NO. 16-35320

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CURTIS WILSON, an individual,

Plaintiff -Appellant,

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,

Defendants-Appellees.

Appeal from the United States District Court for Western Washington, Seattle, Case number : 2:15-cv-00629-JCC, The Honorable John C. Coughenour

BRIEF FOR PLAINTIFF APPELLANT CURTIS WILSON

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JURISDICTIONAL STATEMENT

After the District Court dismissed all claims except plaintiff Wilson's claim for conversion, the jurisdiction of the federal court was derivative of the certification by the Attorney General of Brandon Gates as a federal employee of the Bureau of Indian Affairs. Because the United States was properly a party, the federal court had jurisdiction to hear the case under 28 U.S.C. 1346 (b) and denied Wilson's motion to remand to state court. Wilson's conversion claim against Horton's Towing remained in federal court.

The trial court granted the motion of the government to certify Brandon Gates as a federal employee on December 4, 2015 and denied plaintiff's motion for reconsideration on April 28, 2016.

The trial court granted the government's motion to dismiss and Horton's motion for summary judgment of dismissal on March 29, 2015.

Plaintiff filed a Notice of Appeal on April 28, 2016 and an Amended Notice of Appeal on May 5, 2016.

STATEMENT OF ISSUES

Whether in the enforcement of an Indian Tribe's in rem drug forfeiture law, a tribal police officer seizes a motor vehicle owned by a non Native American from a towing company off reservation, is the owner's conversion lawsuit against the tribal officer individually and the tow company in state court subject to removal to the tribal court by comity despite the fact that the conversion took place on state land and the lawsuit involved two non Indians and a tribal police officer individually?

Whether the federal court hearing a state conversion claim upon removal must dismiss the case based upon comity because the plaintiff must first exhaust his remedies in tribal court so the tribe can first rule on whether it has jurisdiction to seize and forfeit motor vehicle owned by non tribal members for its use in violation of tribal drug laws while operated on reservation land?

Assuming Indian tribes have jurisdiction to seize and forfeit cars owned by non Indians for violation its drug laws, can the tribes seize the cars off reservation if their police officers possess probable cause to believe that the suspect automobile was operated on reservation lands in violation of its drug cod?

Whether the District Court, having decided to refer the case to the tribal court for a discussion on jurisdiction, erred in dismissing plaintiff's conversion claim against Horton's Towing on the merits and holding that the Lummi Tribe did in fact have jurisdiction and authority to seize the Wilson truck off reservation and its seizure based upon tribal law satisfied the defense of lawful justification to the plaintiff's claim of conversion.

INTRODUCTION

This case involving Curtis Wilson and the Lummi Tribe is one of four related cases that are the result of Indian tribes enforcing in rem forfeiture statutes against non Indian owners of motor vehicles. 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, United States District Court for Western Washington.

Candee Washington and Jordynn Scott predate Wilson. They were dismissed on a CR 19 motion brought by the Washington State Attorney General representing the Department of Licensing who argued that the Indian Nation was an indispensable party. The Washington and Scott cases involve the forfeiture of automobiles and a change in the Certificate of Title with respect to those motor vehicles by the Department of Licensing upon presentation of the tribal court order of forfeiture of the motor vehicle to the Department.

Washington, Scott and Pearson tried to obtain an injunction against the Department of Licensing barring the Department from transferring title to motor vehicle based upon a tribal order of forfeiture. The court in Washington and Scott refused to grant an injunction because the Department in these cases conceded such transfers were in violation of the department protocols and Washington Court Rules, CR 82.5. The Department announced in those cases that in future the Department would no longer honor tribal orders of forfeiture to change ownership in automobiles.

STATEMENT OF THE CASE

A. Factual Background

The statement of facts in pages 1-3 of the District Judge's Order Granting Defendants' Motions for Summary Judgment motion is accurate. A seminal point not addressed in the order is the fact that Wilson's truck was not seized for forfeiture the night it was stopped on the Lummi Reservation. Lummi Tribal Officer Grant Austick, who stopped Wilson and held him for the Washington State Patrol, did not seize Wilson's truck for forfeiture on the night of the stop or give consent to Washington State Trooper Echevaria to take the truck off of the reservation.

