No. 40859-7-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

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

Appellant,

v.

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

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

Early one evening in the spring of 2007, Dr. Jeffrey Young wandered onto the Puyallup Indian Reservation and asked for help. But instead of help, he got death.

By all accounts, Dr. Young was acting strangely that day. He told the security guard at the health clinic that he was a doctor – which was true. He had a Ph.D. in Psychology from the University of California at Berkeley. But he also told him that he was supposed to see patients at the clinic – which was untrue. Concerned by his behavior, the security guard called the tribal police.

The police arrived. During the ensuing conversation, Dr. Young asserted that both the security guard and the Residential Assistant were the Anti-Christ and asked the police officers to protect him. While Dr. Young's behavior was bizarre, it was also docile. Dr. Young complied with every request the officers made of him. When asked to sit on the curb, he did so. When asked to return after wandering off, he did so. Unarmed, obese, and with an enlarged heart, Dr. Young never hurt, or threatened to hurt anyone, or anything.

Nonetheless, the police officers decided to take him into custody. While one officer kicked his feet out from under him, another electrocuted

him with a Taser, eventually Tasering him at least three times. Two other officers, meanwhile, pinned him face down on the pavement, wrestled his arms out from under his chest, and handcuffed his arms behind his back. Dr. Young begged them to stop. He buried his hands under his chest so the officers couldn't gain access to his wrists. He tried to get away. Impervious to his cries, the officers decided to ankle-cuff him as well.

After binding his ankles, their handiwork complete, the officers sat on the curb, straightened out their uniforms, and caught their breath. Meanwhile, a fourth officer arrived and noticed that Dr. Young's lips were blue and he wasn't breathing. The officers started CPR and called the ambulance. It was no use. Dr. Young was pronounced dead about half an hour later.

Dr. Young's estate tried in vain to get justice through the Office of the Tribal Attorney and then through tribal court. Unfortunately, those *fora* were unavailing and non-responsive. Tribal court sat on the complaint and at least two of Dr. Young's motions for nine months, then finally dismissed the cause based on Dr. Young's own motion to dismiss. The state trial court was also unavailing, asserting that it lacked jurisdiction over the police officers, even though they are state-certified peace officers, non-members of the tribe, and committed serious violations of state law sounding in tort and federal law sounding in the Constitution.

The Estate of Dr. Young asks this court to reverse the trial court and remand this case for trial. The trial court has jurisdiction over the cause because it is a court of general jurisdiction and has general authority over the reservation except in certain limited circumstances not applicable here. Per case law and federal statute, Washington State Courts have exclusive civil jurisdiction over tort and federal law claims that arise from conduct between non-members within the exterior boundaries of the reservation. Here, both the plaintiff and the defendants are non-tribal members. The fact that the conduct arose on the Reservation is immaterial.

II. ASSIGNMENTS OF ERROR

1. Order Denying Plaintiff's Motion for Reconsideration, May 22, 2010.

   The trial court erred when it denied Plaintiff's motion for reconsideration. The trial court erred when it concluded that dismissal of the lawsuit for lack of subject jurisdiction was proper.

2. Order Granting Defendants' Duenas, Fitzpatrick, Dausch, Scrivner, and Isadore's Motion to Dismiss with Prejudice, May 28, 2010.

   The trial court erred when it granted Defendants' motion to dismiss. The trial court erred when it concluded that dismissal of the lawsuit for lack of subject jurisdiction was proper.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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2. **Whether the State of Washington Has Subject Matter Jurisdiction Over the Cause of Action Based on U.S. Supreme Court Case Law and Progeny.** (Assignments of Error # 1 & 2);

3. **Whether, in Addition to Case Law, the State of Washington Has Subject Matter Jurisdiction Over the Cause of Action Based on Federal Statutory Law.** (Assignments of Error # 1 & 2);

4. **Whether the State of Washington Has Subject Matter Jurisdiction Over the Cause of Action Because It Has a Strong Interest In Regulating the Conduct of Its Peace Officers, Protecting the Constitutional Rights of Its Citizens, and Protecting Its Citizens From Unfamiliar Courts.** (Assignments of Error # 1 & 2);

