No. 843591

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ELIZABETH PITOITUA,

Appellant,

v.

CLARENCE GAUBE, *et al*.,

Respondents,

RESPONDENTS' RESPONSE BRIEF

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I. INTRODUCTION

The Court should affirm the trial court's CR 12(c) judgment on the pleadings dismissal of appellant Elizabeth Pitoitua's negligence claim against the individual respondents because (1) Pitoitua's allegations against the individual respondents in their purported personal capacity fail because they owed no *personal* duty to Letoi as casino personnel, even if the casino or Tribes owed her a duty; (2) the Tribes were the real-party-in-interest, not the individually named respondents, thus the state court lacks subject matter jurisdiction due to sovereign immunity; and (3) Pitoitua stipulated to dismissal of respondents Corley and Arbuckle. CP 10.

Tellingly, Pitoitua sued the Tribes in Tulalip Tribal Court based on virtually identical facts and theories, while seeking a second recovery in state court against the involved employees for the same alleged acts/omissions.

Finally, Pitoitua never pled a negligence claim premised on the voluntary rescue doctrine, despite raising it in response to the respondents' CR 12(c) motion. She raises the doctrine again on appeal, but her complaint is based on the respondents' nonfeasance (inaction).

In sum, the trial court properly dismissed Pitoitua's negligence claim under CR 12(c). The dismissal should be affirmed on appeal.

II. RESTATEMENT OF THE ISSUES

The respondents assign no error to the trial court's CR 12(c) dismissal of Pitoitua's negligence claim, however, they respectfully submit a restatement of the issues subject to appellate review.

1. Were respondents entitled to the Tulalip Tribes' sovereign immunity from Pitoitua's state court lawsuit given that all alleged acts and omissions herein occurred in the scope of their employment as casino security personnel on tribal land, and Pitoitua had already filed a separate lawsuit

against the Tribes in tribal court for the same alleged failures at issue herein?

2. Did the respondents, in their personal capacity as Pitoitua alleges, owe a legal duty to Hana Letoi as a matter of law when they are not business proprietors and the sole allegations against them are for nonfeasance (rather than misfeasance)?

3. Does Pitoitua's unpled claim for relief under the voluntary rescue doctrine fail because that theory is unsupported by and inconsistent with her factual allegations?

III. RESTATEMENT OF THE CASE

This case arises from an incident at the Tulalip Resort Casino (TRC) on tribal land in Tulalip, Washington. Clerk's Papers (CP) 294. Appellant Pitoitua is the administrator of the Estate of Hana Letoi. Letoi died several days after she visited the TRC with her partner Nomeneta Tauave.

Pitoitua expressly alleges that the state lawsuit is against each of the named respondents in his or her "capacity as a tribal employee acting within the scope of [their] employment." CP 291-93.

A. Pitoitua's factual allegations leading to the 2020 incident.

Letoi and Tauave visited the casino on October 23, 2020. Plaintiff claims, "[a]t approximately 6:41 p.m., Defendant Fejeran observed a verbal altercation between [Letoi] and Tauave." CP 294 (emphasis added). Respondents Jeffreys and Nguyen then "said that the situation had been cleared." *Id*. Plaintiff claims respondents Gaube and Jeffreys later spotted Tauave "but did not confront him or ask him to leave TRC." *Id*.

Pitoitua alleges respondents Gaube and D'Arcis "saw another altercation at approximately 7:45 p.m." *Id*. She contends "Defendant Ingram made contact with the couple at approximately 7:46 p.m.," but "did not attempt to physically separate the couple despite the obvious threat to Hana

[Letoi] at this point." *Id*. She adds, "Defendant Ingram allowed them to leave TRC together." *Id*. Letoi then walked to her vehicle with Tauave. *Id*.

