No. 40859-7-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

(Pierce County Superior Court Case No. 10-2-06346-9)

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 DOES, additional police officers, and Benjamin R. ISADORE, Respondents.

BRIEF OF RESPONDENT BENJAMIN R. ISADORE

Kyme A.M. McGaw, WSBA #21432
Law Offices of Kyme A.M. McGaw PLLC
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101-1360
T: (206) 357-8450
F: (206) 357-9370
Attorney for Respondent Benjamin R. Isadore

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

TREATISES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

After plaintiff-appellant Chris Young voluntarily dismissed his tribal court suit for money damages against the Puyallup Tribe, he sought to hale four of its employees and defendant-respondent Benjamin Isadore, a security guard employed by the Tribe's health authority, into superior court to defend essentially the same claims. Young's claims all arise from the trespass of his decedent, Jeffry Young, onto tribal trust land and his death after he violently resisted detention by tribal police officers.

The Pierce County Superior Court correctly recognized that the defendants' motions to dismiss under CR 12(b)(1) were grounded in settled principles of controlling federal law, recognized and routinely applied by Washington courts. First, "absent explicit and 'unequivocal' waiver or abrogation," tribal sovereign immunity comprehensively protects federally recognized tribes from suit. *Wright v. Colville Tribal Enterprises,* 159 Wn.2d 108, 112, 147 P.3d 1275 (2006) (en banc) (quoting *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59 (1978)), *cert. denied,* 550 U.S. 931 (2007); *Foxworthy v. Puyallup Tribe,* 141 Wn. App. 221, 169 P.3d 53 (2007).[1] Tribal sovereign immunity extends to tribal entities owned and created by a tribe, *Wright,* 159 Wn.2d at 112, 147 P.3d

[1] *Pet. for review dismissed* (not reported).

at 1280, and to tribal officials and employees acting in their official capacity, regardless of where the actions arise. *Id.*

Second, where a claim arises solely from authorized actions of tribal employees to protect tribal interests on tribal land, state courts lack concurrent jurisdiction over claims arising from those actions. *See Rodriguez v. Wong,* 119 Wash. App. 636, 643, 82 P.3d 263 (Div. I 2004) (applying tests of both *Montana v. United States,* 450 U.S. 544 (1981), and *Williams v. Lee,* 358 U.S. 217 (1959), and concluding that exercising subject matter jurisdiction over a dispute arising in the tribal workplace between two non-Indian tribal employees, where the tribe had enacted specific policies and procedures, would undermine the tribe's right of self-governance).

The Superior Court's orders should be affirmed.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Tribal sovereign immunity extends to employees of the Puyallup Tribe and the Puyallup Tribal Health Authority who act within the scope of their authority and applies regardless of the tribal membership of the employees and where an action arises. Under CR 12(b)(1), did the Superior Court correctly dismiss Young's suit because it was barred by tribal sovereign immunity?

2. A trial court may grant reconsideration on one of the grounds enumerated in CR 59(a). On reconsideration Young continued to argue the title status of land on which the Puyallup Tribal Health Authority facilities are located and made the new argument that, that because Jeffry Young was mentally ill, Public Law 280 conferred subject matter jurisdiction on the state. Under CR 59, did the Superior Court correctly deny Young's motion for reconsideration?

III. COUNTERSTATEMENT OF FACTS

A. Factual Background

Respondent-defendant Benjamin Isadore is employed by the Puyallup Tribal Health Authority as a security guard. CP 110, 269. He is not, and has never been, a commissioned police officer in any jurisdiction. CP 110, 207, 269.

The Puyallup Tribe is a federally recognized, sovereign tribe.[2] The Puyallup Tribal Health Authority is a chartered entity of the Tribe. CP 110, 207-208; *see also* http://www.eptha.com/About.html (last accessed 11/29/10). The Tribal Health Authority operated the PTHA Treatment Center, CP 271, which was located on trust land of the Puyallup Tribe. CP 112, 116, 117, 192-194, 223-224, 238-242, 271, 298. The

[2] Department of the Interior, Bureau of Indian Affairs, "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 402218, 40221 (Aug. 11, 2009); *see also* CP 2, 160.

Treatment Center provided in-patient drug and alcohol treatment services until its closure in 2009. CP 113, 271.

On the evening of May 12, 2007, Jeffry Young attempted to gain entrance to the Treatment Center by representing that he was a medical doctor there to see a patient. CP 113, 270, 271. At approximately 7:25 pm, Wade Iverson, a residential attendant employed by the Tribal Health Authority to work at the Treatment Center, telephoned Benjamin Isadore and requested his assistance to get Young to leave the premises. CP 113, 270, 272. Despite Isadore's repeated requests that Young leave the premises, he refused to do so. CP 111, 112, 270-272.

Young appeared to leave for approximately 10 minutes; however, he was hiding behind a bush. CP 270, 272. When Iverson left the Treatment Center building to move his vehicle closer to the facility, Young came back toward Iverson, yelling and trying to prevent Iverson from re-entering the facility. CP 4, 270, 272. Jeffry Young pushed his hands into his pockets, worrying Isadore that Young had a firearm. CP 272. Based on Isadore's concerns for the personal safety of the patients, Iverson, and Young, Isadore called the Puyallup Tribal Police for assistance. CP 4, 272.