5. **Whether the State of Washington Has Subject Matter Jurisdiction Over the Cause of Action Because Tribal Courts Lack Jurisdiction Over Matters of Federal Law, Including, Specifically, Civil Rights Claims.** (Assignments of Error # 1 & 2);

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6. **Whether Congress Expressly Limited the Puyallup's Sovereign Immunity When It Ratified the Treaty of Medicine Creek in 1854.** (Assignments of Error # 1 & 2);

7. **Whether the Tribe's Sovereign Immunity Protects Its Individual Agents When the Agents Act Outside the Scope of Their Authority.** (Assignments of Error # 1 & 2);

8. **Whether the Tribe's Sovereign Immunity Extends to Individual Members of the Tribe.** (Assignments of Error # 1 & 2); and

9. **Whether this Court Should Award Attorney's Fees for the Cost of Bringing this Appeal.**

IV. STATEMENT OF THE FACTS

Narrative

Dr. Jeffrey Young wandered onto the parking lot / access road of the Puyallup Tribal Health Authority Clinic at 2209 East 32nd Street, Tacoma, Wash., in the evening of May 12, 2007, and began to act in a "bizarre and often apparent irrational manner." *CP 251, 252.* In conversations with Wade Iverson, the Residential Attendant at the clinic, and Benjamin Isadore, the clinic security guard, Dr. Young named each of them the anti-Christ and requested their assistance in protecting him from the other person. *Id.*

Based on these conversations, Mr. Isadore called tribal police. *CP 4.* The officers arrived in two separate cars. *CP 252.* Officer Scrivner arrived first. *Id.* Upon arrival, Mr. Isadore made a hand signal to Officer Scrivner indicating that Dr. Young was crazy. *CP 4.* Officer Dausch and Sergeant Fitzpatrick arrived next. *CP 252.* Officer Scrivner did not activate his dashboard video camera in his car because he did not view the

matter as a priority or emergency. *Id.* Footage from the surveillance video in front of the clinic shows that, after the officers arrived, Dr. Young attempted to run away from them, and the officers responded by walking after him and coaxing him back. *CP 252.*

After Dr. Young returned, the officers kicked his feet out from under him so he fell, face-down, on the pavement. CP 59. The officers then pig-piled, handcuffed, and finally ankle-cuffed him, leaving him face-down the entire time. *Id.* While the officers struggled with Dr. Young's limbs, Sergeant Fitzpatrick tasered him times. *Id.* By all accounts, Dr. Young did not fight back. *CP 4.* Rather, he put his arms underneath his chest in a defensive manner and tried to prevent the officers from grabbing them. *Id.*

After the officers immobilized Dr. Young, they stood up, dusted themselves off, and sat together on the curb. Officer Dausch called his wife. Meanwhile, Dr. Young stopped breathing. *CP 252.* Moments later, a fourth officer, Officer Tracy, arrived, and noticed that Dr. Young was not breathing and his lips were blue. *Id.* At that point, Officer Dausch said: "I can't believe I killed him with my bare hands." *Id.* Upon realizing that Dr. Young had stopped breathing, they rolled him onto his back, began CPR, and called the ambulance. *Id.*

An independent forensic pathologist concluded that Dr. Young died of hypoxia induced cardiac dysrhythmia. *CP 59.* His report further concludes that the officer's conduct – kicking Dr. Young onto the ground, leaving him face down, application of the Taser, pinning him against the ground with the weight of two officers, cuffing and shackling him – was the proximate cause of the hypoxia, which was the proximate cause of his death by cardiac dysrhythmia. *Id.* But for the officer's behavior, Dr. Young would not have died. *CP 60.*

Jurisdiction

Officers Scrivner and Dausch, and Sergeant Fitzgerald, are non-tribal members. They are also certified Washington State Tribal Peace Officers . *CP 51 – 55.* As such, they are subject to the same standards and training requirements as any other certified Peace Officer in the state. *RCW 43.101.157(2).* They are also subject to the authority of the Washington State Criminal Justice Training Commission, which is organized pursuant to state law. RCW 43.101 *et. seq.*

