

No. 40859-7

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON DIVISION II**

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

Appellant,

vs.

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.

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**BRIEF OF RESPONDENTS DANIEL J. DUENAS,  
JOSEPH S. FITZPATRICK, CHRISTOPHER E. DAUSCH  
AND JOHN SCRIVNER**

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DIVISION II

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## I. INTRODUCTION

This wrongful death lawsuit arises out of claims of alleged misconduct by three on-duty tribal police officers employed by the Puyallup Tribe of Indians (“the Tribe”) and a security guard employed by the Puyallup Tribal Health Authority (“PTHA”), an entity of the Tribe. CP 1-3, 207-208. The tribal police officers responded to an emergency call for assistance made to the tribal police department by the security guard at the PTHA Treatment Center. CP 3. The PTHA Treatment Center, a tribal medical facility, is located on tribal trust land at the heart of the reservation. CP 192-194, 223-224, 238-242, 298. Security guard Benjamin Isadore (“Isadore”) called for assistance from tribal police because of the threat posed by trespasser Jeffry Young. CP 3. Young had attempted to gain access to the Treatment Center under false pretenses and then refused to leave the facility. CP 1-3. In dismissing this lawsuit, the trial court correctly determined that it did not have subject matter jurisdiction over a tort lawsuit for monetary damages involving tribal police officers and a security guard performing their job duties on tribal land while acting in their official capacity and within the scope of their authority. CP 288-291.

This state court action against the tribal police officers is a tort lawsuit for monetary damages against the Tribe. Consequently, the

lawsuit is barred by tribal sovereign immunity. In an effort to circumvent the jurisdictional bar of tribal sovereign immunity, Plaintiff sued only the tribal police officers and security guard and not the Tribe. Because the tribal police officers and security guard were on-duty tribal employees, acting on the reservation in an official capacity and within the scope of delegated authority, they are protected by tribal sovereign immunity.

Inclusion of the Puyallup Tribe's Chief of Police, Joe Duenas, as a named defendant confirms that this is a tort lawsuit for monetary damages against the Tribe. Duenas was not present when this incident occurred. He was sued only for alleged "negligent hiring and/or training." CP 1, 2, 4, 8, 195-196. The hiring and training of police officers were "official" job duties of the Chief of Police, just as responding to an emergency call to the tribal police department was part of the official job duties of the three tribal police officers. CP 4, 195-196, 244-246, 260-261. The tribal police officers did not do their jobs as "private citizens" but as authorized agents of the Tribe to whom the tribal government had delegated authority to maintain peace and order on the reservation.

Pursuant to the limited waiver of sovereign immunity contained in the Puyallup Tribal Tort Claims Act ("PTTCA")<sup>1</sup>, the proper forum for

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<sup>1</sup> A copy of the PTTCA may be found at CP 168-178 and at [www.puyallup-tribe.com](http://www.puyallup-tribe.com) under "Tribal Laws."

any wrongful death lawsuit against the Tribe, its tribal police officers, and/or the PTHA security guard was in the Puyallup Tribal Court. CP 150-152, 168-178. This is the same court in which Plaintiff originally filed but then dismissed the first lawsuit on his own motion. CP 166-167.

The Pierce County Superior Court properly dismissed this state court lawsuit under CR 12(b)(1) for lack of subject matter jurisdiction based upon tribal sovereign immunity. CP 288-291. The court properly denied the CR 59 motion for reconsideration that followed.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Whether police officers of the Puyallup Tribe are protected by the Tribe's sovereign immunity from tort actions for money damages filed in state court where Congress has never enacted any legislation that abrogates the Tribe's immunity from this type of suit and the Tribe and its officers have not waived immunity.
2. Whether the trial court properly granted the tribal police officers' CR 12(b)(1) motion to dismiss for lack of subject matter jurisdiction and denied the CR 59 motion for reconsideration.

## **III. COUNTERSTATEMENT OF THE CASE**

### **A. The Puyallup Indian Tribe And Its Tribal Officers Acting In An Official Capacity Within the Scope of Their Authority Have Sovereign Immunity.**

The Puyallup Indian Tribe is a federally recognized Indian Tribe operating under a Constitution and By-Laws. CP 2, 168. The Tribe's Council enacted the Puyallup Tribal Tort Claims Act (PTTCA), which allows a person to bring an action for monetary damages in tribal court

against the Tribe or its employees for injuries caused by alleged acts or omissions of the Tribe or its agents, employees or officers acting on behalf of the Tribe. CP 264-271. Pursuant to the limited waiver of sovereign immunity in the PTTCA, tribal court is the exclusive forum for bringing a tort lawsuit against the Tribe and/or its officers and employees for allegedly actionable conduct while acting for the Tribe in the course and scope of employment and authority.

**B. The Pierce County Superior Court Action Was the Wrong Forum for Appellant's Suit.**

This lawsuit case arises from an incident that occurred on the evening of May 12, 2007, at the Puyallup Tribal Health Authority (“PTHA”) Treatment Center on the Puyallup Indian reservation. CP 3. The incident involved: (1) decedent Jeffry Young, (2) Respondent tribal police officers Fitzpatrick, Scrivner and Dausch, (3) Respondent PTHA security guard Benjamin Isadore and (4) PTHA employee Wade Iversen, who was not sued. CP 1-4. Respondent Chief of Police Duenas, a member of the Puyallup Tribe, was sued though not personally involved in the incident. CP 2, 4, 195-196.

