

The Honorable Ronald B. Leighton
Hearing Date: September 13, 2013

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

SHERRI BLACK, individually and as Personal
Representative for the Estate of Thomas
Anthony Black,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, UNITED
STATES DEPARTMENT OF INTERIOR,
BUREAU OF INDIAN AFFAIRS,
SUQUAMISH INDIAN TRIBE, SUQUAMISH
TRIBAL POLICE, PORT GAMBLE
S'KLALLAM INDIAN TRIBE, PORT
GAMBLE S'KLALLAM TRIBAL POLICE,
GREG GRAVES AND DOES 1-25, agents of
the Bureau of Indian Affairs,

Defendants.

No. C13-5415 RBL

OPPOSITION OF DEFENDANTS PORT
GAMBLE S'KLALLAM INDIAN TRIBE,
PUBLIC SAFETY DEPARTMENT AND
GRAVES TO UNITED STATES' MOTION
TO DISMISS

**NOTED FOR CONSIDERATION:
SEPTEMBER 13, 2013**

I. INTRODUCTION

The United States' Motion to Dismiss should be denied. This wrongful death lawsuit involves claims of both intentional tort and of negligence against the Port Gamble S'Klallam

DEFENDANTS' PORT GAMBLE S'KLALLAM INDIAN TRIBE, PORT
GAMBLE S'KLALLAM TRIBAL POLICE AND GREG GRAVES' OPPOSITION
TO UNITED STATES' MOTION TO DISMISS – PAGE 1
CAUSE NO. C13-5415 RBL

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1 (“Port Gamble”) and Suquamish Indian Tribes, their police departments, and tribal police
 2 officers, including individually named defendant Port Gamble detective Greg Graves
 3 (“Graves”). *See* Dkt. No. 1, pgs. 3, 10, 11. It is undisputed that the Port Gamble Tribe had a
 4 638 contract with the Department of the Interior of the United States of America to fund its
 5 tribal police department, that Graves was employed by the Port Gamble Tribe, and that he was
 6 acting in the course and scope of his employment and authority for the Port Gamble Police
 7 Department pursuant to this Public Law 93-638 contract. *See* Dkt. No. 14, pg. 3; *See also*
 8 Dkt. No. 12, pg. 4.

9 The Certification of U.S. attorney Jenny Durkan filed with the USA Notice of
 10 Substitution for defendant Greg Graves on the “common law tort claims” provides in
 11 pertinent part:

12 “...defendant Greg Graves, Detective, Port Gamble Police Department, was an
 13 employee of the Port Gamble S’Klallam Indian Tribe, employed in a position
 14 authorized and funded pursuant to a contract between the Port Gamble
 15 S’Klallam Indian Tribe and the Secretary of the Interior under the Indian Self-
 Determination and Education Assistance Act, Public Law 93-638, and acting
 within the scope of his office or employment at all times and in all respects
 relevant to the common law tort allegations in the Complaint.”

16 Durkan Certification: *See* Dkt. No. 12, Pg.3.

17 In addition to intentional tort claims for assault and battery, negligence claims are also
 18 alleged against defendants, including for failure to provide medical attention to the injured
 19 Thomas Black after the shooting incident¹. The “intentional tort exception” to the FTCA and
 20

21 ¹ *See* Dkt. No. 1, para. 3.7, pg 4; Dkt. No. 1: para. 9.1-9.9, page 11; Dkt. No. 1: para. 8.3 : “Fifth Cause
 22 of action: Negligence.” “Defendant Graves in his individual or official capacity, and other yet
 23 unnamed and unknown individuals, breached their duties by failing to perform their duties.
 Defendants failed to render medical assistance to Thomas Anthony Black leaving him to bleed to
 death.”

the “exception to the exception” do not apply to the liability of the USA for plaintiff’s claims of negligence for the alleged failure of the tribal officers to get medical attention for Thomas Black. Whereas the Federal Tort Claims Act (“FTCA”) covers claims of negligence involving deemed federal employees such as defendant Graves and the “intentional tort exception” to the FTCA is not applicable to the negligence claims alleged in this matter, including for the alleged failure to render medical assistance, the motion to dismiss should be denied as to all common law tort claims for negligence.

In the alternative, defendants seek a finding that the tribal police officers were acting under color of tribal law, not state or federal law, precluding a claim or liability against any tribal defendant under 42 USC §1983.

II. FACTS

This lawsuit arises out of the attempted service of a tribal arrest warrant issued by the Port Gamble S’Kallam Tribal Court by Port Gamble tribal officers, including Greg Graves. The subject of the arrest warrant was Port Gamble tribal member Stacy Calihoo (“Callihoo”). Declaration of Port Gamble Deputy Chief Larry Becker: Exh. A: Arrest Warrant. *See also* Dkt. No. 17, pg. 2.

These events took place on the Suquamish Indian Reservation. The Port Gamble tribal officers were present to serve the tribal arrest warrant with the permission, cooperation and assistance of the Suquamish Tribe’s Police Department and its tribal police officers. *See* No. Dkt.19; Dkt. No. 20. Deputy police officers from non-party Kitsap County Sheriff’s Office (“KCSO”) were also present during these events. *See* Dkt. No. 1, pg. 4. The Port Gamble S’Kallam Tribe does not have any formal, written cross-deputization or inter-

1 governmental agreements with any state or local jurisdiction. *See* Decl. Deputy Chief Larry
2 Becker.