Chief Duenas is a tribal member and does not appear to be a certified tribal Peace Officer. It is unknown whether he has any particular training or competence in state law. Security Officer Isadore is a non-tribal member, but is a member of the Yakima Nation. *CP 207.* None of

the officers have a special commission law enforcement commission from the U.S. Bureau of Indian Affairs. *CP 66.*

V. STANDARD OF REVIEW

The appellate court reviews a motion to dismiss for lack of subject matter jurisdiction under CR 12(b)(1) *de novo*, because it is a question of law. *Kilb v. First Student Transportation, LLC*, ____Wn. App. ____, 236 P.3d 968 (Cause No. 39564-9-II, Aug. 3, 2010), *accord, International Longshore and Warehouse Union, Local 23 v. Port of Tacoma*, 154 Wn. App. 373, 375, 225 P.3d 433, 436 (Div. II, 2010). The existence of subject matter jurisdiction over a claim involving a party asserting tribal sovereign immunity is a question of law, which the court reviews *de novo*. *Smale v. Noretep*, 150 Wn. App. 476, 487, 208 P.3d 1180, 1181 (Div. I, 2009).

VI. ARGUMENT

Agency

1. **An Agent May Be Held Personally Liable to a Third Party for Damages Resulting from Actions He Took on Behalf of His Principal.**

An agent is responsible for his own actions, regardless of whether the principal is also responsible. Thus, a third party can elect to sue the agent, the principal, or both. *Cordova v. Holwenger and Ya-Ki-Ma*, 93 Wash. App. 955, 962, 971 P.2d 531, 535 (Div. III, 1999) ("Under

Washington law, the Cordovas could elect to sue both the tribal corporation and the employee, or, the employee alone."), *accord Restatement (Third) of Agency, American Law Institute* (2006) § 7.01. In a similar vein, an agent, when sued for his own tortious conduct, may not avail itself of the immunities of its principal, even if it was acting at the direction of its principal. *Aungst v. Roberts Construction Co., Inc.*, 95 Wn. 2d 439, 442, 625 P.2d 167 (1981).

Here, the defendants are personally liable for their conduct. Dr. Young has elected to sue them in Pierce County because that is where they reside. He has elected not to sue the tribe because the tribe is shielded from liability by sovereign immunity. While the tribe has sovereign immunity, the agents do not.

Jurisdiction

2. **The State of Washington Has Subject Matter Jurisdiction Over the Cause of Action Based on U.S. Supreme Court Case Law and Progeny.**

This court has inherent subject matter jurisdiction over the cause of action based on case law. Per federal common law, Indian tribes generally lack jurisdiction over non-members. The U.S. Supreme Court, in its most recent Indian law case, reiterated this well-settled principle of law when it held against tribal court jurisdiction over a non-member bank doing business within the exterior boundaries of the reservation.

> But tribes do not, as a general matter, possess authority over non-Indians who come within their borders. The inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. [citations omitted]. The tribes have, by virtue of their incorporation into the American republic, lost the right of governing persons within their limits except themselves.

Plains Commerce Band v. Long Family Land and Cattle Company, 544 U.S. 316, 128 S.Ct. 2709, 2719, 171 L.Ed. 2d 457 (2008).

The seminal U.S. Supreme Court case on tribal jurisdiction recognized two exceptions to this general rule: 1) a tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter into consensual relationships with the tribe or its members, and 2) a tribe may exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe. *Montana v. United States*, 450 U.S. 544, 565, 101 S.Ct. 1245, 1258, 67 L.Ed.2d 493 (1981).

