Docket No. 16-35320

In the

United States Court of Appeals

For the

Ninth Circuit

CURTISS WILSON,

Plaintiff-Appellant,

v.

JOHN OR JANE DOE, Director of the Department of Licensing,
a Subdivision of the State of Washington, in His/Her Official Capacity,
HORTON'S TOWING, a Washington Corporation
and UNITED STATES OF AMERICA

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Western District of Washington, No. 2:15-cv-00629-JCC · Honorable John C. Coughenour

REPLY BRIEF OF APPELLANT

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THIS REPLY BRIEF addresses the argument presented by Horton's Towing.

1. Horton's has abandoned its argument before the District Court by construing the District Court opinion not to decide the issue of whether Horton's release of Wilson's truck in response to the service of the Lummi Nation Notice of Seizure pleading constituted "lawful justification." Horton's now limits its argument to supporting the dismissal based upon comity; see VI Argument A. page 9 of Horton's brief.

ER7, footnote 4 becomes the centerpiece of the District Court's decision under Horton's argument because it disavows the District Court language now interpreted by Horton's as dicta in adopting on the merits the argument presented by Horton's in its motion for summary judgment before the District Court, ER 83-91. On the merits, Horton argued before the District Court that the service of the Lummi Notice of Seizure on Horton's in Bellingham was a lawful justification for its release of the truck to Brandon Gates as a matter of Washington state law. ER 83-91. It is important to note that Horton's in its contention that the service of the Notice of Seizure was a lawful justification did not address the underlying root issue of whether an Indian tribe has authority under the second exception of *Montana v. United States* 450 U.S. 544 (1981) to legislate and enforce its drug forfeiture code against nonnative Americans, much less whether the tribal court can authorize seizure of private property off reservation of motor vehicles owned

by non Native Americans for illegal use of their motor vehicle while on the reservation.

2. Horton now argues for a result not predicated on a holding that Horton's acted with lawful justification but limits its argument to now, for the first time, to contend that Wilson's tort case against Horton's cannot be heard in state or federal court because the case involves a judicial determination of the scope of Lummi sovereignty, which mandates under federal law doctrine of comity that this case must be referred the Lummi Tribal Court so it can make the first decision on the scope of its sovereignty inside Washington.

This is where, as Wilson has argued before, it is important to recognize that the issue avoided by the District Judge in footnote 4 must be addressed. That issue is whether the Lummi Nation, assuming it has authority to enact and enforce its drug forfeiture law against native Americans for violations of tribal drug law taking place on public state roads inside an Indian reservation, can the Lummi Nation drug law be enforced by physical seizure of the suspect motor vehicle by presentation of its tribal court process inside Washington, as took place in this case.

In it reply brief at page 9 last paragraph states, "the District Court correctly found that the Lummi Nation had a colorable claim where it is undisputed that the transactions forming the basis of appellant's case "occurred or were commenced on tribal territory," ER 8. It is unquestioned that the appellant was stopped by a Lummi tribal police officer while driving on tribal land, after drinking at the

Lummi Casino. Appellant expressly acknowledges that these facts as set forth by the District Court in the order granting summary judgment are accurate."

Wilson has stated his position in his opening brief at pages 4-6. Wilson sees his conversion claim commenced at the moment in time when Brandon Gates presented his Notice of Seizure form, and Horton's in response thereto, released Wilson's truck to Gates; see Declaration of Daniel J. Johnson, ER 60. Whether the Lummi Nation has authority to enforce its drug forfeiture laws against nonnative Americans and seize their cars on the reservation is not the dispositive issue to determine whether Horton's converted Wilson's property. The dispositive issue is whether Gates' service of the Lummi Seizure Notice on Horton's in Bellingham is legal justification under Washington state tort law, and since the tort took place inside Washington and involves two non Indian entities, the Superior Court of Washington has subject matter jurisdiction and jurisdiction over the parties. Wilson argues Washington sovereignty overrides any interest of the Lummi Nation and the Washington court has exclusive jurisdiction to decide whether the service of the Lummi process had any legal effect inside Washington. The same is true if the Royal Canadian Mounted Police came across the border into Washington, and seized a motor vehicle for earlier being in Canada, and violating Canadian drug laws. A federal court should not send the tort lawsuit against the tower for releasing the motor vehicle to the Royal Canadian Mounted Police to Canada so

