UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CURTIS WILSON, an individual, Plaintiff, vs. UNITED STATES OF AMERICA, JOHN OR JANE DOE, Director of the Department of Licensing, a subdivision of the State of Washington, in his/her official capacity and the STATE OF WASHINGTON and HORTON'S TOWING, a Washington Corporation, Defendants.	Case No: 2:15-cv-00629-JCC MEMORANDUM IN OPPOSITION TO CROSS MOTION OF THE UNITED STATES FOR SUMMARY JUDGMENT AND/OR TO DISMISS

THIS MEMORANDUM is submitted in opposition to the cross motion of the United States of America for summary judgment and/or to dismiss.

The central purpose of plaintiff's lawsuit is to obtain any declaration or determination recognizing that the Lummi Nation Police Officer Brandon Gates, the now federalized employee herein, had no authority to seize his 1999 Ram Pickup in Bellingham based upon presentation of a Notice of Seizure signed by him acting, at that time, as an employee of the Lummi Nation Police Department. On that question, while

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Miners Electric was reversed by the 10th Circuit at 505 F.3d 1007 on Indian sovereignty grounds, the legal analysis of the United States District Judge H. Dale Cook in Miners Electric on whether tribal courts have subject matter jurisdiction to forfeit non Native American's automobile for violation of tribal drug forfeiture laws remains sound. Plaintiff embraces and adopts its reasoning.

1. The United States correctly points out that plaintiff has not filed a claim which is consistent with his legal argument to date, that he is entitled to sue Gates in his individual capacity as held in Pistol v. Garcia 791 F.3d 1104 (9th Cir. 2015) and Maxwell v. San Diego County, 697 F.3d 941 (9th Cir. 2012). Wilson maintains his argument that Gates acted so far outside of his arguable scope of authority by illegally seizing Wilson's truck off reservation in Bellingham by service of the Lummi Court process to qualify as acting within the scope of employment under Washington State law. Plaintiff wishes to challenge this adjudication. As a point of fact, at the time of critical juncture when Gates obtained physical possession of the 1999 Ram Pickup, he was acting as a Lummi employee and executing Lummi law, not a federal employee.

2. The government has interpreted the exception in 28 USC 2860 © to apply only to forfeitures accomplished pursuant to federal law, a circumstance not applicable here or in the many, many cases where tribal courts have adjudicated forfeitures of automobiles owned by non Native Americans pursuant to tribal law. The logic of the government's argument is that the entire class of non Indian persons' whose cars were confiscated and sold, even if unlawful, have no recourse. Congress intended in passing the escape value

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to total immunity under 28 USC 2680 to have it apply only to federal forfeiture law, not tribal law; therefore tribal police officers acting illegally under their tribal forfeiture law are immune under 28 USC 2860 © (1).

I suspect Congress never envisioned a tribal officer enforcing tribal law to be executing the tribal ordinance off reservation against any non Native Americans.

The actions of the United States in certifying any or all of the tribal officers involved in all of these forfeitures as federal employees would shield the tribe and its officers even when acting in their individual capacities from liability, thus eviscerating RCW 10.92 and its relationships with the Swinomish police officers. [1] The United States has not yet declared the Swinomish Tribal officer involved in the seizure of Ms. Pierson's truck a federal employee.

The United States assertion of immunity under 28 USC 2680 © aligns the United States to the position taken by the Muscogee Tribe in the 10th Circuit where the Muscogee Tribe was able to keep the federal court from addressing the illegality of

[1] In the companion case before Judge Coughenour, another person, Susan Pierson, also a non Native American, had her truck seized for forfeiture on January 23, 2015 by the Swinomish Nation and she filed a lawsuit identical to this instant case in Pierson v. Director of the Department of Licensing, Skagit County Cause No. 15-2-00461-4. Pierson's has been removed to the United States District Court in Seattle and has been assigned Cause No. 2:15-cv-00731-JCC. The case presented identical issues except the seizure was accomplished by Swinomish tribal police officers who have been certified as state law enforcement officers under RCW 10.92 with insurance purchased and available to pay compensation for any torts committed by said police officers acting pursuant to their authority as Washington state police officers. Other non Native Americans whose automobiles have been confiscated by the Swinomish Nation for violation of its drug forfeiture law who have sued in Washington State courts include Candee Washington, and all other persons similarly situated v. Director of Department of Licensing, Washington Supreme Court No. 92084-2, and Scott v. John/Jane Doe, Director of the Department of Licensing, Washington Supreme Court Cause No. 92458-9.

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Muscogee Tribe's actions. Here, there is no argument by any of the defendants addressing the legal scholarship United States District Judge H. Dale because the law is clear that Indian Tribes are illegally seizing cars owned by non Indians and avoiding any legal determination of the issue by the assertion of immunity. Here, the United States asserts a federal statute, 28 USC 2680 ©, to achieve this result, just as the Muscogee Tribe asserted its immunity to vacate the judgment of the United States District Judge H. Dale in Miners Electric v. Muscogee (Creek) Nation 505 F3d (2007).