The burden of proving one of the *Montana* exceptions is on the tribe. *Id.* The exceptions are limited and must be construed such that they do not swallow the rule or severely shrink it. *Id.* The consensual relationship exception only applies if the suit arises from the consensual relationship itself. *Phillip Morris v. King Mountain Tobacco*, 569 F.3d 932, 941 (9th Cir. 2009). The political integrity / economic security

exception only applies in extreme cases where the non-member's conduct imperils the very existence of the tribe. *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645, Fn. 12, 121 S.Ct. 1825, 149 L.Ed. 2d 889 (2001)

The status of the land, *e.g.* Indian trust land or non-Indian fee land, is not relevant to whether the Tribe has jurisdiction over a non-member. *Montana* applies to both Indian and non-Indian land. *Id.* at 936; *MacArthur v. San Juan County*, 497 F.3d 1057, 1069-1079 (10th Cir. 2007) (holding that general rule announced in *Montana* applies to Indian and non-Indian land alike). The only relevant characteristic for determining whether *Montana* applies in the first instance is the membership status of the individual or entity over which the tribe is asserting authority. *Id.*

Washington case law follows *Montana*. Washington courts have exclusive jurisdiction over a tort action between non-members arising from the non-member's conduct within the exterior boundaries of the reservation. *Cordova v. Holwenger and Ya-Ki-Ma*, 93 Wash.App. 955, 968, 971 P.2d 531, 538 (Div. III, 1999) ("we conclude that the *Montana* rule, rather than its exceptions, applies and that jurisdiction rests exclusively in the state court rather than the tribal court.").

Here, state court has jurisdiction over the cause of action because Dr. Young – the non-consenting party – is a non-member. In addition,

four of the five defendants are non-members. Finally, the *Montana* exceptions do not apply. The consensual relationship exception does not apply because the Dr. Young never had a consensual relationship with the tribe. The torts and the civil rights claims are not based on the consensual employment relationship between the officers and the tribe. Rather, the claims are based on the conduct between the officers and Dr. Young, who was a complete stranger to the Puyallup Tribe.

The political integrity, economic security, or health and welfare exception does not apply either. While a verdict against the individual officers may have a significant effect on their own personal health and welfare, it would not affect the tribe in any meaningful way. Neither the tribe's internal political process nor its treasury would be affected by a judgment adverse to the defendants. A judgment against the defendants would not be a judgment against the tribe.

3. **In Addition to Case Law, the State of Washington Has Subject Matter Jurisdiction Over the Cause of Action Based on Federal Statutory Law;**

Federal statutory law is consistent with federal common law and provides an independent basis for the court's subject matter jurisdiction over this cause of action. The federal statute, generally referred to as Public Law 280, authorized the various states to assume comprehensive criminal and civil jurisdiction over Indian reservations, including over

non-members, members, Indian trust lands, and activities on such lands. *See* Pub. L. No. 280, 67 Stat. 588 (1953), codified, as amended, at 18 USC § 1162, *accord, State v. Squally*, 132 Wn.2d 333, 338, 937 P.2d 1069, 1071 (1997). The only limitation on this grant of authority was on the states themselves. In order to assume comprehensive criminal and civil jurisdiction over the reservation, the state legislature was required to affirmatively assert such jurisdiction. *Id.*

Washington's legislature asserted such jurisdiction in 1957. *Laws of 1957*, ch. 240, § 1, later codified at RCW 37.12.021. However, jurisdiction was voluntary. The statute required Washington to assert jurisdiction only over those tribes that requested it. *Squally* at 338. Puyallup was not one of those tribes. However, in 1963, the legislature amended chapter 240 of the laws of 1957 to assert partial, non-consensual civil and criminal jurisdiction over all the remaining reservations in the state, which included the Puyallup Reservation.

The 1963 amendment remains in full force and effect today. RCW 37.12 *et seq*. It asserts non-consensual civil and criminal jurisdiction over all conduct and causes of action on the reservation, regardless of membership or land status, unless the conduct is 1) exclusively between tribal members, 2) on Indian trust land, and 3) does not implicate at least one of eight specified areas of law.

The assumption of the State's jurisdiction is obligatory and binding.

> The State of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian Reservation and held in trust by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:
>
> (1) Compulsory school attendance;
> (2) Public assistance;
> (3) Domestic relations;
> (4) Mental illness;
> (5) Juvenile delinquency
> (6) Adoption proceedings
> (7) Dependent children; and
> (8) Operation of motor vehicles upon the public streets, alleys, roads, and highways.