This incident took place on tribal trust land. According to the United States Department of the Interior, Bureau of Indian Affairs (“BIA”) and the Pierce County Tax Assessor’s Office, the PTHA Treatment Center

is located on land held in trust for the Tribe by the United States of America (“trust land”). CP 193-194, 239-242, 294-298.<sup>2</sup> When the tribal police officers responded to the emergency call, they came to protect patients, employees and others on tribal trust land.

The tribal police officers responded as the duly authorized law enforcement agents of the Tribe. They used a police car, taser and handcuffs, and wore the tribal police uniforms issued by the Tribe in their “official” capacity as tribal officers, not as private individuals. CP 195-196, 260-281, 243-259. Just as the officers did not respond as private citizens, they also did not respond at the behest of the State of Washington as “state commissioned peace officers.” CP 196-197, 243-258. Rather, they came to provide assistance as tribal police officers, authorized by the Tribe to act under color of tribal law. Accordingly, the tribal police officers are protected by the Tribe’s sovereign immunity in this state court lawsuit.<sup>3</sup>

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<sup>2</sup> Certified Copy of Title Status Report, United States Department of the Interior, Bureau of Indian Affairs, for BIA Tract No. 115-T1035, states “Trust 1” and “Fee 0.” CP 294-298. *See also* Corbett and Arnold Declarations regarding GIS Maps of PTHA Treatment Center on BIA Tract No. 115-T1035; CP 192-194, 238-242.

<sup>3</sup> *See Wright v. Colville Tribal Enterprise Corp.*, 159 Wn.2d, 108, 111, 147 P.3d 1275, 1278 (2006); *Cook v. AVI Enterprises, Inc.* 548 F.3d 718, 726-27 (9th Cir. 2008).

Plaintiff Chris Young originally filed a wrongful death lawsuit in Puyallup Tribal Court, naming as defendants the Puyallup Tribe and John and/or Jane Doe Indian Police Officers. CP 150-165. In two different tribal court Complaints dated April 10, 2009, and November 6, 2009, Young alleged that the tribal court had subject matter jurisdiction over this matter “because all of the facts alleged were committed within the territorial jurisdiction of the Puyallup Indian Tribe.” CP 150-165.

On January 26, 2010, on his own motion, Young requested dismissal with prejudice of the tribal court lawsuit. CP 150-151, 166-167. On February 9, 2010, Young then filed the instant lawsuit in Pierce County Superior Court, omitting the Puyallup Tribe as a named defendant and instead naming the Tribe’s Chief of Police, the three tribal police officers involved in the incident, and a PTHA security guard. CP 1-9.

Chris Young does not dispute that Jeffrey Young refused to leave the treatment facility and exhibited aberrant behavior. CP 3, 4. The PTHA security guard Isadore called tribal police for assistance. CP 4. On-duty tribal police officers Scrivner, Fitzpatrick and Dausch responded. CP 4. While Jeffrey Young was being restrained, he suddenly and unexpectedly expired. CP 2, 5. Chief of Police Duenas, a member of the Puyallup Tribe, was not present during these events. CP 2, 4, 195-196.

Chris Young alleged that these on-duty tribal police officers and PTHA security guard were at all times acting as the “agents/employees of the Tribe” and were being sued both in an “individual capacity” and “official capacity.” CP 2. There are no facts alleged in the three tribal and state court complaints demonstrating that the tribal officers ever interacted with Jeffry Young as a private citizen or in any capacity other than in an “official capacity,” as the authorized agents of the Tribe or the PTHA, acting within the scope of delegated authority. CP 1-9, 109-119, 195-196, 260-261. Chris Young conceded at oral argument that: “yes, the officers were on duty; yes, they were acting in their official capacity” and there was no evidence of intentional misconduct by any officer. “We’re not alleging intent . . . . We’re alleging negligence.” 05/07/10 RP 29:16-18; 05/28/10 RP 4-5.

Chris Young admits that Jeffry Young falsely posed as a medical doctor in order to gain access to patients in the tribal treatment center. CP 1, 3, 112-113, Appellant Opening Brief, pg. 1. Jeffry Young then repeatedly refused requests by PTHA personnel to leave the premises. CP 4, 113, 122. Because he posed a threat to the safety of patients, employees and to himself, Jeffry Young could not be permitted to roam freely on the reservation. Therefore, the tribal police officers made the decision to detain

him in order to protect others from his unpredictable behavior and to get him help. CP 109-118.

To assist his fellow officers in the face of Young's resistance, Officer Fitzpatrick used a taser issued by the Tribe. CP 4-5, 111. Officer Dausch and Jeffry Young were each touched by the taser. CP 114. After Young was finally subdued and handcuffed, he suddenly and unexpectedly expired. CP 5, 114. An autopsy by the Pierce County Medical Examiner described the manner of death as accidental due to "excited delirium syndrome." Pre-existing heart problems and a "history of psychosis" were also noted. CP 259.