Pitoitua alleges that after Letoi arrived at the vehicle, "Defendant Gaube observed Tauave becoming violent toward Hana in the vehicle at 7:52 p.m.," and that "Tauave began to reverse the vehicle to leave the property after he saw Defendant Gaube observing the assault" a minute later. CP 295. Pitoitua contends that Tauave "then pushed [Letoi] out of the moving vehicle," and that Letoi thereafter lost consciousness and was hospitalized, where she died two days later. *Id*. Pitoitua contends that Tauave's actions amounted to "murder[]." CP 294.

B. Pitoitua filed two separate but nearly identical lawsuits arising from the incident.

Pitoitua filed two almost identical lawsuits arising from this incident. She first filed a lawsuit solely against the Tulalip Tribes in the Tulalip Tribal Court in April 2021; that lawsuit remains active. CP 118-23. The tribal court

complaint was submitted with the CR 12(c) motion as a public record, of which the state court could take judicial notice.[1]

The tribal court lawsuit against the Tribes alleged identical causes of action as those alleged against the individual respondents in the state lawsuit: (1) negligence, (2) negligent infliction of emotional distress, and (3) loss of parental consortium. *Compare* CP 295-96 *with* CP 120-22. The Tribal complaint also alleges that security personnel, including the individuals named in the state lawsuit, failed to "de-escalate an incident of domestic violence" and "took no … steps to intervene." CP 119-20. The security personnel were not named in the tribal court lawsuit, although Pitoitua's complaint therein "reserve[d] the right

[1] Consideration of the tribal court complaint does not convert this into a summary judgment motion, as the Court of Appeals has held that "the trial court may take judicial notice of public documents if their authenticity cannot reasonably be contested..." *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 226, 370 P.3d 25 (2016). The authenticity of the document was not contested.

to also bring suit against [tribal employees] in their individual capacities." CP 119-21.

Pitoitua's second lawsuit, filed on January 25, 2022 in state court, alleges causes of action against 10 tribal security employees—purportedly in their personal capacities—most of whom were present at the time of the incident(s). She claims these employees *"owed [Letoi] a duty of reasonable care to protect her from reasonably foreseeable injury"* and *"breached their duty of reasonable care by failing to take appropriate de-escalation steps in response to an obviously violent domestic encounter."* CP 295 (emphasis added).

C. The state court dismissed Pitoitua's lawsuit against the individual respondents.

In February 2022, the respondents answered the state complaint and asserted affirmative defenses. CP 263-73. Thereafter, in June 2022, the respondents moved for judgment on the pleadings with prejudice under CR 12(c). CP 235. The trial court granted this motion. CP 9-11.

The trial court found that (1) Pitoitua's allegations against the individual respondents in their purported personal capacities failed because they owed no personal duty to Letoi as casino employees, even if the establishment itself owed her a duty; (2) sovereign immunity barred the claims because the Tribes was the real-party-in-interest, not the individual respondents, and the state court thus lacks subject matter jurisdiction; and (3) Pitoitua stipulated to dismissal of respondents Corley and Arbuckle. CP 10. Pitoitua timely appealed. CP 4-5.

In state court, the respondents argued that Pitoitua's negligent infliction of emotional distress and loss of consortium claims failed because her underlying negligence claim was not actionable. CP 247-48. Pitoitua contested these arguments in the lower court, CP 103-04, but does not address them on appeal.

Finally, Pitoitua raised the unpled voluntary rescue doctrine in response to the CR 12(c) motion as a separate

or alternative negligence theory. However, her state and tribal court lawsuits did not allege any facts or hypothetical facts that could be sufficient to impose voluntary rescuer liability. Instead, Pitoitua exclusively alleged that the respondents were liable due to nonfeasance (inaction). *See* CP 294 (casino employees did not "confront" Tauave nor asked him to leave; employees allowed Letoi and Tauave to leave the casino together; employees followed Letoi and Tauave "but only from a distance"). But respondents, purportedly sued in their individual capacities, cannot be liable for their alleged inaction as a matter of law.

D. Pitoitua repeatedly misstates the appellate record.

Pitoitua repeatedly misstates the record, and relies on factual allegations in her Tribal complaint to bolster her arguments against dismissal of her state complaint. Respondents submit the following for the Court's consideration.