Canada can first decide whether it has jurisdiction inside Washington. Washington decides its jurisdiction inside Washington and Canada decides its jurisdiction in Canada and the Lummi has jurisdiction only for acts taking place on the reservation or on hunting and fishery areas off reservation which are treaty based; e.g. *Settler v. Lameer* 507 F2d 231 (9th Cir. 1974), *State v. Eriksen* 172 Wn2d 506 (2011)

Horton's adoption of the District Court language that the transactions form the basis of appellant case "occurred or were commenced on tribal land" is the reason that the tort suit against it should go to tribal court. Wilson repeats his argument presented in his motion to reconsider and declaration ER 21, 22 which warrants restatement here. This argument was presented to the District Court in Wilson's motion to reconsider ER 19-60 and contains the following except at ER 30, 31:

> 2. The misrepresentation of facts contained on the Notice of Seizure Form provides an exception to comity under the bad faith and/or harassment exception of National Farmer's Union.
>
> The declaration in support of this motion includes the police reports of Lummi Police Officer Grant Austick. Austick was the only Lummi police officer present at the arrest site. Brandon Gates was not present at the arrest site. The submissions show that no forfeiture action was commenced on the night of plaintiff's arrest for DUI. The truck was not seized for forfeiture and Austick did not give the Washington State trooper permission to impound the vehicle.
>
> Officer Austick testified at a pretrial suppression hearing in the criminal DUI case involving Wilson, that he confiscated the can of

> marijuana but he did not know anything about forfeiture. In the preamble in the Notice of Seizure, Brandon Gates asserted that the Lummi officer seized the truck for forfeiture under the laws of the Lummi Nation and then consented to the WSP impound. Austick testified in direct contradiction to those assertions. The assertions by Gates are false. The record reflects this.
>
> For this reason, the court should apply the bad faith exception to the comity requirement. Undoubtedly these false representations were made with a purpose to enhance a tribal court jurisdiction claim. ER 30, 31.

The memorandum of Brandon Waldron, Deputy Prosecuting Attorney for Whatcom County in Wilson's DUI prosecution, ER 55-60 illustrates the state response to Wilson's motion to dismiss. Wilson subpoenaed Brandon Gates to testify in District Court as to his written statement in his Seizure Notice, ER 60, that on the night of the DUI stop, Wilson's truck was seized for forfeiture and that Lummi Police officer Austick consented to the release of the truck to the Washington State Patrol when the trooper ordered the truck impounded under Washington state law. The Lummi Nation appeared in Whatcom County District Court and moved to quash the Gates subpoena on the basis of sovereignty. Whatcom County District Judge Matt Elich quashed the subpoena. After consideration of Wilson's motion to dismiss, Elich dismissed the DUI prosecution.

Wilson insists that there is a crucial factual distinction in this case as apart from the other three related cases mentioned in Wilson's opening brief at page 3. The other three involved forfeitures executed by the Swinomish

Indian Tribe are: *Candee Washington v. Director of the Department of Licensing*, Washington Supreme Court No. 92084-2, *Jordynn Scott v. State of Washington and Peter's Towing*, Washington Supreme Court No. 92458-9 and *Pearson v. Director of the Department of Licensing* No. 2:15-cv-00731-JCC, 2016 WL 3386798, United States District Court for Western Washington. All of these forfeitures are fact cases where the vehicles are seized at the time of arrest and when the vehicle is physically located on the reservation. In Wilson's case, the colorable claim of Lummi jurisdiction extends only to the facts that Wilson possessed the marijuana on the reservation but not that a forfeiture was commenced on tribal territory.