The argument of the government, if accepted, would encourage the government to intervene in any suits against tribal police officers involved in the seizure and forfeiture of automobiles owned by non tribal members for violation of the tribal forfeiture law and declare those tribal officers, federal employees, and have the United States substituted in per FTCA. Such action would abolish any liability against all tribal officers who participated in past Indian forfeitures. In addition to protecting the tribal police officer from liability, the designation of the tribal officer as a federal employee also has the collateral consequence of extinguishing the plaintiff's otherwise viable option of pursuing suit against the tribal officer in his indivual capacity and thus obtaining a recovery from the underlying insurance. This is the message of the Pistol v. Garcia 791 F.3d 1104 (9th Cir. 2015) and Maxwell v. San Diego County, 697 F.3d 941 (9th Cir. 2012) decisions.

A total federal immunity for tribal officers who illegally seize and forfeit property of Non Native Americans under tribal law, when but for the imposition of a FTCA

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defense, there would be a recovery remedy, supports Wilson's contention that Gates is not a federal officer acting within the scope of his employment.

The second reason for immunity asserted, is the failure of Wilson to be able to show "the interest of the claimant was not remitted or mitigated." See Unites States Cross Motion Memorandum, page 4, lines 15, 16. While it is true the Lummi Nation returned his truck to him, Wilson was denied use of the truck for over five months and needed to pay $300 for truck repair upon its return to stop a leak; see declaration of Curtis Wilson.

2. The service of the Lummi Notice of Seizure upon Horton's lacked authority to confer jurisdictional over the property or the owner of the property. The Lummi Tribal Notice of Seizure was not a court order or valid court process which excuses Horton's release of Wilson's Pick Up to the Lummi Tribal police officer Gates. It was a Notice of Seizure signed by a Lummi Policeman and executed against a known non Indian off the Lummi Reservation. Under State v. Eriksen, 172 Wn2d 506 (2011), the Lummi police have no authority or jurisdiction off reservation inside the State of Washington.

Under Washington law, specifically, CR 82.5, Indian court orders have no authority in Washington absent compliance with the court rule. CR 82.5(c) provides as follows: :

> (c) Enforcement of Indian Tribal Court Orders, Judgments or Decrees. The superior courts of the State of Washington shall recognize, implement and enforce the orders, judgments and decrees of Indian tribal courts in matters in which either the exclusive or concurrent jurisdiction has been granted or reserved to an Indian tribal court of a federally recognized tribe under the Laws of the United States, unless the superior court finds the tribal court that rendered the order, judgment or decree (1) lacked jurisdiction over a

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> party or the subject matter, (2) denied due process as provided by the Indian Civil Rights Act of 1968, or (3) does not reciprocally provide for recognition and implementation of orders, judgments and decrees of the superior courts of the State of Washington.

This rule dictates that a superior court will not enforce a tribal forfeiture order where there is a lack of subject matter jurisdiction. But here we have no facially valid court order because (1) Indian court orders have no effect in the State of Washington absent compliance with CR 82.5. Because an Indian Nation is not a state, its judgments are not entitled to full faith and credit; and (2) the Lummi Nation Notice of Seizure signed by Brandon Gates is not a court order. Rather it is the signature of a tribal police officer on a seizure form. Washington State Police Officers seizing cars when they are found to be used in violation of RCW 69.50.505 use similar seizure forms.

The United States argues in its brief at page 6, lines 8-11 as follows, "Precisely because Gates relied on a facially-valid court order he acted with lawful justification" in taking possession of the vehicle. The order of seizure provided Plaintiff with his remedy, Plaintiff availed himself of that remedy. He entered an appearance in the Lummi Tribal Court, and there he was able to reclaim possession of the truck." The case cited, Judkins v. Sadler-MacNeil 61 Wn2d 1, 3 (1962), for the proposition, which requires "a showing that the converted chattel chattel be seized without lawful justification, United States Cross Motion Memorandum, page 6 lines 5-8, does not support the proposition that the Lummi Tribal Court seizure notice, which is akin to a summons, given to the licensed

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Washington State Tower in possession of a motor vehicle pursuant to a Washington State Patrol DUI impound is a "facially valid court order."

The Judkins v. Sadler-MacNeil case was a conversion claim which was an outcome of a trade by Judkins of his 1951 Ford Pickup to Sadler and MacNeil for a 1957 Cadillac. The lawsuit stemmed from defendants' refusing to let Judkins drive his Pick Up away after they had delivered the Cadillac. Judkins made several efforts and was denied access to his Pick Up to retrieve his personal belongings. When Judkins did get back his things, Judkins claimed he was shorted $1400 in cash, a diamond ring worth $1,000, a watch worth $100 and a trailer hitch and electric brake. The jury found a conversion of the $1400 in cash and the electric brake but not of the diamond or the watch. Sadler MacNeill appealed the issue of the award of $1400 for the cash and lost because this, the Washington Supreme Court concluded, was an issue of fact for the jury.