The professions of fact contained in the Notice of Seizure signed by Lummi Officer Brandon Gates to the contrary are not true, see ER 23. Those false statements were contrived to create the fiction that a forfeiture action against the truck had been started earlier on the Lummi reservation and the later seizure of the truck in Bellingham was a perfection of that earlier seizure, ER 23. Appellant's Motion to Reconsider. Such was not the case. Arguably the truck could have been seized for forfeiture on the night of Wilson's arrest on the Lummi Reservation but the facts of the matter are that no seizure or contemplation of forfeiture happened on the night of Wilson's stop and DUI arrest.

The first exercise of Lummi power to forfeit the Wilson truck under the tribal forfeiture statute occurred inside Washington when the Notice of Seizure was served by Gates upon Horton's Towing. This fact is critical in the resolution of whether Lummi Nation Police Officer was acting within the scope of his authority as an employee of the Bureau of Indian Affairs, as well as whether Gates' seizure of the Wilson truck in Bellingham was tortious under Washington State law. This fact is also critical to Washington's power to adjudicate disputes taking place within its borders. This court should hold under the circumstances, a Washington State court is

empowered to adjudicate the matter without extending comity to the Lummi Tribal Court.

The clash of sovereignties takes place here at this point of assertion of Lummi sovereign power to seize the truck at Horton's in Bellingham versus the power of the Washington court to adjudicate a civil suit. Wilson's conversion suit is against two entities who are non Indian, a towing Company and a Lummi Police officer, sued in his individual capacity for an act, which took place in Washington and off reservation. Washington's jurisdiction is primary. It includes the right to adjudicate without restriction. That is the Washington court should be allowed to consider the precise issue considered by Judge H. Dale Cook in Miner Electric v. Creek Nation 464 F.Supp2d 1130 (2006)), reversed 505 P.3d 1007 (10th Cir. 2007). Wilson acknowledges that the opinion was vacated and is not of precedential value but Wilson urges the court to adopt its analysis as accurate and true.

Wilson's primary goal on appeal is to obtain reversal of the District Court's comity ruling and an order allowing the conversion action to proceed in federal court as a state law conversion action or a remand of the conversion action back to state court. The tort of conversion was first accomplished inside Washington between Wilson and Horton's. A Washington Court (or a federal court upon removal) is empowered to apply

Washington State law to resolve this conversion claim. Smith Plumbing v. Aetna Casualty, 149 Ariz. 524 (1986); cert denied 479 U.S. 987, 107 S.Ct. 578, 93 L.Ed2d 581 (1986); see also White Mountain Apache v. Smith Plumbing Company856 F2d 1301 (9th Cir. 1988) which affirmed the result reached in Smith Plumbing v. Aetna Casualty, 149 Ariz. 524 (1986); cert denied 479 U.S. 987, 107 S.Ct. 578, 93 L.Ed2d 581 (1986). Sending this state based conversion claim first to Lummi Tribal Court infringes upon Washington sovereignty to adjudicate torts in its own courts that are committed inside Washington and involve non Indians.

B. Proceedings Below

The District Court's decision in Wilson's case holds on the merits that the Lummi seizure of his truck inside Bellingham for violation of Lummi Nation drug laws was done with lawful justification, thus negating Wilson's conversion tort action. At the same time, the District Court holds that the Lummi Tribal Court must first address the issue of its jurisdiction to seize and forfeit the automobiles owned by non Native Americans for operation of the said vehicles upon reservation land in violation of the Tribal Drug Code, as a matter of comity. If the dismissal of the case based upon comity is correct, the judgment dismissing the conversion claim against Horton's must

be reversed and go back to the tribal court and await the decision of the tribal court as to whether the Lummi Nation has jurisdiction to enact drug forfeiture laws and enforce them against non Native American owners of automobiles, including seizing suspect vehicles off reservation.