Puyallup Tribal Police Officer Scrivner and, later, Officers Fitzpatrick and Dausch arrived at the Treatment Center. CP 4, 113, 272. Jeffry Young was agitated, yelling, acting erratic and in a threatening manner, and would not comply with the police officers' instructions. CP 114, 272. Young resisted the police officers and yelled, kicked, and hit at the officers. CP 114, 273-274. Even while on the ground, Young continued to kick, strike, and yell at the officers. CP 114, 273-274. Young was placed in handcuffs and, after he continued to struggle, ankle restraints. CP 114. After he refused to cooperate and continued to strongly physically resist, a taser was used to stun Young so that the wrist restraints could be placed on him. *Id.* Officer Scrivner was the first to notice that Young was not moving, and the officers checked Young's pulse. CP 114-115; *see also* CP 5. Several tribal police officers made efforts to resuscitate Young until the Tacoma Fire Department paramedics arrived and took over. CP 5, 115. The paramedics were able to temporarily resuscitate Young, but he later died. CP 5. The Pierce County Medical Examiner's Office determined that the cause of death was excited delirium syndrome and classified the death as accidental. CP 155, 161, 259.

B. Procedural Background

1. Puyallup Tribal Court

On April 14, 2009, pursuant to the Puyallup Tribal Tort Claims Act ("PTTCA"),[3] plaintiff-appellant Chris Young, as personal representative of the Estate of Jeffry Young and on his own behalf, sued the Puyallup Tribe and unnamed tribal police officers in the Puyallup Tribal Court. CP 153-158. He sought monetary damages based on seven causes of action: (1) negligence, (2) false arrest/imprisonment (3) assault and battery, (4) intentional infliction of emotional distress/outrage, (5) loss of consortium, (6) violation of civil rights, (7) and wrongful death. CP 153-158. Young's "First Superseding Complaint for Damages," CP 159-165, added a claim for excessive force in addition to these causes of action. CP 163. Neither tribal court complaint named Benjamin Isadore as a defendant. CP 153, 159. On January 26, 2010, the tribal court granted Young's motion to dismiss his tribal court lawsuit with prejudice. CP 166.

2. Pierce County Superior Court

On February 9, 2010, plaintiff-appellant Chris Young filed an action in Pierce County Superior Court, omitting the Puyallup Tribe and

[3] Puyallup Tribal Tort Claims Act, Puyallup Tribal Ord. No. 211002A (Oct. 21, 2002), *codified at* Puyallup Tribal Codes, Title 4, Courts and Procedure, ch. 4.12, CP 168-178, electronically available at http://www.codepublishing.com/WA/puyalluptribe (last accessed 11/29/10). In this Brief, the PTTCA is cited to the uncodified sections as they appear in the Clerk's Papers.

naming defendant-respondent Benjamin Isadore as well as the three on-scene tribal police officers and Puyallup Tribal Police Chief Duenas. CP 1-9. The complaint seeks monetary relief based on six causes of action: (1) loss of consortium, (2) violation of civil rights (constitution), (3) violation of civil rights (42 U.S.C. § 1983), (4) wrongful death, (5) negligent hiring, and (6) excessive force. CP 4-7. The complaint also sought a monetary award of attorneys' fees and witness fees under 42 U.S.C. § 1988. CP 7.

Defendant-respondent Isadore and the police officer defendants-respondents subsequently filed motions to dismiss under CR 12(b)(1). CP 130-149, CP 197-206. The Superior Court held a hearing on the motions. Verbatim Transcript of Proceedings (May 7, 2010) ("I RP"). The Superior Court granted the motions to dismiss. CP 288-291.

Plaintiff-appellant Chris Young timely filed a motion for reconsideration. CP 92-95. The Superior Court held a hearing on that motion, *see generally* Verbatim Transcript of Proceedings (May 28, 2010) ("II RP"), during which plaintiff-appellant's counsel stated that "a government acts through its individuals, through its agents and so that's why it's complicated," II RP 8:22-23, and stipulated that the officers were acting in their official capacity. *Id.* at 9:12-14. The Superior Court denied Young's motion for reconsideration. This appeal followed.

IV. ARGUMENT

A. Appellant's Introduction Violates RAP 10.7 and Should Be Stricken

This Court may strike portions of a brief and sanction a party for failing to comply with the Rules of Appellate Procedure. RAP 10.7; *Sheikh v. Choe*, 156 Wn.2d 441, 446-47, 128 P.3d 574 (2006); *Nelson v. McGoldrick*, 127 Wn.2d 124, 896 P.2d 1258 (1995) (striking portions of a brief containing factual assertions not supported by the record). Young's two and one-half page introduction advances a rendition of the facts without any citation to the record and makes numerous assertions not supported by citation or the record. App. Br. at 1-3. It should be stricken entirely.

B. Standard of Review

The existence of subject matter jurisdiction over a party asserting tribal sovereign immunity is a question of law, which is reviewed de novo. *See Wright,* 159 Wn.2d at 111, 147 P.3d at 1278; *Foxworthy,* 141 Wash. App. at 55, 169 P.3d at 55. The Superior Court granted defendants' motions for dismissal under CR 12(b)(1) for lack of subject matter jurisdiction. A factual challenge brought under CR 12(b)(1) is functionally similar to a summary judgment motion. *Wright,* 159 Wn.2d at 117-18, 147 P.3d at 1282 (Madsen, J., concurring). A trial court need not accept the plaintiff's allegations as true. *Id.*, 159 Wn.2d at 118 (citing

Safe Air v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)). In such cases, a reviewing court defers to the trial court's factual determinations and reviews its legal conclusions de novo. *Id.*

C. The Superior Court Correctly Granted the Motions to Dismiss Based on Tribal Sovereign Immunity

Under controlling federal law and the precedent of this Court applying that law, tribal sovereign immunity "comprehensively" protects federally recognized tribes from suit absent explicit and unequivocal waiver or abrogation. *Wright,* 159 Wn.2d at 112-13, 147 P.3d at 1278 (citing *Kiowa Tribe v. Manufacturing Technologies,* 523 U.S. 751, 754 (1998); *Santa Clara Pueblo,* 436 U.S. at 59).