First, Pitoitua erroneously states that the casino employees "failed to call enforcement." Opening Br. at 1. However, her state complaint alleges that "Defendant Gaube finally call[ed] for police assistance." CP 295. Second, Pitoitua states that the casino employees "prohibited Hana from re-entering the TRC [Tulalip Resort Casino] on her own (without Tauave), forcing Hana to leave the TRC *with* Tauave." Opening Br. at 1 (emphasis in original). No allegation in Pitoitua's complaints support this statement, and the claim—offered for the first time in this appeal—is a blatant falsehood contradicted by the significant discovery her attorneys have taken in the tribal court matter.

Third, she states, "Although this domestic violence was observed through TRC's video system, Defendants, who were severely undertrained, did nothing in response." Opening Br. at 2, citing CP 96 and 119. However, CP 96 erroneously argues that the defendants "falsified training

documents"—which respondents vehemently deny—but is not pertinent to the sovereign immunity and duty analysis.[2]

Pitoitua also erroneously relies largely on her Tribal Court complaint in this appeal, citing CP 119 (the tribal court complaint) for the assertion that several respondents "watched Tauave continue to assault Ms. Letoi inside the TRC for some time." Opening Br. at 3 (quoting CP 119).

Finally, Pitoitua states that the respondents "took affirmative acts toward [Letoi's] safety that put her in further peril." Opening Br. at 12 (citing CP 294).

IV. ARGUMENT

A. The standard of review is *de novo*.

CR 12(c), the standard for judgment on the pleadings, states as follows:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a

[2] Below, Pitoitua presented purported evidence outside of the complaint of alleged "falsified training documents." This is irrelevant, as any alleged failure to complete training is irrelevant to the legal issues herein. Nevertheless, the witnesses' testimony demonstrates that there was no "falsification" of records, which implies that documents were modified to be untruthful.

> motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

CR 12(c).

Washington courts treat a CR 12(c) motion for judgment on the pleadings identically to a CR 12(b)(6) motion to dismiss. *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012). Judgment on the pleadings is appropriate if the plaintiff can prove no "set of facts, *consistent with the complaint*, that would entitle the claimant to relief." *N. Coast v. Factoria P'ship*, 94 Wn. App. 855, 861, 974 P.2d 1257 (1999) (emphasis added).

A party moving for judgment on the pleadings "admits, for the purposes of the motion, the truth of every fact well pleaded by his opponent," but "does not admit mere conclusions, nor the pleader's interpretation of

statutes involved, nor his construction of the subject matter." *Hodgson v. Bicknell*, 49 Wn.2d 130, 136, 298 P.2d 844 (1956).

Courts may dismiss an action under CR 12 for lack of subject matter jurisdiction. *See* CR 12(b)(1). Subject matter jurisdiction is a court's authority to adjudicate the type of controversy involved in the action. *Smale v. Noretep*, 150 Wn. App. 476, 478, 208 P.3d 1180 (2009). The existence of subject matter jurisdiction over a party asserting tribal sovereign immunity is a question of law that is reviewed *de novo. Young v. Duenas*, 164 Wn. App. 343, 348, 262 P.3d 527 (2011).

Courts are to generally decide disputes as to sovereign immunity "as early in the litigation as possible" to avoid "frustrat[ing] the significance and benefit of entitlement to immunity from suit." *Phx. Consulting, Inc. v.*

Republic of Angola, 342 U.S. App. D.C. 145, 216 F.3d 36, 39 (2000).[3]

B. Respondents should be afforded the Tulalip Tribes' immunity to this lawsuit.

An Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L.Ed.2d 981 (1998). A courtesy copy of *Kiowa* is at CP 144-56. "Sovereign immunity extends not only to the tribe itself, but also to tribal officers and tribal employees, as long as their alleged misconduct arises while they are acting in their official capacity and within the scope of their authority." *Young*, 164 Wn. App. at 349.[4]

"Once a defendant requests dismissal under CR 12(b)(1) on the basis of sovereign immunity, the party

[3] A courtesy copy of *Phx. Consulting* is at CP 179-88.