RCW 37.12.010. In sum, Washington assumed full Public Law 280 jurisdiction over all non-Indians within the exterior boundaries of the Reservation, regardless of land status, over all Indians on fee land within the exterior boundaries of the Reservation, and over Indians on trust land within the Reservation regarding eight different areas of law. *Cohen's Handbook of Federal Indian Law*, LexisNexis: 2005, § 6.04[3][a] Fn.308.

Washington's assertion of Public Law 280 jurisdiction over the Puyallup Reservation was recognized by the U.S. Supreme Court in 1977.

Puyallup Tribe v. Dept. of Game of Washington, 433 U.S. 165, 175, 97 S.Ct. 2616, 2622, 53 L.Ed. 2d 667, 676 (1977) (*Puyallup III*). ("Washington has acquired "Pub. L. 280" jurisdiction over the Puyallup Reservation, much of which coexists with the city of Tacoma."). The tribe conceded that Washington had jurisdiction over the reservation "for most purposes." The U.S. Supreme Court held that such jurisdiction included tribal fishing by tribal members, at least to the extent necessary to conserve the fishing resource.

> Although it is conceded that the State of Washington exercises civil and criminal jurisdiction within the reservation for most purposes, petitioner contends that it may not do so with respect to fishing. Again with particular reference to the facts of this case, we also reject this contention.

Id. at 174.

Here, Washington has general civil jurisdiction over the cause of action because the dispute is between non-members. Assuming, *arguendo*, that Dr. Young were somehow transformed into a tribal member by virtue of his presence on the reservation and that the officers were somehow transformed into members by virtue of their employment with the tribe, the tribe would still not have jurisdiction because the officer's conduct did not occur on trust land. Assuming further, *arguendo*, that Dr. Young and the officers were members and that they assaulted Dr.

Young on trust land, the tribe still wouldn't have jurisdiction because Dr. Young was mentally ill.

4. The State of Washington Has Subject Matter Jurisdiction Over the Cause of Action Because It Has a Strong Interest in Regulating the Conduct of Its Peace Officers and Protecting the Constitutional Rights of Its Citizens.

Washington has subject matter jurisdiction because its 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. The state has jurisdiction over the reservation, including tribal members and tribal lands, when state interests outside the reservation are implicated.

> When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. [citations omitted.] When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribal members on tribal land.

Nevada v. Hicks, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001).

Washington has a strong interest in regulating the conduct of peace officers certified by the State of Washington[1] and protecting its citizens

[1] A tribal police officer is anyone who is trained and certified by the Washington State Criminal Justice Training Commission, but then commissioned by a federally recognized Indian tribe. RCW 43.101.157.

from unreasonable search and seizure. U.S. CONST. Amend. IV. To determine whether the search and seizure was reasonable, courts balance the amount of force applied against the need for that force. *Bryan v. McPherson*, 608 F.3d 614, 620 (9th Cir. 2010). Due to the physiological effects, high levels of pain, and foreseeable risk of physical injury, a Taser is considered an intermediate or medium, though not insignificant, quantum of force. *Id.* at 622. To determine whether the use of force is justified, the courts consider the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest. *Id.*

Here, overwhelming and ultimately fatal force was applied, when absolutely none was needed. Dr. Young was agitated and speaking gibberish. While his behavior was bizarre, it was also non-threatening, either verbally or physically. Neither the officers not anyone else, including Dr. Young, was in immediate danger. Dr. Young was unarmed and tried to leave at least twice after the officers arrived. He did not commit a crime and was not charged with one. The officer'use of force was excessive within the meaning of the Fourth Amendment.

Washington has a similar interest in protecting its citizens from unfamiliar courts. Unlike state courts, tribal courts do not necessarily

enforce Constitutional safeguards. The tribes did not attend the Constitutional Convention in Philadelphia in 1787. The Bill of Rights applies, at best, only as an analogy to the reservation.