The District Court's decision presages that all tort cases coming out of any litigation surrounding the seizure and forfeiture of motor vehicles owned by non Indians and subsequent reissuance of new Certificates of Titles by the Department of Licensing must start in tribal court. The court has ruled that the doctrine of comity requires that the state court or the federal court defer to the Lummi Nation the opportunity to first address the question of its legal jurisdiction. Judge Coughenour holds that the Lummi Nation has a "colorable claim" that it has jurisdiction because the underlying act- use of the motor vehicle- was on the reservation. Thus, in his view, the Indian Nation is entitled to make the first ruling on the ultimate issue of Indian authority to forfeit property of non-Indians for violation of Indian drug laws. The legacy of the dismissal based upon comity in this case is the same in effect as the Candee Washington and Jordynn Scott cases, where the Swinomish tribe was held to be an indispensable party under CR 19, that justice for these litigants must be sought through tribal court and only then on to federal court. Relief in state court has been rendered not an option.

SUMMARY OF ARGUMENT

The seizure of an automobile owned by a non Native American by a tribal police officer off reservation from a Washington State Tow Operator for previously be driven on reservation land in violation of tribal drug law does not constitute lawful justification to a conversion claim under Washington law for the tower's release of the automobile. The tribal court lacks jurisdiction to forfeit property owned by nonnative Americans, and even assuming the tribe did possess such power, the tribe lacks jurisdiction to seize property off reservation in furtherance of the execution of its laws.

The actions of Brandon Gates, Lummi Officer, of presenting the Lummi Notice of Seizure to Horton's Towing in Bellingham is beyond the scope of any authorized activity contemplated by the contractual agreement between the Lummi Nation and the government. For that reason, the District Court erred in designating Gates as an employee of the Bureau of Indian Affairs or the equivalent thereof.

This case should be reversed and the court should grant summary judgment in favor of the plaintiff against Horton's and Brandon Gates in his individual capacity and remand the case for trial on damages. This court should also overturn

the District Court's finding that Bandon Gates was acting as a federal employee and direct that he should stand trial for conversion as an individual.

STANDARD OF REVIEW

This court reviews de novo the district court's entry of summary judgment finding Brandon Gates to be a federal employee and also the summary judgment of dismissal based upon comity and the finding that Horton's is absolved of any conversion having established the defense of lawful justification.

ARGUMENT

1. The District Court erred in ruling on the merits of Horton's legal defense, which was that the service of the Lummi Nation forfeiture notice upon Horton's in Bellingham constituted "legal justification" under Washington law to release the truck from a Washington State Impound to the Lummi Nation police officer. The ruling was error because Indian tribes lack jurisdiction to enact and enforce tribal drug forfeiture laws against non Native Americans. Tribal police officers cannot be empowered to travel off reservation and seize automobiles even if they possess probable cause to believe that the motor vehicle was previously driven on reservation land in violation of the tribe's drug code.

Judge Coughenour's deferral of the case to the Lummi Court under the comity doctrine so it could first rule is perplexing because Judge

Coughenour also granted Horton's motion for summary judgment on the merits. By granting Horton's Motion for Summary Judgment on the merits, Judge Coughenour of logical necessity usurped the rightful authority (under his line of comity reasoning) to reserve to the Lummi Tribal Court exclusively the right to make the first decision on the scope and the power of the Lummi legislature to confiscate the motor vehicles owned by non Indians for violation of Indian drug laws on the Indian reservation. Judge Coughenour's finding of lawful justification was a vindication of any future Lummi Tribal Court ruling that it possessed, not only jurisdiction to forfeit cars owned by non Native Americans for violation of reservation drug laws, but also the authority to seize, pursuant to its tribal court process, the suspect motor vehicle off reservation. [1]

Horton's successfully cited Judkins v. Sadler-MacNeil 61 Wn2d 1, 3, (1962) for the definition of the tort of conversion as "the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is devoid of possession of it." By granting Horton's motion for summary judgment, Judge Coughenour found that service of the Lummi Notice of Seizure form, ER 23, upon Horton's in Bellingham, which resulted in Horton's decision to release Wilson's truck to Lummi police officer

[1] At page 4, line 5 the court acknowledges these issues were raised but the court concluded that these questions need not be reached. ER 7.