At the request of the Tribe, this incident was independently investigated by both a federal agency, the Department of The Interior, United States Bureau of Indian Affairs (BIA), and a state agency, the Tacoma Police Department (Tacoma PD). CP 243-259. The official findings of the BIA and Tacoma PD, reviewed by the Pierce County Prosecutor's Office, demonstrate that the tribal police officers at all times acted in an official capacity and within the scope of delegated authority. CP 243-258. The Tribe also investigated and determined that there was no cause for discipline. The Tribe's Director of Human Resources, Timothy Reynon, and Chief of Police Duenas confirmed that officers Scrivner,

Fitzpatrick and Dausch had each acted within the course and scope of their employment and authority. CP 195-196, 244, 260-261.

During the incident, the tribal police officers enforced tribal law on trust land to protect tribal personnel, patients, and others on the reservation. Training received by these officers at the request of the tribal government from the State of Washington police training academy, as authorized by RCW 43.101.157, did not transform these tribal police officers from tribal employees into state employees acting on behalf of the State of Washington. There is no allegation that the tribal police officers responded as agents of the State of Washington or that any state police officer or state agency was involved in the incident. The tribal police officers were not enforcing state traffic law on a state highway as “state commissioned peace officers.” See Bressi v. Ford, 575 F.3d 891, 894 (9th Cir. 2009). Rather, they were called to preserve and protect tribal personnel, patients, and others on tribal trust land. CP 195-196, 260-261. RCW 10.92.020 authorizes tribal police officers to apply to become a general authority “state commissioned peace officer”<sup>4</sup> to enforce state law. But this statute

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<sup>4</sup> The statute provides, in relevant part:

- (1) Tribal police officers under subsection (2) of this section shall be recognized and authorized to act as general authority Washington peace officers. A tribal police officer recognized and authorized to act as a general authority Washington peace officer under this section has the same

did not become effective until July 1, 2008, the year after the May 2007 incident. CP 195-196.

Plaintiff's claims for monetary damages, including attorney fees and expert fees, were for: (1) excessive force; (2) loss of consortium, (3) violation of civil rights (Constitution), (4) violation of civil rights (42 U.S.C. § 1983), (5) wrongful death, and (6) negligent hiring, retention, and training. CP 5-8. On May 7, 2010, the Pierce County Superior Court granted Defendants' CR 12(b)(1) motions to dismiss for lack of subject matter jurisdiction. CP 288-291. On May 28, 2010, the trial court denied Plaintiff's motion for reconsideration. 05/28/10 RP 16.

#### IV. ARGUMENT

**A. Tribal Sovereign Immunity Protects the Tribe and Its Employees from Private Tort Suits In State Court.**

“Under federal law, tribal sovereign immunity comprehensively protects recognized American Indian tribes from suit absent explicit and ‘unequivocal’ waiver or abrogation.” Wright v. Colville Tribal Enterprise Corp., 159 Wn.2d 108, 111, 147 P.3d 1275, 1278 (2006), *cert. denied*, 550 U.S. 931 (2007). As a federally-recognized Indian Tribe, the Puyallup Tribe possesses the common law defense of immunity from suit

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powers as any other general authority Washington peace officer to enforce state laws in Washington, including the power to make arrests for violations of state laws.

RCW 10.92.020(1).

traditionally enjoyed by sovereign powers. Foxworthy v. Puyallup Tribe of Indians Association, 141 Wn. App. 221, 169 P.3d 53 (2007). See also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Puyallup Tribe v. Washington Dep't of Game, 433 U.S. 165, 172-73 (1977). The Tribe is “exempt from suit without Congressional authorization.” U.S. v. U.S. Fidelity & Guar. Co., 309 U.S. 506, 512 (1940).

Congressional abrogation of tribal sovereign immunity must be unequivocal and cannot be implied. Santa Clara Pueblo, 436 U.S. at 58. Tribal immunity is a matter of federal law and is not subject to diminution by the states. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 756 (1998); Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 154 (1980). State and federal law recognizes the authority of Indian tribes to “employ police officers to aid in the enforcement of tribal law and in the exercise of tribal power.” State v. Schmuck, 121 Wn.2d 373, 382, 850 P.2d 1332 (1993) (citing Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir 1975)). In Ortiz-Barraza, the Court observed:

Indian tribal police forces have long been an integral part of certain tribal criminal justice systems and have often performed their law enforcement duties to the limits of available jurisdiction. W. Hagan, Indian Police and Judges (1966). The propriety of operation of tribal police forces has been recognized, presently and in the past, by the federal government. 18 Op.Atty.Gen. 440 (1886); 25

U.S.C. § 13 (1970); Act of May 15, 1886, ch. 333, 24 Stat. 29, 43; 25 C.F.R. §§ 11.301 *et seq.* (1974). Thus, as a general proposition, we have little difficulty in concluding that an Indian tribe may employ police officers to aid in the enforcement of tribal law and in the exercise of tribal power.

Ortiz-Barraza v. United States, 512 F. 2d at 1179.