[4] Pitoitua contends that the "trial court's order conflicts with federal precedent" because respondents "relied heavily" on Washington's *Young* decision. Opening Br. at 7. This is incorrect. First, respondents cite *Young* exactly twice in the trial court, CP 239-40, and note that Pitoitua also cites *Young* in her opening brief. Opening Br. at 6. Relatedly, Pitoitua's claim that respondents "urged the trial court to ignore" the decision is meritless as they repeatedly cited *Lewis* and its progeny in the trial court. Opening Br. at 7.

asserting jurisdiction has the burden of proving the other party has no immunity or waived it." *Long v. Snoqualmie Gaming Comm'n*, 7 Wn. App. 2d 672, 679, 435 P.3d 339 (2019) (citing and relying extensively on federal law).

Courts follow the recent U.S. Supreme Court case *Lewis v. Clarke*, 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017)[5], when determining whether sovereign immunity bars a suit against tribal employees. In *Lewis*, a tribal employee was sued after causing a car crash on a state highway off-reservation. *Lewis*, 137 S. Ct. at 1292. The U.S. Supreme Court rejected the defendant's sovereign immunity defense, holding that the lawsuit was not against him in his official capacity, but instead "is simply a suit against Clarke to recover for his personal actions, which 'will not require action by the sovereign or disturb the sovereign's property.'" *Id.*

[5] A courtesy copy of *Lewis* is at CP 157-70.

The *Lewis* Court held that to determine whether an action is an official or personal capacity one, "courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Id.* at 1291. "In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.* (emphasis added). The *Lewis* court further noted the "concern that plaintiffs not circumvent tribal sovereign immunity" by simply characterizing actions as individual capacity ones. *Id.* at 1292; *see also Cook v. AVI Casino Enters.*, 548 F.3d 718, 727 (9th Cir. 2008)[6] (stating that "a plaintiff cannot circumvent tribal immunity 'by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity.'").

[6] A courtesy copy of *Cook* is at CP 125-39.

The Seventh Circuit Court of Appeals recently analyzed *Lewis* in a case involving alleged excessive force by tribal police officers removing an elder from a tribal meeting. *See Genskow v. Prevost*, 825 F. App'x 388 (7th Cir. 2020).[7] In *Genskow*, the appellate court affirmed the trial court's determination that the real party in interest was the tribe and not the officers, meaning the case was barred by tribal immunity notwithstanding the individual capacity claim for excessive force. *Id*. at 389.

The lower court in *Genskow* concluded that "to the extent her suit targeted the defendants individually for injuring her while removing her, it too was barred because the Nation was the real party in interest….'" *Id.* at 390. The appeals court agreed, distinguishing the case from *Lewis*, which involved a tort on state land, by concluding the *Genskow* plaintiff was "seek[ing] to hold individual tribal officers liable for using excessive force while removing her

[7] A courtesy copy of *Genskow* is at CP 140-43.

from a meeting of the Nation's governing body on tribal land at the Tribal Chairman's direction." *Id.* at 391.

Further, contrary to Pitoitua's position, Washington courts do not blindly apply Ninth Circuit law when "on point and persuasive." *See* Opening Br. at 9, n.3, and the case she cites, *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 681, 15 P.3d 115 (2000), does not stand for such a blanket proposition. Rather, as cited in the lower court Reply, Washington courts have routinely chosen the law of other circuits over the Ninth Circuit when appropriate. *See, e.g.*, *Lundborg v. Keystone Shipping Co.*, 89 Wn. App. 886, 890-91, 950 P.2d 1014 (1998); *Cantu v. Seattle*, 51 Wn. App. 95, 99, 752 P.2d 390 (1988).