Gates, mandated dismissal of Wilson's conversion claim because such conduct constituted "lawful justification" under Washington state tort law.

a. Analysis of Judge Coughenour's Reasoning

Judge Coughenour acknowledges Horton's Motion for Summary Judgment at ER 5 lines 20-22. "Defendant Horton's moves for summary judgment, claiming the release of the vehicle was pursuant to a Notice of Seizure and therefore with lawful justification. Plaintiff argues in response that the Notice of Seizure is invalid or not enforceable off the reservation."

Then, ER 7, line 5, the Slip Opinion references a footnote 4 which reads as follows:

> Plaintiff asserts additional legal questions, that "the question presented is whether the service of Lummi Notice of Seizure upon Horton's was a lawful justification for its action in releasing Plaintiff's truck to the Lummi police officer,"Dkt. No. 61 at 2) based upon the alleged "lack of legal basis for civil jurisdiction of forfeitures and that "a secondary question could be whether the 1999 Ram Pickup was lawfully seized by Lummi Police Officer Gates by his service of the Lummi Nation forfeiture process upon Horton's outside the territorial limits of the Lummi Nation." These questions need not be reached because dismissal is warranted based upon principles of comity.

Then at ER 8, lines 10 -17, Judge Coughenour wrote:

> The Lummi Nation has a "colorable" claim of jurisdiction as it is undisputed that the transactions forming the basis for plaintiff's claim "occurred or were commenced on Tribal territory." Stock W. Corp,

> 964 F2d at 919. In sum, the court may not hear Plaintiff's case as it requires the court to challenge the Lummi Nation's jurisdiction without providing the tribe the opportunity to first examine the case. Accordingly as there remains no genuine issue of material fact and Horton is entitled to judgment as a matter of law, summary judgment for Horton's is warranted." ER lines 10-17.

The court is saying that the Lummi Nation must first address the question of whether it has authority under its drug forfeiture code to seize and forfeit motor vehicles owned by non Native American whose vehicles are used on the Lummi reservation in violation of the Lummi Code and, for this reason, the court dismissed the claim against the government and Horton's. The first rudimentary judicial act that has to be executed to determine Horton's liability is to determine whether Horton is excused from conversion because its release of Wilson's truck to Lummi officer Gates came after service of the Lummi Notice of Seizure. Did the service of the Lummi Notice of Seizure and Forfeiture upon Horton's in Bellingham establish that Horton's acted with legal justification under Judkins v. Sadler-MacNeil 61 Wn2d 1, 3, (1962)? Before any court determines whether service of process might excuse what would otherwise be a conversion in the release of property, the court logically must address the underlying root legal issue – here, the question of whether an Indian tribe has the authority, in the first instance, to forfeit cars owned by non Indians on the theory that those vehicles were used to violate tribal drug laws while said vehicles are on the

reservation. In addition, the court would have to consider those secondary issues such as whether the 1999 Ram Pickup was lawfully seized by Lummi Police Officer Gates by his service of the Lummi forfeiture process upon Horton's outside the territorial limits of the Lummi Nation.

But then things change in the opinion, when Judge Coughenour states "Plaintiff's Argument that the Order would not have been enforceable even if valid fails." ER 11, line 22, the Judge concludes as follows:

> Plaintiff's citation makes clear that Superior Courts must carry out Tribal orders, but offers no authority to support the idea that private entity may not voluntarily comply with a tribal order[2] off of Indian Country. In brief, the rule cited by plaintiff only further weakens his case. Page 9, lines 4-7.

And then the Judge concludes, "For all of the foregoing reasons, Defendant Horton's Motion for Summary Judgment is GRANTED. ER 12, line 8. Horton's Motion for Summary Judgment clearly establishes that Horton's asked for summary judgment of dismissal based upon the establishment of "the legal justification" that Horton's released the truck in response to the Notice of Seizure.