Wilson is deprived of his right to pursue his tort claim in state court against Horton's because principles of comity, an equitable doctrine, do not relieve a Washington court of jurisdiction to adjudicate a tort conversion suit between two non Indians which took place inside Washington. Because the Washington state court has jurisdiction of the parties and the subject matter, it can decide the underlying root issue of whether an Indian tribe has authority under the second exception of *Montana v. United States* to legislate and enforce its drug forfeiture code against nonnative Americans by executing its seizure process in Washington. The United States District Court cannot and should avoid making this critical factual distinction - that the tribal notice of seizure was served off reservation and

inside Washington - an irrelevancy and not expressly deciding it as the District Court did in ER 5, ft. 4. Washington has primary jurisdiction for acts, which take place in Washington. Lummi tribal court has comparable jurisdiction for action taking place on reservation. Whether the Lummi Nation has forfeiture jurisdiction over non Native Americans is one question but it is an entirely different question as to whether the Lummi Nation can legislate power to seize property off reservation of non Native Americans for actions taken some time earlier. A ruling denying Lummi jurisdiction to serve its seizure process inside Washington does not implicate Lummi sovereignty because the actions evaluated by the Washington court are those actions taken inside Washington.

3. Even if the Lummi Nation has an interest in adjudicating first the issue of whether it has authority over non Native Americans given the nonprecedental opinion of Judge H. Dale Cook 464 F.Supp2d 1130 (2006, reversed on sovereignty grounds 505 F3d 506 (2007), Wilson's tort claim against Horton's is too remote to implicate tribal sovereignty and Wilson's case meets the criteria of *Smith Plumbing Company v. Aetna Casualty & Surety*, 149 Ariz. 524(1986), cert. denied 479 U.S. 987 (1986) and *White Mountain Apache Tribe v. Smith Plumbing* 856 F2d 1301 (9th Cir. 1988).

In *Smith Plumbing*, the Indian corporation, the Housing Authority and Aetna were all parties to the state court action and vigorously objected to the state court proceeding. All moved to dismiss and argued the Indian tribe was an indispensable party. Yet, the Supreme Court of Arizona allowed Smith Plumbing to sue Aetna in state court. This was the court's ruling even though as a result of the state court

adjudication, Aetna might seek reimbursement from the Tribe. Nevertheless the court permitted Smith, a non tribal company, that sold materials to an Indian subcontractor on an Indian construction project, to sue the bondholder, Aetna, in state court without going to tribal court first.

This was a simple sale of supplies and Smith was entitled to be paid. The White Mountain Apache Tribe wanted to control a construction project taking place on the reservation. Poor Aetna, who normally demands indemnity from the bond purchaser, deferred to the needs of the White Mountain Apache Tribe, and agreed to accept reimbursement only if the tribal council agreed to pay.

Here, plaintiff's truck was found to contain marijuana on a state road inside the reservation. The truck is susceptible to forfeiture under the Lummi Code, only if the Lummi Nation Code was intended to apply to non tribal members and, also, if the Lummi Nation had the authority to enact legislation to forfeit automobiles owned by non tribal members.

In *Smith Plumbing Company v. Aetna Casualty & Surety*, 149 Ariz. 524(1986), cert. denied 479 U.S. 987 (1986) the Arizona Supreme Court barred Aetna, a surety, the capacity to assert a sovereignty defense available to its principal, the Indian tribe.

> Generally, a surety may assert any defense available to its principal. *Spear v. Industrial Comm'n*., 114 Ariz. 601, 562 P.2d 1099 (App.1977). One exception to this rule is where a principal takes advantage of a personal defense. Personal defenses "are ordinarily of

> such a character that the principal, as he chooses, may insist upon them or not." 74 Am.Jur.2d Suretyship § 104 (1974). The Tribe may choose to waive its sovereign immunity. *White Mountain Apache Indian Tribe v. Shelley,* 107 Ariz. 4, 7, 480 P.2d 654, 657 (1971). Because the Tribe has the power either to insist upon or to waive its sovereign immunity, that immunity is considered a personal defense not available to the Tribe's surety. See 74 Am.Jur.2dSuretyship § 109.

Horton's lacks standing to assert any sovereignty interest of the Lummi Nation, and there is no sovereignty issue for the Lummi Tribal Court to address.

There is no lawsuit involving any Indian entity and there is no financial consequence to the Lummi Nation, and the only tangentially related issue of concern to the Lummi Nation relates to whether its forfeiture process has any legal effect inside Washington. Respectfully, appellant argues the District Court erred in dismissing on comity.

