swinomish police officers acted under their authority under RCW 10.92 as state law enforcement officers in investigating appellant, searching and seizing her Xterra and facilitating its forfeiture by the Swinomish Tribe, said unknown police officers violated appellants' federal constitutional rights while acting under color of state. As such, said officers and their insurers are liable to pay costs and reasonable attorney fees pursuant to 42 U.S. C. 1983, 1988.

In *Seattle v. McReady*, 131 Wash.2d 266, 931 P.2d 156 (1997) this court has explicitly recognized four equitable exceptions to the American rule: (1) the common fund theory, *Grein v. Cavano*, 61 Wash.2d 498, 505, 379 P.2d 209 (1963); (2) actions by a third person subjecting a party to litigation, *Wells v. Aetna Ins. Co.*, 60 Wash.2d 880, 882–83, 376 P.2d 644 (1962); (3) bad faith or misconduct of a party, *Miotke v. City of Spokane*, 101 Wash.2d 307, 338, 678 P.2d 803 (1984); and (4) dissolving wrongfully issued temporary injunctions or restraining orders, *Cecil v. Dominy*, 69 Wash.2d 289, 291–94, 418 P.2d 233 (1966); *Alderwood Assocs. v. Washington Env'tl. Council*, 96 Wash.2d 230, 247, 635 P.2d 108 (1981).

Appellant asserts that an award of attorney fees is appropriate under the (1) common fund theory. Here, there will be a common fund eventually discovered which will yield a common fund of recovery. In addition, appellant asserts that the conduct of the Department of Licensing

in this case is tantamount to bad faith. Appellant asserts that an award of attorney fees is appropriate under the (3) bad faith or misconduct of a party common fund theory. The State of Washington had a duty to defend RCW 10.92 and was derelict in not doing so, particularly when the consequence of its CR 19 motion is to defeat a lawsuit against the Department for breach of its own protocols and established constitutional laws in changing ownership to Certificate of Title of automobiles owned by non tribal members based upon presentation of an Indian tribe of its order of forfeiture of the automobile. Although Washington has rejected the private attorney general theory as a basis for recovery of attorney fees in *Blue Sky Advocates v. State* 107 Wn2d 112, 122, 727 P.2d 644 (1986) in this case, appellant will advance the interests of state law, specifically force the Department to comply with CR 82.5 and, in addition, appellant will be catalyst to the resolution of how RCW 10.92 works against the efforts of the Department of Licensing and its lawyers.

VIII. CONCLUSION

The statutory language is clear and the insurers of the Swinomish Tribe ought to be attached and the case should proceed. There has been a limited waiver of the Swinomish Tribe's sovereign immunity to the extent that it has accepted the benefits of having its officers certified as Washington peace officers and has insured them.

Even if there was no waiver by the Tribe, tribal sovereign immunity does not protect individual police officers whose conduct caused the illegal seizure and forfeiture of plaintiff's vehicle, because they exceeded their authority whether acting as tribal officers or as Washington peace officers.

Finally, even if the court determines that immunity precludes all other relief requested, at a minimum the court should grant injunctive and declaratory relief so that the Department of Licensing ceases its practice of transferring vehicle title based on void forfeiture judgments and award appellant costs and reasonable attorney fees.

29th
Signed this day of February, 2016 at Bellingham



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Phone: 360 676-1931
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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY**