Judge Coughenour's comity rationale in this case would require all plaintiffs who sue non Indian defendants in some way involved in the

[2] Reference to order is a mistake. The notice served is Notice of Seizure is found at ER 23. The opinion uses Notice and Order interchangeably but the correct assessment and description of the facts is that a Notice of Seizure was served.

seizure, transportation and later change of ownership of motor vehicles affected by Indian forfeiture, to a new owner via public cash auction, must first do so in Indian court. The dismissal of Horton's is a good example showing how a non Indian defendant, sued for actions taken off the reservation, can get the case dismissed because it should have been started in Indian court. Similarly situated defendants represented by insurance defense counsel can make this comity objection successfully because the Wilson opinion is a United States District Court decision of the Western District of Washington. Wilson is precedent at this point.[3]

The dismissal of the state tort claim in this case comes at the expense of Washington sovereignty. The Wilson Slip Opinion is also directly at odds with Smith Plumbing v. Aetna Casualty, 149 Ariz. 524 (1986); cert denied 479 U.S. 987, 107 S.Ct. 578, 93 L.Ed2d 581 (1986); see also White Mountain Apache v. Smith Plumbing Company856 F2d 1301 (9th Cir. 1988) which affirmed the result reached in Smith Plumbing v. Aetna Casualty, 149 Ariz. 524 (1986); cert denied 479 U.S. 987, 107 S.Ct. 578, 93 L.Ed2d 581 (1986). The Wilson holding also contravenes Washington judicial policy to "shape" a judgment which would minimize any prejudice flowing to the

[3] Horton's did not argue comity and limited its argument that it was entitled to dismissal on the merits because its actions in releasing the truck to the Lummi police officer Gates were "legally justified. " ER 15-28.

tribe and separate those claims from those which must be foreclosed because of Indian sovereignty; see Aungst v. Robert's Construction, 95 Wn2d 439, 625 P.2d 167 (1981).

Curtis Wilson respectfully submits that Judge Coughenour has sub silentio overruled State v. Eriksen 172 Wn2d 506, 259 P.3d 1079 (2011) and has pushed Indian power beyond the limit allowed by the federal courts heretofore as explained in Settler v. Lameer, 507 F.2d 231 (9th Cir.1974). There the 9th circuit recognized tribal jurisdiction at traditional treaty hunting and fishing grounds and authorized tribal officials to seize and arrest tribal members for violation of Indian regulatory schemes enacted by the tribe. Inconsistent with this precedent is Judge Coughenour's ruling that the presentation of Lummi tribal process in Bellingham, is as a matter of fact and law, "legal justification" under Washington state tort law for Horton's to release Wilson's truck to Lummi Police Officer Gates.

Judge Coughenour professes not to decide whether the Lummi Nation can legislate and extend its jurisdiction inside Washington and authorize seizure of a suspect motor vehicle, off reservation, by service of its forfeiture notice. But actually, he does decide that issue on the merits. By granting the motion of Horton's Towing for summary judgment, Judge Coughenour found that Horton's release of Wilson's truck to Lummi Police

Officer Gates in Bellingham was lawfully justified under Washington law. Logically, that ruling is predicated upon acceptance of the principle that the Lummi Nation did in fact and in law possess the power to authorize its officers to go off reservation to seize cars owned by non Native Americans. Because Lummi Police Officer Gates served the Notice of Seizure form on Horton's in Bellingham, Judge Coughenour found lawful justification and dismissed the damage action against Horton's on the merits.

Because Judge Coughenour addressed the merits of the Lummi Nation claim of jurisdiction, Wilson is entitled to a review of that decision and asserts that the Lummi Nation has no civil jurisdiction to forfeit non Native American cars, and furthermore, has no jurisdiction to seize automobiles off reservation. Wilson predicates his legal argument on the scholarly legal reasoning of Judge H. Dale Cook in Miner Electric v. Creek Nation 464 F.Supp2d 1130 (2006), acknowledging that the opinion was vacated and is not of precedential value, but Wilson adopts its analysis as valid.