The Tribe's police officers, while acting solely in their official capacity and within the scope of their delegated authority, are protected from private suits in state court for monetary damages. Cook v. AVI Enterprises, 548 F.3d 718, 726-27 (9th Cir. 2008); Linneen v. Gila River Indian Community, 276 F.3d 489, 492 (9th Cir. 2002); Hardin v. White Mountain Apache, 779 F.2d 476, 479 (9th Cir. 1985); Snow v. Quinalt Indian Nation, 709 F.2d 1319, 1321 (9th Cir. 1983); United States v. Oregon, 657 F.2d. 1009, 1013, n.8 (9th Cir. 1981).

Similarly, a security guard employed by an agency of the Tribe, while acting solely in his official capacity and within the scope of his delegated authority, is also protected from private suit in state court for monetary damages. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998); Marceau v. Blackfeet Housing Authority, 455 F.3d 974 (9th Cir. 2006).

Tribal sovereign immunity extends to tribal employees as long as their alleged misconduct occurred while they were acting in their official

capacity and within the scope of their authority. Linneen v. Gila River Indian Community, 276 F.3d 489, 492 (9th Cir.) (tribal community ranger performing official duties on tribal land), *cert. denied*, 536 U.S. 939 (2002); Snow v. Quinault Indian Nation, 709 F.2d 1319, 1321 (9th Cir. 1983) (tribal official protected by Tribe's immunity), *cert. denied*, 467 U.S. 1214 (1984).

In Cook v. AVI Enterprises, Inc., 548 F.3d 718 (9th Cir. 2008), the Ninth Circuit held that tribal employees acting in the course and scope of their employment by a Tribe in a tribal casino have the same protection as the Tribe's officials. In Cook, casino employees were alleged to have over-served a patron at the tribal casino. The court held that protection from suit afforded by sovereign immunity cannot be bypassed by the "pleading artifice" of suing tribal employees where liability for the alleged misconduct is based solely on the authorized activities of these on-duty tribal employees. The court reasoned:

The principles that motivate the immunizing of tribal officials from suit--protecting an Indian tribe's treasury and preventing a plaintiff from bypassing tribal immunity merely by naming a tribal official--apply just as much to tribal employees when they are sued in their official capacity. Here, Cook has sued Dodd and Purbaugh in name but seeks recovery from the Tribe; his complaint alleges that ACE is vicariously liable for all actions of Dodd and Purbaugh. Plaintiffs such as Cook cannot circumvent tribal immunity through "a mere pleading device." Will v. Michigan Dept. of State Police, 491 U.S. 58, 70-71, 109

S.Ct. 2304, 105 L.Ed.2d 45 (1989). Accordingly, we hold that tribal immunity protects tribal employees acting in their official capacity and within the scope of their authority.

Cook, 548 F.3d at 726-727.

Tribal police officers have inherent authority as the employees of the Tribe, a sovereign government, to detain both Indians and non-Indians on the reservation until the status of the trespasser can be determined. In State v. Schmuck, 121 Wn.2d 373, 382, 850 P.2d 1332 (1993), the Supreme Court observed, “Indian Tribes are limited sovereigns which retain the power to prescribe and enforce internal criminal and civil laws. The power necessarily includes the authority to stop a driver on the reservation to investigate a possible violation of tribal law and determine if the driver is an Indian, subject to the jurisdiction of that law.” Schmuck, 121 Wn.2d 373 at 380.

In Schmuck, in addition to affirming the right of tribal police officers to detain persons on the reservation under tribal law, relying upon the decision in Duro v. Reina, 495 U.S. 676, 110 S.Ct. 2053 (1990), superseded by statute on other grounds, the Washington Supreme Court affirmed the right of Indian Tribes to exclude undesirable persons from the reservation as follows:

The tribes also possess their traditional and undisputed power to exclude persons whom they deem to be

undesirable from tribal lands. Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, *tribal officers may exercise their power to detain the offender and transport him to the proper authorities.*

Duro, 495 U.S. at 696-97 (emphasis added) (citations omitted).

The authority of tribal police officers to detain and investigate as discussed in State v. Schmuck, 121 Wn.2d 373, was recently affirmed by the Washington Supreme Court in State v. Erikson, \_\_\_ Wn.2d \_\_\_, 241 P.3d 399 (2010), a case involving fresh pursuit of a traffic offender off the reservation by Lummi Tribal Nation police officers.

The decision in Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) does not support state court jurisdiction. The Puyallup Tribe does not seek to assert regulatory authority over a nonmember; instead, Plaintiff Chris Young, a nonmember, is suing the Tribe in a civil suit for monetary damages arising out of an incident involving tribal officers acting on tribal trust land. Montana involved land that was not owned by the Crow Tribe. The Crow Tribe sought to assert regulatory authority over non-Indian conduct on “fee land” located on the reservation but owned by a nonmember. The Crow Tribe maintained that it had authority to regulate the hunting and fishing rights of nonmembers on nonmember fee land. The Tribe’s only relationship to this land was its

location within reservation boundaries. The Supreme Court held that the Tribe had the right to regulate land that it owned, whether in fee or trust, but the Tribe had no right to regulate land that it did not own.