<p>JORDYNN SCOTT</p> <p>Plaintiff,</p> <p>and</p> <p>JOHN OR JANE DOE, Director of Department of Licensing, a subdivision of the State of Washington and the STATE OF WASHINGTON, and PETER'S TOWING, a Scott corporation, and John and/or Jane Doe, unidentified officers of the Swinomish Tribal Police Officers and General Authority Police Officer pursuant to RCW 10.92 in their official capacity and individually,</p> <p>Defendants.</p>	<p>No. 15-2-00301-8</p> <p>ORDER DENYING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND GRANTING DEFENDANT'S MOTION TO DISMISS</p>
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THIS COURT held a hearing on July 24, 2015 to hear the Defendant State of Washington/Department of Licensing's *Motion to Dismiss* the Plaintiff, Jordynn Scott's, Complaint. After hearing oral argument from the parties and reviewing the briefs and relevant law on this matter, the Court issues the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiff Scott filed a *Complaint for Declaratory and Injunctive Relief and for Damages and For Attorney Fees Pursuant to 42 USC 1983*, alleging that the Defendants violated her civil rights by various actions that resulted in the transfer of title from a 2005 Nissan XTerra from Plaintiff as the registered owner to the Swinomish Tribe as the registered owner.
2. According to the Complaint, Plaintiff alleges the following:
". . . [T]he following is the practice of the Washington State Department of Licensing with respect to the change of ownership of vehicles in Washington State. First,

1 Washington State law states that the ownership of a motor vehicle is evidenced
2 exclusively and only by the person or legal entity designated in an official Certificate
3 of Ownership. In this case, and the plaintiff believes this to be the case in the past
4 with respect to forfeitures of motor vehicles owned by Washingtonians who are not
5 Native American, the change of certificates of ownership is accomplished by the
6 tribal court in the following manner. The Native American Tribe sends an official
7 forfeiture order from its tribal court stripping the registered owner, Native American
8 and non-Native American alike, of his ownership of a particular motor vehicle and
9 then in response thereto, the Department of Licensing issues a new Certificate of
10 Ownership in favor of the particular tribe, designating the tribe as the new registered
11 owner. This new certificate of title is thereafter signed over by the tribe to the highest
12 bidder at a cash auction sale or transferred to that tribe and used by its tribal police.”
13 *Complaint*, ¶ 10.

- 14 3. In this case, the Plaintiff, who is not enrolled in any federally recognized Indian tribe
15 or otherwise identified as Native American, alleges that the Plaintiff’s vehicle was
16 seized by the Swinomish Tribal Police and subject to a forfeiture order under a
17 process codified by the Swinomish Tribal law.
- 18 4. Following the tribal court forfeiture order, the Swinomish Tribe presumably
19 presented the Washington Department of Licensing (DOL) with the Tribe’s court
20 order and a new Certificate of Ownership issued from DOL to the Swinomish Tribe,
21 thereby stripping the Plaintiff of ownership.
- 22 5. In addition to filing the Complaint, the Plaintiff filed a *Motion for Declaratory
23 Judgement and Attorney Fees*, moving the Court for a “declaratory judgment that the
24 ongoing practice of the Swinomish Nation Police Department of seizing and
25 forfeiting the motor vehicles owned by the non-tribal members for violation of the
26 Swinomish Indian Nation’s Drug Forfeiture statute violates federal law.”
- 27 6. The DOL filed a *Motion to Dismiss*, moving for dismissal of the *Complaint* and the
28 *Motion for Declaratory Judgment* under Washington Civil Rules 12(c) and 19 due the
29 failure (and inability) of the Plaintiff to join an indispensable party, the Swinomish
30 Indian Tribal Community.
- 31 7. The dismissal of a suit under CR 12 and 19 is a “drastic remedy that courts should
32 employ sparingly, such as when a defect cannot be cured.” *Mudarri v. State of
33 Washington*, 147 Wash. App. 590, 602 (Div. 2 2009). Under CR 19(b), the trial court
34 must undertake a two-step analysis to determine whether a party is necessary for
35 adjudication and, when a party is necessary but cannot be joined, “whether in equity
36 and good conscience the action should proceed among the parties before it or should
37 be dismissed.” *Id.* at 604.

1 8. In the *Complaint* and the *Motion for Declaratory Judgment*, the Plaintiff moves this
2 Court to rule on the legality of the Swinomish Indian Tribe's Drug Forfeiture
3 ordinance, asking that the Court determine that the Tribe's ordinance violates federal
4 law. As in *Mudarri*, in which the Plaintiff sought to have the State-Tribal gaming
compact invalidated, the Plaintiff here asks this Court to determine the authority and
rights of a party that has sovereign immunity from such claims in state court.