Respectfully Judge Coughenour erred in endorsing a policy that will encourage the Lummi Nation and other Indian Nations, not only to enforce their drug forfeiture laws with impunity against non Native Americans, but also to authorize tribal police to go off reservation and seize cars owned by nonnative Americans for past alleged drug violations of Indian Tribal law

occurring when the desired motor vehicle was on the particular Indian reservation.

Judge Coughenour, a federal court sitting as a state court, applied Washington state law and decided a conversion claim concluding that Horton's had shown sufficient evidence for summary judgment purposes facts which entitled it to dismissal based upon its showing that it released Wilson's truck in response to the service of the Lummi seizure notice which constituted legal justification for the release. In this, he erred.

b. Wilson's conversion action should have been allowed to proceed without referral to tribal court. Seizure of an automobile owned by a non Indian off reservation by an Indian police officer does not constitute lawful justification for what would otherwise be conversion under Washington law.

Because Horton's and Wilson were both non Indians and the act of conversion alleged was the transfer of Wilson's truck to Gates in Bellingham (outside the reservation), the District Court was correct that it had jurisdiction and authority to decide the case on the merits. But the District Court erred and should have granted summary judgment in favor of Wilson because the Lummi Nation lacked any authority to seize and forfeit automobiles owned by non Native Americans. The breadth of Judge

Coughenour's dismissal based upon comity pulls a routine state based conversion claim into tribal court. Now the Lummi Tribal Court can address the legal issue of whether the presentation of its Notice inside Bellingham constituted a legal justification within the meaning of that term in Washington state law- yet the court has already decided this issue while professing in ER 7 footnote 4 of its opinion that the question is reserved to the tribal court based upon comity.

A Washington court can decide the issue of whether service of the notice of seizure inside Washington was a lawful justification under Washington State law for Horton's release of the truck to the Lummi police officer Gates. The correct ruling is that service of the Notice of Seizure by Gates in Bellingham was a nullity and thus could not qualify as legal justification to excuse conversion. The Washington court should be free to decide the issue of whether service of the Lummi Tribal Notice was lawful inside Washington and decide that it was not. The Washington court is free to adopt the reasoning of Miner's Electric v. Creek 464 F2d 1130 (N.D. Okla. 1987)), reversed 505 P.3d 1007 (10th Cir. 2007) and conclude that the Lummi Nation had no authority to seize and forfeit the cars of nonnative Americans under federal law, for the express purpose to resolve Horton's defense of conversion. Under Washington law, specifically State v. Eriksen

and Settler v. Lameer, supra, Indian tribes have the legal basis to seize only tribal members on reservation and outside reservation at the accustomed fishing and hunting grounds.

The Washington State court should be free to decide the issue of whether service of the Lummi Tribal Notice was lawful inside Washington under Aungst v. Robert's Construction, supra. Aungst, is a case where suit was brought against many parties and the Superior Court dismissed upon the assertion that the Indian Tribe was an indispensable party. The Aungst court reversed and wrote:

> Regardless of their status as contracting parties, we hold that neither the Tribe nor the camping club must be joined as parties under appellants' allegations. It would seem a judgment rendered against Roberts, if such is found to be appropriate, would be adequate even if limited to those remedies available through the statutes alleged to have been violated. Rescission, in this instance, is not available to appellants because of the prejudice to nonjoinable parties, the Tribe, and the camping club. Thus, if the facts so warrant, it is possible in this case for the court to shape a judgment, which would minimize any prejudice flowing to the Tribe or camping club from this litigation.
> After considering all the factors included in CR 19(b), we hold there is no reason in equity and good conscience to dismiss appellants' complaint. It follows that the Tribe and the camping club are not indispensable parties to this action. 95 Wn2d at 444.

c. Wilson challenges the certification of the Attorney General that Gates was acting within the course of a Compact of Self Governance with the United States and therefore is deemed to have been an employee of the BIA.

The 9th circuit decided Shirk v. United States 773 F3d 999 (9th Cir. 2014), a matter of first impression. Two tribal officers traveling home from a training session in a marked police cruiser followed and attempted to stop a motorist on a state road off any Indian Reservation for erratic driving. The suspect driver, Sanford, stopped at a traffic light and one of the tribal officers following got out of the police cruiser and approached Sanford. As the tribal officer approached, Sanford accelerated and drove through the red light and collided with a motorcyclist causing great injuries.