Tribal sovereign immunity extends to tribal agencies and instrumentalities as extensions of tribal government. *Wright,* 159 Wn.2d at 112-13, 147 P.3d at 1279 (citing cases); *Cook v. Avi Casino Enterprises,* 548 F.3d 718, 726 (9th Cir. 2008) (recognizing casino, as an arm of the tribe, enjoys sovereign immunity from tort suit), *cert. denied,* ___ U.S. ___, 129 S. Ct. 2159 (2009) (mem.); *Allen v. Gold Country Casino,* 464 F.3d 1044, 1047 (9th Cir. 2006) (same), *cert. denied,* 549 U.S. 1231 (2009).

Tribal sovereign immunity extends to tribal officials and employees when "acting in their official capacity and within the scope of

their authority." *Linneen v. Gila River Community,* 276 F.3d 489, 492 (9th Cir.), *cert. denied,* 536 U.S. 939 (2002); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *Snow v. Quinault Indian Nation,* 709 F.2d 1319, 1321 (9th Cir. 1983), *cert. denied,* 467 U.S. 1214 (1984); *United States v. Oregon*, 657 F.2d. 1009, 1013 n.8 (9th Cir. 1981). Tribal police officers have authority to stop and detain non-Indian offenders until state authorities can assume custody. *State v. Eriksen,* __ Wn.2d. __, 241 P.3d 399, 406 (2010) (en banc); *see also State v. Schmuck,* 121 Wn.2d 373, 383-86, 850 P.2d 1332 (1993).

A waiver of tribal sovereign immunity can arise in only two ways: from a tribe's express waiver or through a congressional statute expressly abrogating tribal immunity. *Foxworthy,* 141 Wash. App. at 227, 169 P.3d at 55-56 (citing *Santa Clara Pueblo,* 436 U.S. at 58). In *Foxworthy,* this Court noted that, in the Puyallup Tribal Tort Claims Act,[4] the Puyallup Tribe had made such a waiver of its immunity for private tort actions. *Id.* at 227 & n.3. That waiver, however, extended only to suits brought in the Puyallup Tribal Court. *Id.* Acknowledging that "[t]he Puyallup Tribe has not waived its sovereign immunity to private lawsuits in state court," this Court held "as a matter of law that lack of subject matter jurisdiction

[4] *See* discussion below.

required the [state] trial court to dismiss Foxworthy's action against the Puyallup Tribe." *Foxworthy,* 141 Wash. App. at 234-35, 169 P.3d at 59-60.

Sovereign immunity continues to bar suits naming officials and employees when the sovereign is "the real, substantial party in interest." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101-02 (1984) (footnote, citations and internal quotation mark omitted). Even where only officers are named, a suit is against the sovereign if the judgment sought "would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Id.*, 465 U.S. at 101 n.11.

1. Young's Superior Court Suit Is, as Was His Tribal Court Suit, Against the Puyallup Tribe

The Superior Court did not err in its perception that, despite Young's artifice of naming only individual employees of the Tribe and the Tribal Health Authority, his suit was against the sovereign Puyallup Tribe. II RP at 16:4-6 ("The key fact is that they were agents by virtue of their employment status as police officers and then I think a security officer."). Although the complaint sued Benjamin Isadore and the tribal police officers in their individual capacities as well as "official capacity as

agents/employees of the Tribe," CP 2, every allegation of the complaint centers on what the defendants did as employees of the Tribe and the Tribal Health Authority. After the Treatment Center's residential attendant called Isadore for assistance in dealing with Jeffry Young, Isadore told Young that he did not have authorization to enter the Treatment Center and requested that he leave. CP 4. When Young did not leave, Isadore called the Puyallup Tribal Police. *Id.* The three responding tribal police officers did not arrest or cite Jeffry Young for a crime. App. Br. at 17.

None of the alleged actions of the tribal police officers could have been performed as private citizens.[5] Tribal Police Chief Duenas, who was not a responder to the call for assistance, is sued for negligent hiring and training. CP 8. The complaint does not make any claim for intentional torts,[6] and Young confirms repeatedly that his suit is a negligence suit. CP 36; II RP 12:16-17. The complaint seeks only retroactive, compensatory monetary damages and punitive damages, CP 9, precisely

---

[5] The only basis on which Young argues that defendants acted outside the scope of their authority is his conclusion that they used excessive force in violation of the fourteenth amendment, CP 22-23; *see also* II RP 9:14-17, which is inapplicable to tribal governments. The complaint contains no allegation that the defendants acted outside the scope of their authority. CP 1-5, CP 22-23. And, while Young alleges that Benjamin Isadore was "involved" in Jeffry Young's death, there is no allegation of any sort that Isadore (or Police Chief Duenas) acted with excessive force.

[6] *Cf.* CP 162.

the type of relief that is barred by the doctrine of sovereign immunity. *Edelman v. Jordan,* 415 U.S. 651, 668-69 (1974).

2. The Puyallup Tribe Exercised Its Right of Self-Governance to Regulate Tort Claims in the Puyallup Tribal Tort Claims Act

Aside from expending itself on the Puyallup Tribe's treasury and domain, Young's requested relief would subvert the sovereign authority of the Puyallup Tribe to exercise its power of self-government and to administer its lands, health care facility, and employees. In particular, Young's requested relief seeks to avoid the Puyallup Tribal Tort Claims Act, which the Puyallup Tribe specifically enacted to govern tort claims asserted against it and its officials, employees and agents that arise within the Puyallup Reservation.