> 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 [citations omitted]. Although the Indian Civil Rights Act of 1968 (ICRA) makes a handful of analogous safeguards enforceable in tribal court, 25 USC § 1302, the guarantees are not identical [citations omitted.] and there is a definite trend by tribal courts toward the view that they have leeway in interpreting the ICRA's due process and equal protection clauses and need not follow the U.S. Supreme Court precedents jot-for-jot. [citations omitted.]

Nevada v. Hicks at 2323. Tribal courts differ from other American courts (and often from one another) in their structure, substantive law, and independence of their judges. *Id.* Tribal law is still frequently unwritten, and is handed down orally from one generation to another. *Id.* There is no effective review mechanism to police tribal court's decisions on matters of non-tribal law, since tribal court judgments can be neither removed nor appealed to state or federal courts. *Id.*

5. **Washington Has Subject Matter Jurisdiction Over the Cause of Action Because Tribal Courts Lack Jurisdiction Over Matters of Federal Law, Including, Specifically, Civil Rights Claims.**

This court has subject matter jurisdiction over the civil rights claims because such claims may not be heard in tribal court. The U.S. Supreme Court has specifically held that tribal courts are not courts of general jurisdiction and do not have authority to hear matters of federal law, including actions under § 1983.

> [The] historical and constitutional assumption of concurrent state-court jurisdiction over federal law cases is completely missing with respect to tribal courts. Respondent's contention that tribal courts are courts of general jurisdiction is also quite wrong. ... [T]ribal courts cannot entertain § 1983 suits.

Nevada v. Hicks at 2315, *followed by Philip Morris v. King Mountain Tobacco*, 569 F.3d 932, 937 (9th Cir. 2009) ("Tribal courts are not courts of general jurisdiction and a mere failure to affirmatively preclude tribal jurisdiction in a [federal] statute does not amount to a congressional expansion of tribal jurisdiction" and holding that Yakama tribal court lacks jurisdiction over federal trademark claims).

Here, because tribal court lacks jurisdiction over the § 1983 claims, Washington has original jurisdiction. The superior courts of Washington have original jurisdiction in all cases and proceedings in which exclusive jurisdiction has not been vested by law in some other court. WASH. CONST. art. IV, § 6. Dr. Young's

primary claim is based on § 1983. Tribal court does not have jurisdiction to hear it. Accordingly, jurisdiction lies in State Court.

Sovereign Immunity

6. **Congress Expressly Limited the Puyallups' Sovereign Immunity When It Ratified the Treaty of Medicine Creek in 1854.**

The Treaty of Medicine Creek, which the Puyallup Tribe's predecessors-in-interest negotiated with the United States in 1854, constitutes an express, albeit limited, Congressional abrogation of the Puyallups' sovereign immunity. The Treaty of Medicine Creek provides that the Puyallups shall not "shelter or conceal offenders against the laws of the United States, but deliver them up to the authorities for trial." *Treaty of Medicine Creek*, Art. 8, 10 *Stat.* 1132 (Dec. 26, 1854), 2 *Kappler* 663 (1904).

Here, the language is unmistakably clear. The last sentence of Article 8 specifically enjoins the Puyallup tribe from sheltering or concealing individuals who have offended the laws of the United States. Both the federal civil rights act, 42 *USC* 1983 *et seq.*, and the Fourth Amendment are laws of the United States. Both laws were violated. Therefore, the police officers have offended the laws of the United States and must be delivered up to the authorities for trial. The authority in this case is Judge Serko, Pierce County Superior Court.

The U.S. Supreme court has already determined that the police powers of this state are sufficient to enforce the treaty, despite the Tribe's sovereign immunity. *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392, 398, 88 S.Ct. 1725, 1728, 20 L.Ed. 2d 689, 693, (1968) ("Puyallup I"). Interpreting Article 3 of the Treaty, *Puyallup I* held that the police powers of the state were sufficient to protect the citizens' rights to fish in common with the Indians and to conserve the resource.