However, a portion of the opinion is insightful to the facts of the instant case:

> The defendants' appeal is only on the cash item.
> They urge that if the $1,400 was in the pickup (and there is no evidence that it was except the testimony of the plaintiff[1]) when they took possession of it, the legal relationship was that of bailor and bailee and that the trial court erred in refusing to give an instruction on bailment. ***They further urge that an essential element of conversion was missing: an intent to deprive the owner of his property, and that the trial court erred in instructing that intent is not an essential element of conversion.*** We shall consider the latter contention first. Plaintiff's cause of action is founded upon the unwarranted interference with his right to the possession of his property.
> It is said in Salmond on the Law of Torts (9th ed. 1936), § 78, p. 310:

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'A conversion is the act of wifully interferring with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it.'

This is quoted in Wilson v. Wilson (1958), 53 Wash.2d 13, 16, 330 P.2d 178, 179; and Martin v. Sikes (1951), 38 Wash.2d 274, 278, 229 P.2d 546, 549.

Proof of the defendants' knowledge or intent are not essential in establishing a conversion. An excellent statement on this proposition, typifying a long line of authority, is found in Poggi v. Scott (1914), 167 Cal. 372, 375, 139 P. 815, 816, 51 L.R.A.,N.S., 925:

The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results.Therefore neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action. 'The plaintiff's right of redress no longer depends upon his showing, in any way, that the defendant did the act in question from wrongful motives, or, generally speaking, even intentionally; and hence the want of such motives, or of intention, is no defense. Nor, indeed, is negligence **839 any necessary part of the case. Here, then, is a class of cases in which the tort consists in the breach of what may be called an absolute duty; the act itself (in some cases it must have caused damage) is unlawful and redressible dressible as a tort.' * * *'

(quoted approvingly in Fisher v. Pickwick Hotel, Inc. (1940), 42 Cal.App.2d 823, 826, 108 P.2d 1001, 1002, 1003.)

The trial court made it very clear that the defendants had the right to take possession of the pickup and that the basis of recovery, if any, was the defendants' refusal to deliver to the plaintiff his personal belongings after demand therefor. ***The trial court did not err in instructing that the intent of the defendants was not an essential element of conversion.***

Turning now to the claim of the defendants that they were bailees; if they can get the label of bailment on the transaction, then they rely on Theobald v. Satterthwaite (1948), 30 Wash.2d 92, 190 P.2d 714, 1 A.L.R.2d 799, to relieve them of any liability on the theory that they did not have knowledge of the valuable nature of the items of personal property alleged to have been left in the pickup. What that case held was that the

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> proprietors of a beauty shop did not become bailees of a fur coat which a customer left in the reception room without the knowledge of the proprietors, since there was no change of possession of the coat sufficient to constitute a delivery. None of the elements of conversion was present in that case.
> We are not concerned with the label placed on the legal relationship between the plaintiff and defendants, when the defendants took possession of the plaintiff's personal property. It is clear that when they refused to surrender its possession to the plaintiff, who was entitled to its immediate possession, there was a conversion.
> The rule is stated succinctly in Restatement, Torts (1934), § 237:
> 'One in possession of a chattel as bailee or otherwise, who on demand, refuses to surrender its possession to another entitled to the immediate possession thereof, is liable for its conversion. * * *'
> See also our statement to the same effect in Walling v. S. Birch Construction Co. (1950), 35 Wash.2d 435, 438, 213 P.2d 478, 480.
> However much we may marvel at the jury's ability to distinguish between fact and fantasy in determining which, if any, of the three articles in issue were in the pickup when the defendants took possession of it, we must concur in the trial court's comment, 'the matter was a question of fact for the jury to determine'; and we find no prejudicial error in the record.

CONCLUSION

Wilson contends that Horton's compliance with the Lummi Nation Notice of Seizure releasing the vehicle to Officer Gates constituted the tort of conversion. Horton's and the United States dispute this contention because the alleged tortious actions of releasing Wilson's truck to Gates in compliance with receipt of the official Notice of Seizure (issued by the Lummi Nation Police Officer Gates) was done pursuant to lawful authority.

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As it relates to tribal court orders or seizure notices affecting the property of non Indians situated off reservation, any such pleading bearing a tribal court cannot qualify as a "facially valid court order."

There is no legal basis for civil jurisdiction of forfeitures under the Lummi Code over non tribal members who violate the tribal code in its tribal court. Lummi Nation Officer Brandon Gates had no lawful authority to enforce the Lummi drug code against Curtis Wilson, a non tribal member, and his presentation of the Lummi Notice of Seizure was a nullity and provided no legal basis for Horton to release the 1999 Dodge Ram Pickup to Gates.

Horton's had a duty to keep custody of the 1999 Ram Pickup and only allow the registered and legal owner to redeem the truck under state law and breached its duty by giving the truck away to an entity which had no right to seize or possess the truck.

For the above stated reasons, plaintiff respectfully requests that the court deny the motion of the United States and Horton's Towing for Summary Judgment Dismissing Plaintiff's claims against Horton's and instead grant plaintiff's Motion for Summary Judgment.

Dated this 10th day of March, 2016 at Bellingham, Washington

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