The motorcyclist, Mr. Shirk, sued the United States, claiming the officers were employees of the BIA for the purposes of the FTCA. Shirk alleged that the tribal officers were acting within the scope of their employment under the FTCA act. The government's motion to dismiss for lack of subject matter jurisdiction was granted and an appeal taken.

In a very technical opinion the appellate court remanded the case. The court stated:

> In 1990, after it enacted the ISDEAA, Congress extended the FTCA's waiver of sovereign immunity to claims "resulting from the performance of functions ... under a contract, grant agreement, or cooperative agreement authorized by the [ISDEAA] of 1975, as amended." 25 U.S.C. § 450f (note). This provision is commonly referred to as § 314, an allusion to its location within the Act. See Department of Interior and Related Agencies Appropriation Act, Pub.L. 101–512, § 314, 104 Stat 1915 (1990). However, the waiver of sovereign immunity is limited:

> [A]n Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs ... while carrying out any such contract or agreement and its employees are deemed employees of the Bureau ... while acting within the scope of their employment in carrying out the contract or agreement.

The contract referenced hereinabove is referred to as a 638 contract. It appears that to satisfy the criteria of the Shirk decision, it is necessary to obtain the 638 contract or compact[4] between the Lummi Nation and the BIA and examine it. After a technical analysis of the relevant federal statutes language, the 9th Circuit panel concluded in Shirk:

> An employee's conduct is covered by the FTCA if, while executing his contractual obligations under the relevant federal contract, his allegedly tortious conduct falls within the scope of employment as defined by state law.[3] Thus, the federal contract "defines the nature and contours of [an employee's] official responsibilities; but the law of the state in which the tortious act allegedly occurred determines whether the employee was acting within the scope of those responsibilities." Lyons v. Brown, 158 F.3d 605, 609 (1st Cir.1998).

The Shirk court goes on and concludes with this advice to the District Judge:

> These conclusions show that § 314 requires a two-step approach.[4] Because "[t]he party asserting jurisdiction bears the burden of establishing subject matter jurisdiction," In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 984 (9th Cir.2008), a plaintiff in an FTCA suit must identify which contractual provisions the alleged tortfeasor was carrying out at the time of the tort.[5] At the first step of the § 314 inquiry, courts must determine whether the alleged activity is, in fact, encompassed by the relevant federal contract or agreement. The scope of the agreement defines the relevant "employment" for purposes of the scope of employment

[4] The material in the record relating to agreements between the Lummi Nation and the government can be found at ER 52-93.

> analysis at step two. Second, courts must decide whether the allegedly tortious action falls within the scope of the tortfeasor's employment under state law. If both of these prongs are met, the employee's actions are covered by the FTCA.
> As this two-part test makes clear, however, a plaintiff's failure at either step is sufficient to defeat subject matter jurisdiction. If a court determines that the relevant federal contract does not encompass the activity that the plaintiff ascribes to the employee, or if the agreement covers that conduct, but not with respect to the employee in question, there is no subject matter jurisdiction. Likewise, if a court decides that the employee's allegedly tortious action does not fall within the scope of employment, the employee's conduct does not come within the FTCA. Shirk, 773 F.3d at 1006-1007.

To satisfy the criteria of Shirk, it is necessary for the record to support the conclusion that the 638 contract or the Compact between the Lummi Nation and the BIA authorized the activity in question. That activity is, first, the enforcement of in rem forfeiture laws against non Indians who operate said automobiles on the reservation in violation of tribal drug laws. The second activity is the service of Indian process to authorize seizure of suspect automobiles off reservation. Are these activities, in fact, encompassed by the relevant federal contract or agreement between the Lummi Tribe and the BIA? The record does not answer this question.