The Puyallup Tribe exercised its jurisdiction and formally enacted a limited waiver of its sovereign immunity to tort claims arising on its lands and naming the Puyallup Tribe or any person acting in an official capacity as the Tribe's agent, employee, or officer. PTTCA, CP 168-178. The Act, which is publicly available as part of the entire Puyallup Tribal Code,[7] expressly waives the Tribe's sovereign immunity to "injuries proximately cause by the negligent acts or omissions of the Tribe, its

[7] Electronically available at http://www.codepublishing.com/WA/puyalluptribe (last accessed 11/29/10).

agents, employees, or officers." PTTCA, § 4.02A.030(3)(a), CP 172.[8] The waiver is limited to actions brought in the Puyallup Tribal Court and expressly preserves the Tribe's immunity from claims brought "in any state or federal court." *Id.*, § 4.02A.030(2), CP 172. The Act also expressly preserves the defenses of qualified or absolute immunity "to actions for monetary damages brought against agents, employees or officers of the Tribe in their individual capacities." *Id.*, § 4.02A.090(2), CP 177.

In addition to waiving the Puyallup Tribe's sovereign immunity to suits brought in the Puyallup Tribal Court, the PTTCA expressly states that any liability for monetary damages assumed by the Tribe for the tortious acts committed by its officials, employees or agents shall be the exclusive remedy of any person who suffers an injury caused by the Tribe, or its officials, employees, or agents. PTTCA, § 4.02A.090(1), CP 177. The Act also limits the types of damages that may be awarded against the Tribe. *Id.,* § 4.02A.040, CP 172-73.

The Act establishes a prerequisite administrative procedure for bringing tort claims against the Tribe and its officials, employees, and

[8] The Act similarly provides that claims for individual liability arising out of conduct exceeding the alleged tortfeasor's scope of employment or authority and arising within the exterior boundaries of the Puyallup Indian Reservation "shall be heard only in the Tribal Court." *Id.*, § 4.02A.050(1), CP173.

agents, *id.*, § 4.02A.060, CP 173-74, including the requirement of a written notice of claim to the required parties within 180 days after the act or omission giving rise to the claimed injury. *Id.*, § 4.02A.060(3)(a), CP 174; *see also Foxworthy,* 141 Wash. App. at 55 n.3, 169 P.3d at 227 n.3.

Permitting this suit to go forward would significantly prejudice the Tribe's right of self-government to enact law governing claims for monetary damages against it arising from tortious acts committed on the Reservation as well as maintaining an administrative process and judicial system for resolving those claims. *See Eriksen,* 241 P.3d at 404 ("Tribes have an inherent power of self-governance, which includes the power to prescribe and enforce internal laws. . . ."; citing *Schmuck,* 121 Wn.2d at 381-82, 850 P.3d 1332, and *Wheeler,* 435 U.S. at 326); *Rodriguez,* 119 Wash. App. at 643-44, 82 P.2d at 266-67 (state court exercise of subject matter jurisdiction would directly affect the tribe's inherent power to enact laws governing gaming and personnel actions); *see also Republic of the Philippines v. Pimentel*, 553 U.S. 851, 128 S. Ct. 2180, 2190 (2008) (in the context of a foreign nation's sovereign immunity, stating "[t]he dignity of a foreign state is not enhanced if other nations bypass its courts without right or good cause.")

3. Young's Agency Argument Does Not Avoid the Bar of Sovereign Immunity

The complaint sues the defendants "in their individual capacity and in their official capacity as agents/employees of the Tribe." CP 2. There is no allegation in the complaint that any defendant acted outside the scope of his employment authority or as an individual. Young's cited cases do not support his notion that, by simply calling employees "agents," the bar of tribal sovereign immunity is removed. *E.g., Aungst v. Roberts Construction,* 95 Wn.2d 439, 625 P.2d 167 (1981) (non-Indian who contracted with tribe not protected as agent because state consumer protection act claims did not depend on any relationship to the tribe); *Cordova v. Holwegner,* 93 Wash. App. 955, 971 P.2d 531 (Div. III 1999) (subject matter jurisdiction, not tribal immunity, case involving private corporation licensed under Yakama tribal law and operating in closed area of the Yakama Reservation).

4. Young's New Treaty Argument Does Not Establish a Waiver of the Puyallup Tribe's Sovereign Immunity

For the first time in this action,[9] Young argues that, by negotiating the Treaty of Medicine Creek,[10] the "predecessors-in-interest" of the

---

[9] This Court generally refuses to review arguments not raised in the trial court. RAP 2.5(a); *Torgerson v. One Lincoln Tower, LLC,* 166 Wn.2d 510, 524 n.9, 210 P.2d 318 (2009); *State v. R.J. Reynolds Tobacco Co.*, 151 Wn. App. 775, 787 n.30, 211 P.3d 448 (2009).

Puyallup Tribe made an express, limited waiver of the Tribe's sovereign immunity such that the Tribe is required to "deliver up" and subject its employees to private state-law tort suits for monetary damages, such as his. *See* App. Br. at 20-21.

There are two significant problems with this argument: First, this argument is inconsistent with Young's stipulations that the Puyallup Tribe possesses sovereign immunity to his suit. *Compare* App. Br. at 20-21 *with id.* at 22; *see also* CP 94. Second, this argument ignores the point that his snippet of language, taken out of the context of article 8,[11] App. Br. at 20, is not the clear, unequivocal, and express language required for such a

---

[10] 10 Stat. 1132 (1854), *reprinted in* II INDIAN AFFAIRS: TREATIES 661-664 (Charles J. Kappler ed. 1904), *digitally available at* http://digital.library.okstate.edu/kappler/Vol2/treaties/nis0661.htm (last accessed 11/21/10).