3 In response to plaintiff's decedent Thomas Black ("Black") reaching for a revolver,
4 and in accord with his job duties and training as a tribal police officer for the Port Gamble
5 S'Kallam Tribe, detective Greg Graves shot Black in the reasonable belief that Black was
6 going to shoot the officers. Black was not fatally wounded by the gunshots. *See* Dkt. No.1,
7 pg. 4. Black died because convicted felon Stacy Callihoo, a non-party to this lawsuit, refused
8 to surrender, thereby preventing anyone, including defendant Graves, from providing
9 immediate life-saving medical assistance to Black. *See* Dkt. No. 1, pg. 5.

10 III. ARGUMENT

11 A. THE FTCA INTENTIONAL TORT EXCEPTION DOES NOT APPLY TO ALL 12 CLAIMS ALLEGED BY PLAINTIFF.

13 The premise of this motion is that all claims alleged by plaintiff against the
14 defendants, including Detective Graves, are for intentional tort and therefore, the intentional
15 tort exception applies. However, plaintiff's complaint also includes claims of negligence
16 arising out of the alleged conduct of the tribal police officers, including for the alleged
17 negligent failure to get prompt medical attention to plaintiff's decedent Thomas Black after he
18 was wounded. *See* Dkt. No. 1.

19 Defendants contend that the failure of violent offender Stacy Callihoo, the subject of
20 the arrest warrant, to surrender after Black was wounded is the superseding, intervening
21 proximate cause of Black's death. *See* Dkt. No. 20, pg. 15. At a minimum, at this early
22 juncture in the proceedings, there are questions of fact that must be flushed out in discovery
23 regarding the ability of the tribal officers to get lifesaving medical treatment to Thomas Black

1 and the effect of this treatment. There is no allegation (or evidence) that the tribal officers
2 intentionally deprived Black of needed medical assistance so that he would not survive his
3 wounds. See Dkt. No. 1, pgs. 5, 10.

4 In Locke v. United States of America, 215 F. Supp. 1033 (2002), a tribal police
5 dispatcher brought claims under the FTCA against the USA arising out of the conduct of a
6 tribal police officer who placed an air gun at her head and pulled the trigger. She alleged
7 claims for assault and battery and intentional and negligent infliction of emotional distress.
8 The court dismissed the claims for assault and battery and intentional infliction against the
9 USA based upon the FTCA's "intentional tort exception." 28 USCA Section 2680 (h). The
10 court agreed that the "exception to the exception" for law enforcement officers did not apply
11 because the tribal officer was never issued a special law enforcement commission (SLEC) and
12 was not authorized to execute a search, seize evidence or make an arrest for violations of
13 federal law. The court also dismissed the negligent infliction of emotional distress claim
14 because it was "nothing more than a restatement or 'dressing up' of a claim grounded or
15 founded on assault and battery or both." Locke v. United States of America, 215 F. Supp.
16 1033 at 1041 (2002).

17 In contrast, in the case at hand, plaintiff alleged that medical care was not provided to
18 Thomas Black who then died from "gunshot wounds." This alleged negligent conduct in
19 failing to provide medical aid occurred after the shooting. It is separate and apart from the
20 original alleged assault or intentional act that created the necessity for medical care for
21 Thomas Black. This negligence claim raises issues as to duty and breach of duty which are
22 separate from the reasonable use of force by a police officer in imminent danger.
23

1 B. ALTERNATIVELY, DEFENDANTS REQUEST A FINDING THAT THE
 2 TRIBAL OFFICERS, INCLUDING GRAVES, WERE ACTING UNDER
 3 COLOR OF TRIBAL LAW, NOT STATE OR FEDERAL LAW, PRECLUDING
 4 ANY CLAIM OR CAUSE OF ACTION AGAINST THESE TRIBAL
 5 DEFENDANTS UNDER 42 USC §1983.

6 The underlying factual premise of the USA's motion to dismiss is that, while serving
 7 the tribal arrest warrant issued by the Port Gamble S'Klallam Tribal Court on a tribal member
 8 on the Suquamish Indian Reservation, the Port Gamble tribal police officers were not certified
 9 by the BIA to enforce federal law because they did not have the requisite SLEC certification.
 10 At the time of these events, the Port Gamble S'Klallam Tribe and its Public Safety
 11 Department (Police Department) did not have any formal written inter-governmental, cross-
 12 deputization compacts or agreements with any other Tribes or state or local government,
 13 including Kitsap County, regarding its law enforcement activities. Therefore, if the USA's
 14 motion to dismiss is granted, this court is requested to make a finding that the Port Gamble
 15 S'Klallam tribal police officers and the Suquamish tribal police officers were acting as tribal
 16 police officers under color of tribal law, and not under color of state law or federal law, at
 17 the time of the events which are the subject of this lawsuit.

18 IV. CONCLUSION

19 USA's motion to dismiss should be denied. Alternatively, the court should find that
 20 the tribal police officers, including Port Gamble police Detective Graves, acted under color of
 21 tribal law and not state or federal law, thus precluding any claim or liability under 42 USC
 22 §1983 against any of the tribal defendants.
 23

1 DATED this 9th day of September, 2013.

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3
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13 S'Klallam Public Safety Department and
14 Greg Graves
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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

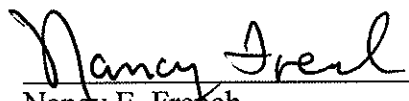
On the date given below I caused to be served the foregoing DEFENDANTS' PORT GAMBLE S'KLALLAM INDIAN TRIBE, PORT GAMBLE S'KLALLAM TRIBAL POLICE AND GREG GRAVES' OPPOSITION TO UNITED STATES' MOTION TO DISMISS on the following individuals in the manner indicated:

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SIGNED this 9th day of September, 2013, at Seattle, Washington.


Nancy E. French