> [W]e see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. The right to fish "at all usual and accustomed' places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States [citations omitted]. But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

Id. at 398. Here, since the police power is sufficient to enforce Article 3 of the treaty, it is also sufficient to enforce Article 8. While the Puyallup tribe itself can assert sovereign immunity and escape liability, its individual police officers may not.

7. The Tribe's Sovereign Immunity Does Not Protect Its Individual Agents When the Agents Act Outside the Scope of Their Authority.

The Puyallups' tribal immunity does not shield individual non-members from state court jurisdiction. The Puyallup Indian Tribe, like any other federally recognized Indian tribe, enjoys tribal immunity from suit absent 1) explicit Congressional abrogation, or 2) tribal consent by authorized tribal entity. This immunity extends to its agents and employees when working in their official capacity and within the scope of their authority.

Conversely, however, it does not extend to tribal officials when acting in their individual capacity or outside the scope of their authority.

> An Indian tribe's sovereign immunity does not extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him. [citations omitted]. Thus, when a 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."

Burrell v. Armiljo, 456 F.3d 1159 (10th Cir. 2006). The courts have consistently held that tribal sovereign immunity does not extend to an individual tribal agent when that agent acted outside the scope of his authority. *Decl. of Counsel Re: Treaty of Medicine Creek, PL 280, and Caselaw.*

The 9th Circuit has already determined that tribal sovereign immunity does not protect individual tribal police officers from a suit based on § 1983, if the officers were acting under the color of state law. *Bressi v. Ford*, 575 F.3d 891 (9th Cir. 2009). In *Bressi*, tribal police from the To-hono O'odham Reservation Police Department in California set up a roadblock on a highway running through the reservation. The officers were authorized to enforce tribal law against tribal members based on retained tribal sovereignty not abrogated by federal law. The officers were authorized to enforce state law against non-tribal members because they were certified Arizona Peace Officers. *Id.* at 894.

The officers detained Bressi at the roadblock and eventually cited him for violation of Arizona law. Bressi sued the officers under § 1983 and other sources of law. The court held that the officers were acting under the color of state law when they continued to detain Bressi after they determined that he was not a tribal member. *Id.* at 897. Such detention was subject to Constitutional safeguards. *Id.* If the officers failed to follow such safeguards, they were subject to § 1983. *Id.*

Likewise, in *Evans v. McKay*, the court determined that tribal officers and agents, acting under the color of state law, were subject to § 1983. *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989). In *Evans*, non-Indian plaintiffs brought a civil rights action against tribal agents and non-

tribal agents for a warrantless seizure of assets and detention of their person. The court held that the individual officers were subject to §1983. *Id.* at 1347.

Here, the facts are similar to *Bressi* and *McKay*. A non-tribal member, Dr. Young, alleges that the individual police officers violated his civil rights. The officers are sued in their individual capacity and in their official capacity to the extent that they acted outside the scope of their authority. In *Bressi*, the non-member alleged that the officers exceeded their authority when they detained him for four hours without probable cause. In *Evans*, the non-member alleged that the officers violated his Constitutional rights when they seized some of his personal property without a warrant and also detained him. Here, the non-member alleged that the officers violated his Constitutional rights when they seized, bound, and killed him.

8. **The Tribe's Sovereign Immunity Does Not Extend to Individual Members of the Tribe.**

While a tribe's sovereign immunity protects the tribe from suit, it does *not* protect its individual members from suit. *U.S. v. Washington*, 909 F. Supp. 787, 793 (1995) (Overruled on other grounds) ("Tribes cannot be sued without their unequivocal consent [citations omitted]. However, individual tribal members are not protected by tribal sovereign

immunity."); *Accord, Puyallup Tribe v. Department of Game of Washington*, 433 U.S. 165, 171, 97 S.Ct. 2616, 53 L.Ed. 2d 667, 673 (1977) (Puyallup III) ("Whether or not the Tribe itself may be sued in state court without its consent or that of Congress, a suit to enjoin violation of state law by individual tribal members is permissible. The doctrine of sovereign immunity ... does not immunize the individual members.").