[11] The full article reads:

> The aforesaid tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

TREATY OF MEDICINE CREEK, art. 8, II INDIAN AFFAIRS: TREATIES at 663.

waiver. *Santa Clara Pueblo,* 436 U.S. at 59. Indeed, article 8 states that, at the time the Treaty was signed, the federal government was the only forum for resolution of "all matters of difference" between the treaty signatories and other Indians or "citizens." TREATY OF MEDICINE CREEK, art. 8, II INDIAN AFFAIRS: TREATIES at 663. No authority supports Young's construction of article 8, and no case addressing the sovereign immunity of the Puyallup Tribe has construed this article or any other part of the Treaty as a waiver. *E.g., Puyallup Tribe, Inc. v. Washington Dept. of Game,* 433 U.S. 165, 168-73 (1977) (vacating portion of judgment to honor Puyallup Tribe's valid claim of immunity); *Foxworthy,* 141 Wash. App. at 227, 169 P.3d at 56 (noting that Congress has not abrogated Puyallup tribal sovereign immunity in context of private, dram-shop actions); *Matheson v. Gregoire,* 139 Wash. App. 624, 632, 161 P.3d 486, 491 (Div. II 2007) (upholding Puyallup tribal sovereign immunity to claims for equitable relief and damages), *review denied,* 163 Wn.2d 1020, *cert. denied,* __ U.S. __, 129 S. Ct. 197 (2008).

Young's argument appears to draw from the dissent in *State v. Eriksen,* ___ Wn.2d ___, 241 P.3d 999 (2010) (en banc). In the context of determining whether tribal police officers have authority to engage in fresh pursuit off-reservation of a suspected non-Indian drunk driver and detain her for proper authorities, the Washington Supreme Court construed

substantially similar language in article 9 of the Treaty of Point Elliot.[12] After applying the canon of construction that Indian treaties must be construed to their benefit, the en banc Court held that the Lummi Nation has "authority to stop, under its sovereign authority, and detain, pursuant to [article 9 of] the Point Elliott Treaty, non-Indian offenders who violate traffic laws until state authorities can assume custody." *Eriksen,* 241 P.3d at 405. The dissent argued that article 9 is a limitation on a treaty signatory's authority to detain non-Indians. *Id.*, 241 P.3d at 408-09 (Fairhurst, J. dissenting). This argument does not change the correctness of the Superior Court's dismissal on grounds of tribal sovereign immunity.

D. The Superior Court Did Not Err When It Declined to Exercise Subject Matter Jurisdiction Over Young's Tort Claims Against Tribal Employees Arising on Tribal Land

The Superior Court also correctly concluded that, with respect to a "tort action that occurred on tribal land with only tribal employees as defendants," I RP 38:21-22, it did not have subject matter jurisdiction. *Id.* The Superior Court's conclusion is well supported:

> Absent controlling federal law, tribes retain jurisdiction over events in Indian country: Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers lawfully vested in an

[12] art. 9, 12 Stat. 927 (1855), *reprinted in* II INDIAN AFFAIRS: TREATIES 669-673 (Charles J. Kappler ed. 1904), *digitally available at* http://digital.library.okstate.edu/kappler/Vol2/treaties/dwa0669.htm (last accessed 11/30/10).

> Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.

Eriksen, 241 P.3d at 402 (quoting F. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005), § 4.01[1][a] at 206, and *Wheeler*, 435 U.S. at 322-23; internal quotations omitted).

In *Eriksen,* the Washington Supreme Court affirmed the inherent sovereign authority of a tribe's police officers to engage in common-law fresh pursuit off-reservation of a non-Indian motorist suspected of drunk driving. *Eriksen,* 241 P.3d at 407. In reaching its decision, the Court noted that, while the U.S. Supreme Court has limited tribes' authority over non-Indians based in part on *Montana v. United States,* 450 U.S. 544 (1981), and its progeny, tribes retain their existing sovereign powers until Congress acts. *Eriksen,* 241 P.3d at 405. Tribes have an inherent power of self-governance, which includes the power to prescribe and enforce internal laws. *Id.*

Young's entire argument is permeated with a logical flaw: State jurisdiction does not automatically arise in circumstances where a tribe lacks it. COHEN'S HANDBOOK, § 6.03[2][c] at 536. Many of the *Montana,* cases addressing the scope of tribal court jurisdiction[13] arise from

[13] *Plains Commerce Bank v. Long Family Land and Cattle Co.,* 544 U.S. 316 (2008) (no tribal court jurisdiction over non-Indian bank's sale of fee land to a non-Indian

challenges by non-Indian defendants to a tribal court's authority to hear claims against them. Such cases do not squarely answer whether the Superior Court erred in declining to exercise subject matter jurisdiction over tort claims against employees of the Tribe and its Health Authority arising solely from actions taken within their employment authority, and for which claims the Tribe has established law addressing the resolution of such claims. Young does not cite, nor can he, controlling federal law holding that, in these circumstances, a Superior Court erred by declining to exercise jurisdiction over tort claims that effectively run against the Tribe. *See, e.g., Rodriguez,* 119 Wash. App. at 638, 82 P.3d at 263.