Horton's has abandoned any effort to sustain its dismissal on the merits, and has limited its argument that it is entitled to a dismissal based solely on the basis of comity. Wilson asserts Horton's lack standing to get the benefit of any comity dismissal.

Exhaustion is not required here because the dispute does not involve Indians and it is reasonably certain that the tribe lacks jurisdiction. If there is no tribal court jurisdiction to decide a civil tort committed by a non Indian against another non Indian on a state road inside an Indian reservation, *Strate v. A-1 Contractors*, 117 S.Ct. 37 (1996), it follows that no tribal court has jurisdiction over Horton's

Towing for converting the property of plaintiff, a non Indian, even if the conversion took place on a state road inside an Indian reservation.

But even if the Lummi Tribal Court must first rule on whether the Lummi Nation can legislate confiscation of non members automobiles for violation of tribal drugs law on the reservation, that is not the question to be resolved in the Horton's conversion case. The question is: can the Lummi Nation empower its police officers to travel off reservation and seize the property of a non tribal member as if the Lummi police man had a temporary restraining order to the same effect from a state court?

In the instant case, there is no impact upon the Lummi Nation if a Washington court decides that service of a tribal seizure notice to a towing company to seize the truck of a non tribal member in Bellingham is not legal justification under Washington law. A Washington court's sovereignty is impinged upon by denying its subject matter and personal jurisdiction over the parties to a conversion action, neither of who are Indian, and the act of conversion takes place off the reservation. The operative question of what is legal justification inside Washington is proper for a Washington court to decide. The question is not whether the Lummi Nation could enforce its laws within its reservation or established hunting and fishing grounds off reservation, *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974).

For this reason, the tribal exhaustion requirement in this case is extraordinary. There is no reported case justifying process issued by a tribal court as legal authority for the seizure of property owned by a non Indian off reservation and outside the limits of the hunting and fishing grounds of the Indian Tribe. This exhaustion requirement is especially startling when the tribal process, here a Notice of Seizure signed by a Lummi Police Officer, is the de facto equivalent of a temporary restraining order issued without notice, and without even the blessing of the tribal court.

CONCLUSION

Wilson urges the court to reverse the District Court and allow plaintiff's claim against Horton's to proceed without having to go to tribal court. The seminal issue, which will determine the outcome of the conversion claim, is whether the truck was lawfully seized in Bellingham, the day after plaintiff's arrest for DUI on a state road inside the Lummi reservation. Plaintiff has an interest, as does the State of Washington and its sovereignty, to have Washington courts decide whether the Indian seizure process can be enforced in Washington and can constitute a lawful justification for conversion. The precedent of *Smith Plumbing*, which was approved by the 9th circuit, supports prosecution of the state claim in state court or federal court, because there is no adverse financial impact upon the tribe or its agents, applies here also. The precedent of *State v. Eriksen*, shows that

the Lummi Nation has no authority inside Washington. The precedent of *Settler v. Lameer* shows, supra, that Indian sovereignty can extend only to justify seizure of their own members off reservation at specified treaty hunting and fishing grounds. The precedent of *Farmers Union Ins. Cos. v. Crow Tribe of Indians* 471 U.S. 845 (1985) shows that exhaustion is not required where it is patently violative of express jurisdictional prohibitions, or where there is bad faith.

For the above stated reasons, appellant respectfully requests that the court overturn the District Court and remand the case to the District Court with a directive to remand the case back to Whatcom County Superior Court. Since Horton's conversion suit does not implicate Lummi sovereignty, Wilson's case against Horton should be remanded independently of how the court resolves the issues of Wilson's appeal of the order certifying Brandon Gates to be a federal employee under the FTCA.

Dated this 15th day of September, 2016 at Bellingham, Washington

s/ William Johnston
WILLIAM JOHNSTON
Attorney for Plaintiff/Appellant
CURTISS WILSON

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 2,993 words.

Dated this 15th day of September, 2016 at Bellingham, Washington

s/ William Johnston
WILLIAM JOHNSTON
Attorney for Plaintiff/Appellant
CURTISS WILSON

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kirstin E. Largent