The Montana court explicitly stated that there are two exceptions to the general rule regarding regulatory authority by an Indian tribe over the conduct of nonmembers. The first exception involves consensual relationships with the Indian tribe, such as employment or contractual relationships. The second exception involves matters affecting the internal affairs of the tribal government and the health and welfare of the Tribe. The Tribe has authority to exercise civil jurisdiction over nonmembers under these circumstances as follows:

A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See Fisher v. District Court, 424 U. S. 382, 424 U. S. 386; Williams v. Lee, *supra* at 358 U. S. 220; Montana Catholic Missions v. Missoula County, 200 U. S. 118, 200 U. S. 128-129; Thomas v. Gay, 169 U. S. 264, 169 U. S. 273.

Montana v. United States, 450 U.S. at 568.

The Montana decision does not support state court jurisdiction in this case. The Puyallup Tribe is not the plaintiff. The Tribe is not seeking to assert regulatory authority over a non-Indian or nonmember. Further, under the second Montana exception, the Puyallup tribal government was

entitled to have its law enforcement agents protect the safety of patients and employees on the reservation without being subject to state court civil jurisdiction. The officers carried out the mission of the tribal government to protect the health and welfare of the Tribe and the Tribe provided a tribal court system if a judicial remedy was needed.

The Supreme Court decision in Plains Commerce Bank v. Long Family Land and Cattle Company, Inc., 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008), also does not support state court jurisdiction. It involved a land sale transaction of nonmember fee land by a nonmember owner (bank) to a nonmember purchaser. The Tribe did not own the land, so the dispute did not implicate the internal affairs of the tribal government. “Montana does not permit tribes to regulate the sale of non-Indian fee land. Rather it permits tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe’s sovereign interests.” Plains Commerce Bank, 128 S.Ct. 2709 at 2713 (emphasis added).

**B. Washington Courts Have Correctly Interpreted the Scope and Attributes of Tribal Sovereign Immunity.**

Washington courts have properly followed the body of tribal sovereign immunity law established by the federal courts. The Washington Supreme Court has already held that an Indian tribe is immune from garnishment actions and the Tribe’s commercial activities

off reservation land did not waive sovereign immunity. North Sea Prods. Ltd. v. Clipper Seafoods Co., 92 Wn.2d 236, 237, 595 P.2d 938 (1979). In Clipper Seafoods, the Whatcom County Superior Court issued a writ of garnishment ordering the Lummi Tribe's governing body and the tribe's seafood processing plant to withhold the wages of a plant employee. Because Congress had not enacted any statute relinquishing tribal sovereign immunity from garnishment actions and the Tribe had not impliedly waived its immunity by conducting commercial activities off the reservation and by hiring a judgment debtor to work at its plant, the Court remanded the case with instructions to quash the writ and dismiss the case. Clipper Seafoods, 92 Wn.2d at 241-42.

The Washington Supreme Court affirmed the controlling principle in this case: "Under federal law, tribal sovereign immunity comprehensively protects recognized American Indian tribes from suit absent explicit and 'unequivocal' waiver or abrogation." Wright v. Colville Tribal Enterprise Corp., 159 Wn.2d 108, 111. Another key concept this Court adheres to is that tribal sovereign immunity protects Tribes and their employees from suits involving both governmental and commercial activities, both on and off the reservation. Wright, 147 P.3d at 1276 (citing Kiowa Tribe, 523 U.S. at 754-55).

In Wright, the majority held that two tribal corporations of the Colville Tribe and their agent acting in his official capacity were immune from an employment discrimination action filed in state court, specifically recognizing that, “Congress has not abrogated tribal sovereign immunity to suit for employment discrimination.” Wright, 147 P.3d at 1280.

In Foxworthy v. Puyallup Tribe of Indians Association, 141 Wn. App. 221, 169 P.3d 53 (2007), Foxworthy sued the Puyallup Tribe in Pierce County Superior Court in derogation of the Puyallup Tribal Tort Claims Act. She alleged over-service of a patron at the Tribe’s casino, which was located on the reservation. Foxworthy was injured in an off-reservation motor vehicle accident involving this patron and sued the Tribe. Dismissal for lack of subject matter jurisdiction based upon sovereign immunity was affirmed by a panel of this court. As in the present situation, the court noted that Foxworthy could have pursued a claim against the Tribe under the PTTCA in tribal court. Foxworthy, 141 Wn. App at 227.

In Matheson v. Gregoire, 139 Wn. App. 624, 161 P.3d 486 (2007), Puyallup tribal member Matheson brought suit in state court against the Puyallup Tribe and its Cigarette Tax Administrator in his official capacity. The CR 12(b)(1) dismissal for lack of subject matter jurisdiction was affirmed based upon sovereign immunity, which protected both the

director and Tribe from suit in state court (“[T]ribal sovereign immunity continues to protect individual tribal officials acting in their representative capacity and within the scope of their authority”). See Wright, 159 Wn.2d at 116, 147 P.3d 1275; Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985). Matheson v. Gregoire, 139 Wn. App. at 633.