In answer to this question, Division I of this Court states: "To determine whether state courts have jurisdiction over civil claims between nonmembers concerning conduct within an Indian reservation, we must consider the extent of tribal and state authority over the particular matter at

---

purchaser); *Nevada v. Hicks,* 533 U.S. 353 (2001) (no tribal court jurisdiction over action arising under 42 U.S.C. § 1983); *Philip Morris USA v. King Mountain Tobacco Co.,* 539 F.3d 932 (9th Cir. 2009) (no tribal court jurisdiction over trademark action arising under federal law); *Montana v. United States,* 450 U.S. 544, 656 (1981) (no tribal regulatory jurisdiction over nonmembers on fee lands).

Like these cases, the Tenth Circuit decision cited by Young, *MacArthur v. San Juan County,* 497 F.3d 1057, 1069-70 (10th Cir. 2007), *cert. denied,* 552 U.S. 1181 (2008), App. Br. at 11, addresses claims brought in tribal court against multiple non-Indian defendants arising out of the employment activities of a health clinic operated by the county on fee land owned by the State of Utah. Thus, it does not support Young's contention that *Montana* and its progeny deprive a tribal court of jurisdiction arising from the actions of tribal employees taken on tribal trust land. The *MacArthur* case has an extensive procedural history.

hand." *Rodriguez v. Wong,* 119 Wash. App. at 640, 82 P.3d at 265. The court applied both *Williams v. Lee* and *Montana v. United States* to affirm the King County Superior Court's summary judgment that it lacked subject matter jurisdiction over employment claims arising on tribal land brought by one non-Indian tribal gaming commission employee against his supervisor, also a non-Indian employee. *Rodriguez v. Wong,* 119 Wash. App. at 638, 82 P.3d at 263.

Applying the first *Montana* exception, the *Rodriguez* court found the existence of a consensual relationship, which was undisputed, because the conduct giving rise to the non-Indian plaintiff's claims "occurred entirely within the employment context" and on tribal land. *Id.* at 640, 82 P3d. at 266. Here, by entering tribal lands and seeking to enter the Treatment Center, Jeffry Young established a consensual relationship with the Puyallup Tribe. *Montana,* 450 U.S. at 565-66. Young now characterizes his decedent as the "non-consenting" party. App. Br. at 11. But Jeffry Young "appears to have been gambling, or at least spending time, at the tribal casino." CP 3, 154, 160. He "entered the tribal drug and alcohol clinic. . . apparently seeking help for his medical needs." CP 155, 161. His personal representative later alleged that all events giving rise to his tort claims "were committed within the territorial jurisdiction of the Puyallup Indian Tribe," CP 154, 160, and that the Puyallup Tribal Court

had jurisdiction over the subject matter and defendants pursuant to federal law and the PTTCA. CP 154, 160. In situations such as this, the first *Montana* exception applies. *Strate v. A-1 Contractors,* 520 U.S. 438, 457 (1997) (holding that *Williams* falls within first *Montana* exception). Here, it does.

When the *Rodriguez* court applied the second *Montana* exception, it concluded that the tribe had jurisdiction because "state jurisdiction over [the non-Indian plaintiff's] claims would directly affect the tribe's political integrity" because the tribal government has taken official action to regulate its relationship with its employees." *Id.* at 641-42, 82 P.3d at 266-67; *see also Strate,* 520 U.S. at 459 (clarifying that a tribe's inherent authority does not extend "beyond what is necessary to protect tribal self-government or to control internal relations.") That is not to say, however, as Young does, that tribes have utterly no authority over nonmembers, even when those nonmembers trespass upon tribal lands. App. Br. at 11 (asserting that state courts have exclusive jurisdiction over a non-Indian's tort claims against tribal employees arising on tribal land).

Perhaps even more so than the tribal employer that regulated its employment relationship in *Rodriguez,* the Puyallup Tribe has taken official action to regulate the administration and scope of tort claims brought against it and its officials, employees and agents through

enactment of the Puyallup Tribal Tort Claims Act. The United States, the State of Washington, and numerous other sovereigns have enacted similar laws to administer and regulate tort claims brought against their officials, employees, and agents.

Exercise of state subject matter jurisdiction in this situation will further and directly infringe on the Puyallup Tribe's authority to preserve the peaceful enjoyment and public welfare on its own lands. It will directly infringe on the Tribe's self-governing authority to subject its employees to State jurisdiction and state-law standards when they were acting within the scope of their tribal authority on tribal trust land. It will directly infringe on the Tribe's self-governing authority and undermine its judicial system as well as its process and procedure for adjudication of tort claims for monetary damages. The Superior Court did not err by declining to exercise subject matter jurisdiction over virtually the same tort claims Young first brought, then abandoned, in the Puyallup Tribal Court under the PTTCA. Thus, the second *Montana* exception is satisfied here.

Young overreads the holding in *Nevada v. Hicks,* 533 U.S. 353 (2001), to support his argument that the State of Washington "has jurisdiction over the reservation, including tribal members and tribal lands, when state interests outside the reservation are implicated." App. Br. at 16. In *Hicks,* a tribal member plaintiff sued state law enforcement officers

under 42 U.S.C. § 1983 in tribal court based on their execution of state search warrants relating to off-reservation crimes. Such a suit implicated significant federal and state law enforcement interests simply not present here. Young's argument based on *Hicks* also does not fairly weigh the interests involved in this suit. App. Br. at 16-18. He asserts that the State's "interest in regulating the conduct of its peace officers, protecting the Constitutional rights of its citizens, and protecting its citizens from unfamiliar courts exceeds the tribe's nominal countervailing interest in self-government and economic self-sufficiency." App. Br. at 16 (emphasis added). He argues that the voluntary certification under RCW 43.101.157(1) of the three on-scene tribal police officers confers state subject matter over his suit. However, there is little State interest in monitoring officers who are not general Washington police officers. *See Eriksen,* 241 P.3d at 407. And, the myriad concerns regarding tribal courts adjudicating federal causes of action, which Young also adapts from *Hicks*, App. Br. at 18, apply far more strongly to non-Indian defendants challenging exercise of a tribal court's jurisdiction than to him, who invoked, then abandoned, his claim in Puyallup Tribal Court.