Here, the best evidence that Pitoitua's lawsuit is truly aimed at the Tribes and *not the individual respondents* in their *personal capacity* is the concurrent Tribal case. Pitoitua has already sued the Tribes for negligence arising from its employees' alleged acts/omissions in Tribal Court.

CP 118-23. The core allegations of this case are virtually identical, including the allegation that the Tribes and its employees "owed Ms. Letoi a duty of reasonable care," CP 121, and that the entity "fail[ed] to exercise due care in the performance of safety and security of invitees." CP 122.

Pitoitua's tribal court lawsuit specifically alleges that these respondents were "under the direction, supervision, and control of [The Tribes]." CP 121. Pitoitua's tribal court lawsuit demonstrates that this case is *merely a suit against the Tribes in disguise for the same alleged wrongdoing*, likely to seek a double recovery.

Importantly, this case is readily distinguishable from *Lewis*, which involved a tribal employee's car accident while driving on state lands. *Lewis* presented a run-of-the-mill state tort case arising out of the defendant's active negligence. But here, Pitoitua sued individual respondents for their alleged omissions arising on tribal land in the course of their employment with the Tribes.

The location and nature of the accidents (an off-reservation car accident versus on-reservation security services) are fundamentally different. Pitoitua likewise seeks to hold the individual respondents liable not for any specific wrongful acts, such as a car accident, but instead for alleged collective omissions she claims caused Letoi's alleged injuries. Pitoitua's lawsuit in state court is thus little more than an attempt to sue the Tulalip Tribes yet again, using the respondents individually as a conduit for the same. Further, as explained more below, Pitoitua's attempt to impose business enterprise tort duties personally upon the individual respondents as employees for their alleged failure to act underscores that the Tribes is the real party-in-interest, not the individual respondents.

In sum, the Tulalip Tribes' sovereign immunity cannot be circumvented by how Pitoitua stylized her complaint. Rather, courts must look under the hood of the complaint at the relevant facts and law to determine whether

sovereign immunity bars the action. Respondents posit that the circumstances of this case, including the context of alleged wrongdoing and the specific claims/arguments asserted against respondents, establishes that sovereign immunity applies notwithstanding Plaintiff's attempts to plead around it.

The Court should therefore find as a matter of law that the Tribes, not the respondents individually, is the real party-in-interest in this case. This Court should affirm the trial court's dismissal based on the absence of subject matter jurisdiction due to sovereign immunity.

C. There is no cognizable negligence claim against the respondents because Pitoitua cannot establish the existence of a duty as to any casino employee in their personal capacity.

"A cause of action for negligence requires the plaintiff to establish (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury." *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 127-28, 875

P.2d 621 (1994). The existence of a legal duty is a question of law. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). “Not every act which causes harm results in legal liability.” *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976).

A duty of care is “an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” *Centurion Props. III, LLC v. Chi. Title Ins. Co.*, 186 Wn.2d 58, 64, 375 P.3d 651 (2016) (citations omitted). The duty of care question implicates three main issues—the existence of a duty, the measure of that duty, and the scope of that duty. *Id.*

“In a negligence action, in determining whether a duty is owed to the plaintiff, a court must not only decide who owes the duty, but also to whom the duty is owed, and what is the nature of the duty owed.” *Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 845 (2002). To decide if the law imposes a duty of care, and to determine

the duty's measure and scope, courts weigh considerations of logic, common sense, justice, policy, and precedent. *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 449, 243 P.3d 521 (2010).

1. The respondents had no legal duty to Letoi *personally* and *individually* as security personnel.

As a general rule, "in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another." *Robb v. City of Seattle*, 176 Wn.2d 427, 433, 295 P.3d 212 (2013) (citation omitted). This "special relationship" must be between the defendant and the victim or the defendant and the criminal for the imposition of liability. *Id.*

Applicable here, the Washington Supreme Court has held that "a business owes a duty to its invitees to protect them from imminent criminal harm and reasonably foreseeable criminal conduct by third persons." *Nivens v.*