C. **General Principles of Principal-Agency Law Do Not Nullify the Protection Afforded by Tribal Sovereign Immunity When Tribal Employees Act In An Official Capacity.**

Indian tribes are authorized to employ tribal police officers to enforce tribal law on the reservation. State v. Schmuck, 121 Wn.2d 373; Ortiz-Barraza, 512 F.2d 1176; Confederated Tribes of Colville Reservation v. Washington, 938 F.2d 146, 149 (9th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992). The alleged actionable conduct of the tribal police officers described in both the tribal court and state court complaints occurred while the officers lawfully served as employees of the Puyallup Tribe and acted within the scope of delegated authority. “[T]he officers were carrying out their duties under law. They were doing lawful things in lawful ways.” CP 254-255. The BIA exonerated Fitzpatrick, Scrivner and Dausch, stating as to each officer, “the officer’s actions were lawful and proper.” CP 256-258.

Appellant's reliance on Aungst v. Roberts Construction, 95 Wn.2d 439, 625 P.2d 167 (1981) is of no assistance. Aungst involved statutory claims against a non-tribal corporation for violation of Washington's Consumer Protection Act and Securities Act. Aungst claimed that he was defrauded by Roberts Construction in connection with the purchase of a camp membership. The membership was for a camp located on land transferred by Roberts Construction to the Tulalip Tribe. When Aungst sued Roberts Construction, he did not sue the Tribe. Roberts asserted tribal sovereign immunity as a bar to the state court jurisdiction, arguing that he was protected as the agent of the Tribe. The court held that general agency principles and sovereign immunity were not relevant since the statutory claims did not depend on any relationship to the Tribe and remedies could be fashioned under these state statutes that would not harm the Tribe.

In contrast, the Tacoma PD and BIA investigations confirmed that when tribal police officers Scrivner, Fitzpatrick and Dausch responded to the emergency call, they responded solely in their official capacity for the Tribe, using their training and equipment as authorized by the Tribe. CP 1-9, 109-118, 195-96, 260-261. As tribal police officers, they were authorized to detain and to exclude trespassers on the reservation.

Discussing the right to exclude, the court in Ortiz-Barraza v. United States, 512 F.2d 1176, observed:

Also intrinsic in the sovereignty of an Indian tribe is the power to exclude trespassers from the reservation. 1 Op. Atty. Gen. 465 (1821); Department of the Interior, Office of the Solicitor, Federal Indian Law 438, 439 (1958). A tribe needs no grant of authority from the federal government in order to exercise this power. F. Cohen, Handbook of Federal Indian Law 306 (1942 ed. as republished by the University of New Mexico Press). It has at times been held that tribes may not exercise criminal jurisdiction over non-Indians. Ex parte Kenyon, 14 Fed. Cas. No. 7720 (1878). Such holdings, if presently valid, have not derogated from the sovereign power of tribal authorities to exclude trespassers who have violated state or federal law by delivering the offenders to the appropriate authorities.

Ortiz-Barraza v. United States, 512 F. 2d at 1179.

This tort suit for monetary damages is a lawsuit against the Tribe which directly impacts its welfare and tribal self-government. The Tribe's sovereign immunity protects these tribal officers.

**D. The Exercise of State Court Jurisdiction In This Tort Lawsuit Involving Tribal Officers Acting On Tribal Land Would Undermine Tribal Self-Government.**

Suing the tribal police officers in their "official" capacity is the legal equivalent of suing the Tribe. The instant lawsuit is fundamentally a state court tort lawsuit for monetary damages against the Tribe, without an express waiver by the Tribe or Congressional abrogation of tribal sovereign immunity. Allowing this action to proceed against the tribal

police officers would violate the centuries old doctrine of tribal sovereign immunity.

In addition, it would undermine the authority of the Puyallup tribal government and its tribal court. In Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), the United States Supreme Court held that Arizona state courts may not exercise jurisdiction over an Indian in a lawsuit brought by a non- Indian where the cause of action arose on the Reservation. In finding that the tribal court had jurisdiction over this dispute, Justice Black observed:

There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. Cf. Donnelly v. United States, *supra*; Williams v. United States, *supra*. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. **If this power is to be taken away from them, it is for Congress to do it."**

Williams v. Lee, 358 U.S. at 223 (emphasis added).

In Rodriguez v. Wong, 119 Wn. App. 636 (2004), a non-Indian tribal employee sued the executive director of the Indian gaming commission and his wife, alleging discrimination based upon race and ethnicity. The Court affirmed the CR 12(b)(1) dismissal of the state court

lawsuit for lack of subject matter jurisdiction. Citing the decision in Williams v. Lee, the court held that the state court did not have jurisdiction over these employment-related claims because the claims against the tribal official pertained to internal matters of tribal self-government. Rodriguez v. Wong, 119 Wn. App. at 644 (“[T]he question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.” (quoting Williams v. Lee, 358 U.S. at 220)). See also Rodriguez, 119 Wn. App. at 644 (“Indian tribes retain the authority necessary ‘to protect tribal self-government or to control internal relations[.]’” (quoting Montana, 450 U.S. at 564)).