1. Young's Public Law 280 Argument, Raised for the First Time on Reconsideration, Does Not Establish Subject Matter Jurisdiction

Young argues that, because Jeffry Young exhibited symptoms of excited delirium and had a history of psychosis, the Superior Court had subject matter jurisdiction pursuant to RCW 37.12.010(4). App. Br. at 12-16; *see also* CP 59. Young raised this argument for the first time in reply in support of his motion for reconsideration, and the Superior Court correctly did not consider it. CR 59; *see also Wilcox v. Lexington Eye Institute,* 130 Wash. App. 234, 241, 142 P.3d 729 (2005).

RCW 37.12.010 states that the State of Washington "assume[s] criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with. . . Public Law 280."[14] The statute goes on to state that "such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation" "except for the following:. . . . [m]ental illness." RCW 37.12.010(4).

The plain language of both Pub. L. 280 and RCW 37.12.010(4) state that the State's assumption of jurisdiction extends only to individual Indians suffering from mental illness who reside on tribal lands and who

[14] Act of August 15, 1953, ch. 505, 67 Stat. 588-590 (codified as amended in 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, and 28 U.S.C. § 1360).

would otherwise be outside of the state's jurisdiction, not to sovereign tribal governments, their entities, or their employees. *See generally State v. Abrahamson,* 157 Wash. App. 672, 676-81, 238 P.3d 533 (Div. 1 2010) (discussion of history of Pub. L. 280 and RCW 37.12). The plain language of the statute does not confer state jurisdiction over a non-Indian's suit for monetary damages against tribal employees acting within the scope of their employment authority, regardless of the mental health of plaintiff's non-Indian decedent.

E. Because Young Fails to Establish a Deprivation of a Federal Constitutional Right and State Action, His Constitutional Tort Claims Do Not Survive Dismissal

The Superior Court dismissed Young's action in its entirety, including Young's claims brought under 42 U.S.C. § 1983. Those claims were properly dismissed, not because the tribal court does not have jurisdiction over them, *cf.* App. Br. at 19-20, but because the complaint fails to allege essential elements of a § 1983 action. For actions brought under § 1983, one essential element is the deprivation of a federal constitutional right, the other essential element is state action. *See, e.g., Sintra, Inc. v. City of Seattle,* 119 Wn.2d 1, 11, 829 P.2d 765 (1992). Young's complaint fails to establish both of these essential elements.[15]

[15] The complaint asserts separate claims of excessive force, violation of the federal constitution and violation of 42 U.S.C. § 1983. CP 5-6, 7.

1. Tribal Sovereigns Are Not Bound by the Federal Constitution, So the Complaint Did Not Establish a Deprivation of a Federal Constitutional Right

The first step in analyzing a claim under § 1983 is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. *See, e.g., Siegert v. Gilley,* 500 U.S. 226, 232 (1991) ("A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all," and courts should not "assume[e], without deciding, this preliminary issue.").

The United States Constitution constrains only the federal and state governments. "As separate sovereigns pre-existing the [United States] Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo,* 436 U.S. at 56; Thus, neither the fourth nor fifth amendments of the U.S. Constitution apply to tribes nor are they applied to tribes through operation of the fourteenth amendment. *Nevada v. Hicks,* 533 U.S. 353, 383 (2001) ("it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes."); *accord* App. Br. at 18 (quoting *Hicks*).

Individual rights are protected from tribal governmental action by the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1302. Congress did not generally abrogate the immunity of tribes to unconsented suit and instead limited enforcement of ICRA in federal court to criminal cases and only then through a writ of habeas corpus. 25 U.S.C. § 1303; *see also Santa Clara Pueblo,* 436 U.S. at 58-59; *Foxworthy,* 141 Wash. App. at 227 n.4, 169 P.3d at 56 n.4. In light of the interest of tribal self-government, the Supreme Court refused to imply a cause of action to enforce ICRA in the absence of clear direction from Congress abrogating tribes' immunity to suit. *Id.* at 72.

The plain language of § 1983 does not permit actions to be maintained for alleged deprivations of constitutional rights under color of tribal law. *Santa Clara Pueblo,* 436 U.S. at 55-58; *Monroe v. Pape*, 365 U.S. 167, 171 (1961); *Talton v. Mayes,* 163 U.S. 376, 381-82 (1896); *R.J. Williams Co. v. Fort Belknap Housing Authority,* 719 F.2d 979, 982 (9th Cir. 1983), *cert. denied,* 472 U.S. 1016 (1985). *Compare Bressi v. Ford,* 575 F.3d 891, 895-96 (9th Cir. 2009) (where tribal officers set up roadblock on state highway and conceded they were acting under color of state law pursuant to AZ POST certification when they arrested and cited non-Indian defendant under state law, § 1983 action may proceed); *Evans*

v. McKay, 869 F.2d 1341, 1348 (9th Cir. 1989) (where tribal officers acting under both tribal and city authority, § 1983 action may proceed).