7-11 Hoagy's Corner, 133 Wn.2d 192, 205, 943 P.2d 286 (1997) (emphasis added); *see also McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 766, 344 P.3d 661 (2015) ("It is the special relationship between a business and its business invitee….") (emphasis added); *Wilbert v. Metro. Park Dist.*, 90 Wn. App. 304, 308, 950 P.2d 522 (1998) ("[A] business owner has a special relationship with his or her business invitees…") (emphasis added); RESTATEMENT (SECOND) OF TORTS; § 302B, cmt. e, illustration 4 ("The A company operates a hotel, in which B is a guest. C, another guest, approaches B in the hotel lobby, threatening to knock him down. There are a number of hotel employees on the spot, but, although B appeals to them for protection, they do nothing, and C knocks B down. The A Company may be found to be negligent toward B.") (emphasis added).[8]

[8] A courtesy copy of the RESTATEMENT (SECOND) OF TORTS; § 302B is at CP 189-94.

Most of the existing special relationships involve situations where the defendant is benefiting financially from the prospective plaintiff. *See Lauritzen v. Lauritzen*, 74 Wn. App. 432, 441, 874 P.2d 861 (1994).

Here, the individual respondents are not themselves businesses but merely security personnel employed by a tribal enterprise. The respondents did not benefit from Letoi's patronage at the casino or have an economic relationship with her, even if the TRC did. Thus, sovereign immunity issues aside, there is no reasonable argument that these individuals had a special relationship with Letoi or Tauave sufficient to impose a tort duty under Washington law.[9] Thus, respondents individually and personally owed Letoi no duties as a matter of law and, without more, they did not have a personal/individual capacity duty to protect her.

[9] This is not an admission of wrongdoing, of any duty (as the Tulalip Tribes is not subject to the application of Washington courts' application of tort law), or a waiver of sovereign immunity by the Tribes.

2. Respondents cannot be personally liable for alleged nonfeasance.

Beyond the absence of a "special relationship," respondents are not liable for mere omissions or nonfeasance. The common law has long distinguished between torts based upon "acts" and "omissions," refusing to impose liability for the latter. *Brown v. Macpherson's, Inc.*, 86 Wn.2d 293, 300, 545 P.2d 13 (1975).

Misfeasance involves active misconduct resulting in positive injury to others and "necessarily entails the creation of a new risk of harm to the plaintiff." *Robb v. City of Seattle*, 176 Wn.2d 427, 437, 295 P.3d 212 (2013). Conversely, through nonfeasance—a "passive inaction or failure to take steps to protect others from harm"—the risk is merely made no worse. *See id.* The *Robb* court concluded that while a duty to prevent a third party's criminal act "may arise … absent a special relationship," it does so "only where the actor's conduct constitutes misfeasance." *Id.* at 439 (emphasis added).

In *Robb*, several Seattle police officers were sued for negligence after failing to pick up and remove shotgun shells during a *Terry* stop. *Id.* at 429. After police left, the suspect returned to retrieve the cartridges and used one of them to kill the plaintiff. *Id.* The parties disputed whether a legal duty was owed, and the Washington Supreme Court held that while there may be an independent duty to protect against the criminal acts of a third party where the actor's own affirmative act creates or exposes another to the recognizable high degree of risk of harm, the failure to pick up shotgun shells was not an affirmative act warranting liability. *See id.* at 429-30.

The *Robb* court concluded that "the situation of peril in this case existed before law enforcement stopped [the subject], and the danger was unchanged by the officers' actions." *Id.* at 438. Thus, it was "[m]ere nonfeasance … insufficient to impose a duty on law enforcement to protect others from the criminal actions of third parties." *Id.* at 439;

see also generally Coffel v. Clallam Cty., 47 Wn. App. 397, 403, 735 P.2d 686 (1987) ("[A]n individual has no cause of action against law enforcement officials for failure to act.").[10]