At issue in this matter are fundamental self-government interests and services provided by the sovereign government of the Puyallup Tribe on the reservation. As a federally recognized Indian Tribe, the Puyallup Tribe had the sovereign right to govern its internal affairs, including by the establishment of the Puyallup Tribal Police Department and the Puyallup Tribal Court. State v. Schmuck, 121 Wn.2d 373. Allowing a state court to exert civil jurisdiction over the Tribe and its police officers in this tort action would directly interfere with the internal affairs of a tribal government charged with the health and welfare of tribal members, employees, and others on the reservation.

**E. RCW 37.02.010 Does Not Support State Court Jurisdiction Over These Tribal Employees.**

Public Law 280 as codified in RCW 37.02.010 also does not provide a basis for state court jurisdiction in this matter. RCW 37.02.010 reserves eight specific areas to state civil and criminal jurisdiction, specifically: “(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.” None of these areas are involved in this matter.

This case does not involve the right of the state government to regulate mental health or any of the other areas covered by RCW 37.02.010 on an Indian reservation. These tribal police officers and tribal security guard were not employees of a tribal mental health agency. They were tribal police officers dealing with the aberrant behavior of a trespasser on the reservation. These on-duty officers were not hired to handle Young’s mental health treatment. They were present to protect and maintain order on tribal land as employees of the Puyallup Tribe.

**F. Because There Are No Facts Demonstrating State Action, There Is No Claim for Violation of 42 U.S.C. § 1983.**

No action under 42 U.S.C. § 1983 can be maintained in state or federal court for persons alleging deprivation of federal constitutional

rights under color of tribal law because Indian tribes are separate and distinct sovereign nations. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978). Actions taken by tribal employees under color of tribal law are beyond the reach of § 1983. McKinney v. State of Oklahoma, 925 F.2d 363, 365 (10th Cir. 1991). *See also* Dry v. U.S., 235 F.3d 1249, 1253 (10th Cir. 2000) (“Due to their sovereign status, suits against tribes or tribal officials in their official capacity ‘are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress.’” (quoting Fletcher v. United States, 116 F.3d 1315, 1324 (10th Cir. 1997))).

In E.F.W. v. St. Stephen’s Indian High School, 264 F.3d 1297, 157 Ed. Law Rep. 15 (10th Cir. 2001), the court held that a tribal agency, its officials, and an employee of a federal Indian health agency could not be sued under § 1983. It was not relevant that they had an agreement with the state in which they agreed to follow some state law guidelines regarding child welfare. This was not “state action.”

The decision in Bressi v. Ford, 575 F.3d 891, 897 (9th Cir. 2009), confirms that state action is a required element of a 42 U.S.C. § 1983 claim. In Bressi, tribal officers set up a roadblock on a state highway that crossed the reservation. They conceded that the roadblock, arrest of a non-Indian, and issuance of citations for violation of state law was all done

under “color of state law” because these officers were enforcing state law. The roadblock on the state highway was “an instrument for the enforcement of state law.” Bressi v. Ford, 575 F.3d 89 at 897.

In contrast, the Puyallup tribal police officers were enforcing tribal law. They acted on trust land under color of tribal law to detain and, if necessary, exclude a trespasser. Bressi v. Ford, 575 F.3d 891, 896 (citing Ortiz-Barraza v. United States, 512 F.2d 1176, 1180 (9th Cir. 1975); State v. Schmuck, 121 Wn.2d 373, 850 P.2d 1332 (1993)).

Plaintiff claims that because several of the tribal police officers had successfully completed training at the state’s police training academy as permitted under RCW 43.101.157<sup>5</sup>, this automatically transformed them

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<sup>5</sup> RCW 43.101.157 provides:

(1) Tribal governments may voluntarily request certification for their police officers. Tribal governments requesting certification for their police officers must enter into a written agreement with the commission. The agreement must require the tribal law enforcement agency and its officers to comply with all of the requirements for granting, denying, and revoking certification as those requirements are applied to peace officers certified under this chapter and the rules of the commission.

(2) Officers making application for certification as tribal police officers shall meet the requirements of this chapter and the rules of the commission as those requirements are applied to certification of peace officers. Application for certification as a tribal police officer shall be accepted and processed in the same manner as those for certification of peace officers.

(3) For purposes of certification, “tribal police officer” means any person employed and commissioned by a tribal government to enforce the criminal laws of that government.

into state peace officers, acting as the agents of the State of Washington, to enforce state law on tribal trust land. Nothing in this statute so provides and there are no facts alleged showing “state action.” If certification under RCW 43.101.157 meant that all actions of tribal police officers on the reservation were performed pursuant to the “general authority” of the state, there would have been no need for the new statute RCW 10.92.020 that came into effect the year following this incident. RCW 10.92.020 permitted officers to apply to become “state commissioned peace officers” with “general authority” to enforce state law.

There is no basis for a 42 U.S.C. § 1983 claim against any officer because each tribal employee was acting under tribal law while fulfilling his job duties. There are no facts alleged demonstrating that any officer acted jointly with, under the direction of, or on behalf of any agency of the state government. The mere existence of a certification or cross-commission agreement does not establish that the tribal officers were acting as employees or agents of the state at the PTHA Treatment Center.