In this case, the question is whether the contract between the Lummi Nation and the government envisioned tribal police officers seizing property of non Native Americans off reservation for violation of its drug code. Wilson asks: did the 638 contract contemplate the Indian tribes exercising

civil drug forfeiture power over nonnative Americans? Did the agreement envision that the tribal police would enforce this power off reservation by seizing vehicles previously driven on the reservation?

In the concurring opinion in Shirk authored by Judge Sack, he notes in light of the fact that the tribal officers possessed state law certification (Arizona certifies tribal police officers as state police officers) , it was apparent that the federal government and the tribe intended that tribal law enforcement officers possess and exercise the power to enforce state law, both on the reservation and, in some cases, outside of it. The controversy in Shirk was over whether there was any justification for the tribal police officers driving a clearly marked tribal patrol cruiser car miles and miles from its home reservation to be doing DUI enforcement on Arizona state roads.

The irony of the Shirk case is there the government did not designate the tribal officers as federal employees, while here the government has apparently taken the opposite approach. Wilson's argument is a first step of the § 314 inquiry. The agreement between the BIA and the Lummi Nation could not have contemplated that the tribe would by legislation empower its police officers to enforce the tribal forfeiture law against non Indians. It

appears extremely unlikely that the BIA would be endorsing the exercise of Indian power to seize property of non Native Americans off reservation.

Because the exercise of this extraordinary power to seize property of non Native Americans is beyond the scope of any relevant federal Lummi Nation agreement, this court should overturn the District Court and remand the case for trial against Brandon Gates in his individual capacity consistent with Pistol v. Garcia 791 F.3d 1104 (9th Cir. 2015) and Maxwell v. San Diego County, 697 F.3d 941 (9th Cir. 2012).

The state certification referred to in Shirk is Arizona's certification of tribal officers to act as state peace officers. This does not apply with respect to the Lummi Nation. The only tribal police department in Washington which has received state certification is the Swinomish Tribe.

CONCLUSION

Respectfully, Wilson asserts that the federal court should have heard his conversion action and adjudicated it, granting Wilson's motion for summary judgment on liability. Horton's converted Wilson's truck when its employees released the truck upon service of the Lummi Notice of Seizure at Horton's yard in Bellingham. Because the location of the alleged tort was inside Washington, the Washington judiciary had jurisdiction over the

subject matter and persons involved. Horton's assertion of the defense of lawful justification provided by the Lummi Notice of Seizure upon it is erroneous and does not override Washington state court jurisdiction to hear the action and decide all matters related thereto, including the questions of the authority of the Lummi Nation to enforce forfeiture laws against automobiles owned by non Native Americans and also the question of whether Lummi Nation has authority to execute its seizure process, in Washington outside of the reservation. A referral of the case to the Lummi Tribal Court on the basis of comity violated Washington State sovereignty to hear the case. This court should reverse and grant summary judgment on liability in favor of Wilson against Horton's.

This court should also reverse the District Court order affirming Brandon Gates to be a federal employee on the basis that there is no compelling evidence to show that the Compact of Self Governance with the United States and the Lummi Nation envisioned its tribal police officers enforcing a tribal forfeiture ordinance against non tribal members and seizing automobiles off reservation in furtherance thereof. The suggestion implicit in the concurring opinion in Shirk authored by Judge Sack is that it is not contemplated that tribal police officers would be enforcing state law well outside the confines of the particular reservation. Unlike the officers in

Shirk, the Lummi Nation police officers have no state certification to enforce Washington state law. Therefore the government's certification of Brandon Gates as a BIA employee in the actions that he took in seizing Wilson's truck in Bellingham failed to meet the first step of the § 314 inquiry, that the alleged activity, was encompassed by the relevant federal contract or agreement between the Lummi Nation and the government. Because Brandon Gates was sued in his individual capacity, the court should reverse the District Court's order finding Brandon Gates to be a federal employee and remand for trial consistent with Pistol v. Garcia 791 F.3d 1104 (9th Cir. 2015) and Maxwell v. San Diego County, 697 F.3d 941 (9th Cir. 2012).

Dated this 8th day of August, 2016 at Bellingham, Washington

WILLIAM JOHNSTON
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