Here, the only tribal member is Chief Duenas. He is not entitled to sovereign immunity based on his status as a tribal member.

9. **This Court Should Award Attorney's Fees for the Cost of Bringing this Appeal.**

This court should award attorney's fees based on the fee-shifting provision of the U.S. Civil Rights Act. This court is authorized to award fees on appeal if applicable law grants reasonable attorney's fees or expenses. *RAP 18.1(a).* Here, the applicable law provides that in any action or proceeding to enforce a provision of 42 USC 1981 – 42 USC 1986, the court, in its discretion, may allow the prevailing party a reasonable attorney's fees as part of its costs. *42 USC 1988(a).* Expert witness fees may be included as part of the attorney's fees. *42 USC 1988(b).*

This court should exercise its discretion to award attorney's fees because this is a case of first impression about a matter of considerable

public importance. As tribes continue to entice more and more non-members onto their reservations to gamble at their casinos, more and more plaintiffs like Dr. Young are going to get injured and sometimes killed. It is imperative that such plaintiffs have a rational, predictable, transparent, and Constitutional method of obtaining justice. An award of fees, and publication of an opinion reversing the trial court, would send a message to tribal police officers that they are not above the law and they will be held accountable.

Any fee award should be based on the lodestar method. To determine the lodestar, the court first determines the total number of hours reasonably expended on the case and then multiples that by a reasonable hourly rate of compensation. *Morgan v. Kingen*, 166 Wn.2d 526, 539, 210 P.3d 995, 1000 (2009). The lodestar figure is then adjusted by a contingency adjustment. *Id.* The contingency adjustment is designed to compensate attorneys who take cases with a high-risk of zero recovery. *Id.* It is based on the contingent nature of success and the quality of work performed. *Id.*

Here, the hourly rate should be $250.00, which is about average in King and Pierce County. The contingency adjustment should be at least 2 because the risk of zero recovery is high. If this court embraces the defendant's expansive view of sovereign immunity, then no recovery will

be possible. In the alternative, even if the court holds that the defendants are not cloaked with the tribe's sovereign immunity and Dr. Young ultimately gets a judgment, whether the defendants would have sufficient assets to satisfy it remains unknown. In addition, it is unknown whether the Tribe will cooperate in seizing the officer's assets, garnishing their wages, and otherwise enforcing the judgment.

VII. CONCLUSION

This court should reverse the lower court and remand for trial. Washington has subject matter jurisdiction over the cause pursuant to federal common law and Public Law 280. Per federal common law, Indian tribes lack jurisdiction over non-members unless the non-member 1) has a consensual relationship with the tribe, or 2) imperils the political integrity, economic security, or health and welfare of the tribe. These exceptions are to be construed narrowly.

Here, Dr. Young and, indeed, four of the five defendants, are non-members. The exceptions do not apply. In addition, per Public Law 280, this state has partial, non-consensual jurisdiction over the reservation. Such jurisdiction includes jurisdiction over non-members regardless of land status.

Sovereign immunity is no defense to the state's jurisdiction because, per the Treaty of Medicine Creek, the tribe may not shelter and

conceal offenders against the laws of the United States. Rather, the tribe must deliver them up to the authorities for trial. In addition, the tribe is not a defendant. The defendants are the tribe's individual agents. These agents acted outside the scope of their authority when they used excessive force and killed Dr. Young. They cannot hide behind their employer's sovereign immunity.

This court has a duty and an opportunity to act on behalf of Dr. Young and every other non-member who gets injured on the Reservation. When tribal police officers interact with non-members, their conduct must be within the boundaries of the Constitution and the laws of the United States. Tribal police officers should not be allowed to kill someone, even if the killing was not intentional, and get away with it. They must be held accountable. The trial court's Order Denying Plaintiff's Motion for Reconsideration should be reversed and the case should be remanded for trial.

Respectfully submitted, this 1st day of NOVEMBER, 2010

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CERTIFICATION OF SERVICE

I CERTIFY that I served the foregoing document on the following parties at the following addresses by e-mail (PDF) and hand delivery on November 1, 2010:

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