Plaintiff cannot state a claim under 42 U.S.C. § 1983 because the facts alleged do not establish that: (1) the events at the PTHA Treatment Center occurred under color of state law, and (2) any “state action” by the tribal officers resulted in deprivation of a constitutional or federal statutory right. Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d

420 (1981), *overruled on other grounds*, Daniels v. Williams, 474 U.S. 327 (1986); McDade v. West, 223 F.3d 1135, 1139 (9th Cir. 2000) (citations omitted).

Further, to state a 42 U.S.C. § 1983 claim against any officer, Plaintiff must allege how each individually-named officer caused or personally participated in causing alleged harm to the decedent, Jeffrey Young. Arnold v. IBM, 637 F.2d 1350, 1355 (9th Cir.1981). Furthermore, Chief of Police Duenas cannot be held liable under 42 U.S.C. § 1983 solely on the basis of his supervisory position. Monell v. New York City Dep't of Social Services, 436 U.S. 658, 694 n.58, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A theory of *respondeat superior* is not sufficient to state a § 1983 claim. Padway v. Palches, 665 F.2d 965 (9th Cir. 1982).

**G. The Decision in Puyallup Tribe v. Washington Dep't of Game Does Not Support State Court Jurisdiction.**

Plaintiff included a copy of the Treaty of Medicine Creek in an Appendix, without citing to any particular portion or providing any explanation as to its relevance. The Supreme Court implicitly recognized in Puyallup Tribe, Inc. v. Washington Dep't of Game, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977), that the Tribe did not waive its tribal sovereign immunity in signing the Treaty of Medicine Creek. There is no

reported decision that has ever held that the Puyallup Tribe waived its tribal sovereign immunity in this treaty or that the United States abrogated the Tribe's sovereign immunity in this treaty. Moreover, the tribal police officers do not assert the right to be protected by the Tribe's sovereign immunity as individual members of the Puyallup Tribe. They claim protection as authorized employees of the Tribe.

In Puyallup Tribe, Inc. v. Washington Dep't of Game, the Washington Supreme Court reaffirmed the guiding principle in this case that, "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." Puyallup Tribe v. Washington Dept's of Game, 433 U.S. at 172-173. Neither the Tribe nor its tribal police officers have waived their right to be protected by sovereign immunity from lawsuits for monetary damages, except as provided in the PTTCA.

**H. Since There Are No Facts To Support a Civil Rights Claim, There Is No Legal Basis For an Award of Attorney Fees.**

Plaintiff claims entitlement to attorney fees and expert fees. Since he cannot state a claim under 42 U.S.C. § 1983 because there are no facts to support the element of "state action," there is no basis for an award of attorney fees or expert fees.

## V. CONCLUSION

This case involves tribal employees of an Indian tribe acting on tribal trust land. Tribal sovereign immunity protects tribal officers acting in the course and scope of their employment and delegated authority on tribal land. Congressional abrogation of that most fundamental attribute of tribal sovereign immunity, freedom from private lawsuits, must be explicit and unequivocal. Plaintiff has not asserted either Congressional abrogation or waiver of tribal sovereign immunity by the Tribe or its officers.

The Tribe provided a limited waiver of sovereign immunity in the Puyallup Tribal Tort Claims Act. Initially, Plaintiff exercised his right under the PTTCA to sue the Tribe and John Doe tribal police officers in tribal court but then inexplicably requested dismissal with prejudice. Plaintiff's decision to reject the only judicial remedy available did not affect the legal right of these tribal police officers and the PTHA security guard to be protected by the Tribe's sovereign immunity.

Exercise of state court jurisdiction over this tort lawsuit would undermine the authority of the tribal government and its tribal court. Further, there is no basis for a 42 U.S.C. § 1983 claim against any tribal officer since there was no state action.

Officers Duenas, Fitzpatrick, Scrivner and Dausch respectfully request that this Court affirm the orders dismissing this lawsuit under CR 12(b)(1) for lack of subject matter jurisdiction and denying the CR 59 motion for reconsideration.

DATED this 30<sup>th</sup> day of November, 2010.

FORSBERG & UMLAUF, P.S.

By: 

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Roy A. Umlauf, WSBA #15437

Attorneys for Respondents Duenas,  
Fitzpatrick, Scrivner and Dausch

**CERTIFICATE OF SERVICE**

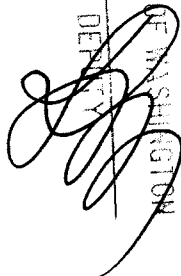
The undersigned certifies under the penalty of perjury of the laws of the State of Washington that on the date given below I caused to be served in the manner indicated a copy of the foregoing **BRIEF OF RESPONDENTS DANIEL J. DUENAS, JOSEPH S. FITZPATRICK, CHRISTOPHER E. DAUSCH AND JOHN SCRIVNER** upon the following person(s):

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COURT OF APPEALS  
DIVISION II

DATED this 30th day of November, 2010, at Seattle, Washington.

  
Franny Drobny, Legal Assistant