"State action" for constitutional purposes depends on "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351 (1974) (holding that state regulation, even of heavily regulated utilities, is not "state action"). A person acts under color of state law when the person exercises power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic,* 313 U.S. 299, 326 (1941). The mere fact that an individual or private entity is subject to extensive regulation does not convert its action into that of the State for purposes of the fourteenth amendment. *Jackson,* 419 U.S. at 349. The State must be "so far insinuated into a position of interdependence with the [private party] that it was a joint participant in the enterprise." *Id.* at 357-58. Even detailed regulation and substantial funding for private actors is not sufficient to transform the private party's actions into state action. *Blum v. Yaretesky,* 457 U.S. 991, 1008, 1011 (1982) (finding of no state action where, despite heavy regulation and significant funding of nursing home, determinations "ultimately turn on medical judgments made by private

parties according to professional standards that are not determined by the State.")

The complaint broadly alleges that there was state action because the tribal police officers are "commissioned police officers pursuant to Washington's Peace Officer Statute." CP 7. Young later argued that the tribal police officers' attendance at Washington police academy classes was state action, *see, e.g.,* CP 51-55 (transcripts of class attendance by tribal Officers Scrivener, Dausch, and Fitzpatrick). Tribal police officers who undertake voluntary officer training and certification under RCW 43.101.157(1) are not general authority Washington peace officers. *Eriksen,* 241 P.3d at 407 (noting that RCW 10.92.020 provides a mechanism for tribal police to become "general authority Washington peace officers."). Thus, merely taking classes from the State of Washington police academy is not sufficient to transform tribal police officers who are exercising purely tribal authority on tribal lands into state actors. It certainly could not transform Isadore or Police Chief Duenas into state actors where no allegation or argument is made that they received any training or certification under RCW 43.101.157.

Moreover, individual defendants will not be liable for constitutional violations resulting from the alleged use of excessive force if their conduct did not cause the violation. By use of the terms "subjects

or causes to be subjected" § 1983 requires an "affirmative link" between the conduct directly causing a constitutional violation and the individual defendants. *See Daniels v. Williams,* 474 U.S. 327 (1986); *Rizzo v. Goode,* 423 U.S. 362, 370-71 (1976). The allegations that Isadore was "directly involved in" Jeffry Young's death, CP 3; that he told Young that he did not have authority to enter the Treatment Center, CP 4, that he called the tribal police officers when Young would not leave, *id.*, and that he gave a hand signal signifying to the officers that Young was mentally ill, *id.*, do not establish a nexus between Isadore and the alleged constitutional violations. Nor are these allegations sufficient to withstand a motion to dismiss. *Ivey v. Bd. of Regents,* 673 F.2d 266, 268 (9th Cir. 1982) (vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss). With respect to all defendants, and in particular Mr. Isadore, Young failed to establish the requisite elements of a constitutional tort action. Young's constitutional tort claims were properly dismissed.

F. Because Young Is Not a "Prevailing Party," He Is Not Entitled to An Award of Attorneys Fees Under § 1988

Young claims entitlement to attorney's fees. App. Br. at 25-27. But the plain language of 42 U.S.C. § 1988 requires a party to be a "prevailing party" to obtain attorneys' fees. "[A] plaintiff 'prevails' when

actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby,* 506 U.S. 103, 111-12 (1992). Young failed to establish the deprivation of a constitutional right, and he failed to establish state action. Young is not a "prevailing party" within the meaning of § 1988 and is not entitled to an award of attorneys fees. This request should be denied.

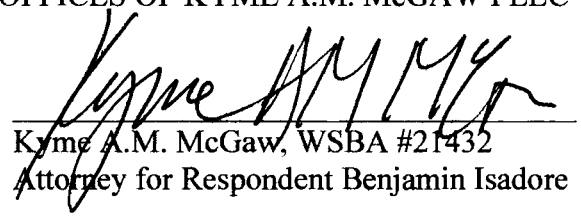
V. CONCLUSION

This Court has consistently applied controlling federal law and held that tribal employees and employees of tribal entities acting in the scope of their employment and authority are immune from suit by virtue of a tribe's sovereign immunity, regardless of where the incident giving rise to the claim occurs and regardless of where the claim is brought. Even if tribal sovereign immunity did not bar Young's suit, Washington state courts generally do not exercise subject matter jurisdiction over suits arising on tribal lands and brought against tribal employees acting in the scope of their employment and authority. No cause of action lies under § 1983 where a deprivation of a federal constitutional right is not established and state action is lacking, both of which were the case here. Even if the complaint alleged a viable § 1983 claim, it did not allege that Benjamin Isadore did anything to harm Jeffry Young. Consequently, the

Superior Court properly granted defendants' motions to dismiss and denied the motion for reconsideration. Its decisions should be affirmed. Young's request for attorney fees under 42 U.S.C. § 1988 should be denied.

Respectfully submitted this 1st day of December, 2010.

LAW OFFICES OF KYME A.M. McGAW PLLC

By: 

Kyme A.M. McGaw, WSBA #21432
Attorney for Respondent Benjamin Isadore

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the date below signed, the foregoing Brief of Respondent Benjamin R. Isadore was served upon each party listed below by transmitting a true and correct copy of the document in the manner indicated and with all costs of delivery prepaid:

Attorney for Appellant Chris Young
O. Yale Lewis III
Law Offices of O. Yale Lewis III
1511 Third Avenue, Suite 1001
Seattle, Washington 98101

****Via Messenger ****

Attorney for Respondents Duenas, Fitzpatrick, Dausch and Scrivner
Ann C. McCormick
Forsberg & Umlauf
901 Fifth Avenue, Suite 1400
Seattle, WA 98164-2050

****Via Messenger****

Dated this 1st day of December, 2010.

Kyme A.M. McGaw