5 9. In *Mudarri*, the Court held "[t]he Tribe's sovereignty renders it uniquely immune to
6 a private lawsuit without its consent, and the Tribe has not consented to Mudarri's
7 lawsuit." *Id.* at 605. Here, the Plaintiff has not attempted to join the Tribe,
8 recognizing in its pleadings and argument that such a joinder would not be possible.
9 The Plaintiff argues that the Tribe is not necessary; however, this court is being asked
to determine the authority of the Tribe or its agents to undertake actions the Tribe's
laws allow. A determination of the validity of the Tribe's laws requires its presence
in much the same manner as a determination of the validity of a State-Tribal gaming
compact.

10 10. The named defendants in this lawsuit cannot provide the relief the Plaintiff seeks.
11 The Tribe is a necessary party to this suit.

12 11. Any judgment rendered in the absence of the Tribe would require this court to rule on
13 the Tribe's laws and doing so would be prejudicial to the Tribe without their
14 participation in the suit.

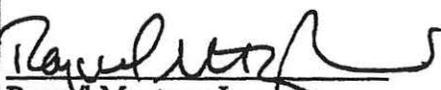
15 12. The prejudice to the Tribe cannot be mitigated through any protective measures or
16 shaping of relief.

17 13. No judgment of the authority of the Tribe or its agents to carry out the actions under
18 the Tribe's laws can be rendered in its absence. Therefore, under CR19 and *Mudarri*,
19 this matter cannot proceed.

20 THEREFORE, THE COURT ORDERS THAT:

- 21 1. The Plaintiff's Motion for Declaratory Judgment is **denied**.
22 2. The Defendant's Motion to Dismiss is **granted**.

23 SO ORDERED this 10th day of August, 2015.

24 
25 Raquel Montoya-Lewis
Superior Court Judge

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Whatcom County
WASHINGTON

BY _____
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR WHATCOM COUNTY

JORDYNN SCOTT,

Plaintiff,

vs

JOHN OR JANE DOE,

Director of
the Department of Licensing,
a subdivision of the State of
Washington, in his/her official
capacity and the STATE OF
WASHINGTON, and PETER'S
TOWING a Washington
Corporation, and John and/or)
Jane Doe, unidentified Swinomish)
Tribal Police Officers and General)
Authority Police Officer pursuant)
To RCW 10.92 in their official)
Capacity and individually,)

Defendants.

No. 15-2-00301-8

PLAINTFF'S PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

COMES NOW the Plaintiff Scott and proposes that the court modify its
decision to address the below proposed Conclusions of Law.

1. The court rejects the plaintiff's argument that she has a right to sue the tribal officer in his individual capacity under Pistol v. Garcia , 2015 WL 3953448 (9th Cir. June 30, 2015) and Maxwell v. County of San Diego, 697 F3d 941 (9th Cir. 2012) because _____

PLAINTIFF'S PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW-

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Appendix 2
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2. The court rejects the plaintiff's argument that the DOL can not bring its motion to dismiss under CR 19 because the defense of sovereign immunity is personal to the tribe and can only be raised by the tribe as held in *Smith Plumbing v. Aetna Casualty*, 149 Ariz. 524 (1986), affirmed *White Mountain Apache v. Smith Plumbing*, 856 F32d 1301 (9th Cir. 1988) because _____
3. The court rejects the plaintiff's claim that by virtue of seeking and obtaining certification of its officers under RCW 10.92 the Swinomish Nation made a limited waiver of sovereign immunity and agreed that neither the tribe nor its insurers 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." This argument lacks merits because _____

Dated this day of August, 2015

J U D G E

Presented by:



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PLAINTIFF'S PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW-

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**PLAINTIFF'S PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW-**

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