Division I reached a similar conclusion in *Garcia v. Joey's 1983*, Inc., No. 70395-1-I, 2014 Wash. App. LEXIS 703 (Ct. App. Mar. 24, 2014) (unpublished).[11] *Garcia* arose from a shooting in which officers failed to investigate the allegation that the victim was nearby, where she laid unconscious and eventually died. *Id.* at *2. Instead, upon responding, and despite the 911 operator being told that the body was pulled to the back of the house, the police merely questioned a witness about other crimes. *Id.*

The *Garcia* court cited *Robb* to affirm the dismissal of the plaintiff's negligence claim, concluding that the

[10] Respondents do not agree that they are subject to the duties of law enforcement officers as private casino security personnel. Nevertheless, if police officers are not liable for failing to act, respondents certainly cannot be.

[11] Under GR 14.1, unpublished opinions of this Court have no precedential value and are not binding on this Court. However, this decision may be accorded such persuasive value as this Court deems appropriate.

officers' failure to investigate "did not create a new risk." *Id.* at *12. Instead, police "failed to reduce an already-existing risk," which was mere nonfeasance that did not create liability. *Id.* at *12-13. The Washington Supreme Court denied review. 181 Wn.2d 1009, 335 P.3d 940 (2014).

Here, Pitoitua's negligence theory as included in her complaint is that the respondents failed to take action to prevent Letoi's alleged harm. This is consistent with her allegations in the Tribal Court lawsuit. *See* CP 119-20. But a mere failure to intervene or otherwise de-escalate the situation is nonfeasance that, under *Robb*, is insufficient to create liability absent a special relationship, which did not exist.

Relatedly, similar to *Robb*, Pitoitua alleges that Tauave was violent both before and after the respondents allegedly "made contact" with the couple outside of the casino. CP 294-95. However, the couple subsequently began yelling, arguing, and "becoming violent" CP 295-95,

meaning the danger was "unchanged by the officers' actions." *Robb*, 176 Wn.2d at 438.

In sum, Pitoitua's contention that respondents' failed to intervene or deescalate the encounter is pure alleged nonfeasance. This is insufficient to create liability under Washington law even if this Court rules that sovereign immunity does not bar the lawsuit. Without a special relationship at law, respondents cannot be liable for mere omissions. *See Robb*, 176 Wn.2d at 436 ("Liability for nonfeasance (or omissions) … is largely confined to situations where a special relationship exists.").

3. Pitoitua's reliance on new legal authority is unavailing.

Pitoitua relies on new legal authority to support her argument that the casino employees owed Letoi a common law duty in their personal, individual capacities, even though they failed to raise the cases in the trial court. Compare Opening Br. at 12 with CP 100-01.

But *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 550, 442 P.3d 608 (2019), among other cases that Pitoitua cites, pertains to "affirmative acts of misfeasance." Here, as explained, Pitoitua's claim is premised on the individual casino employees' alleged *nonfeasance*, including their claimed failure "to take appropriate de-escalation steps." CP 295. *Beltran-Serrano* is therefore of little consequence. *Norg v. City of Seattle*, 18 Wn. App. 2d 399, 413, 491 P.3d 237 (2021) is similarly not persuasive because it involved alleged misfeasance, not nonfeasance.[12] And, these references to misfeasance and the rescue doctrine are not consistent with her complaint (and therefore improper to rebut this CR 12(c) motion).

Curiously, Pitoitua's Opening Brief raises two new instances of alleged misfeasance by respondents when "clearing" the scene(s), which she claims "prevent[ed]

[12] The Washington Supreme Court has also accepted review of *Norg*, which remains on appeal.

other security from investigating the incident or removing Tauve from the facility." Opening Br. at 13. These arguments should be ignored as they have been raised for the first time on appeal. *See* RAP 9.12*; Kave v. McIntosh Ridge Primary Rd. Ass'n*, 198 Wn. App. 812, 823, 394 P.3d 446 (2017). While the facts from discovery do not support this theory whatsoever, even a cursory reading of her own complaint contradicts it.

Pitoitua first alleges that Letoi was harmed when the situation was allegedly cleared at 6:41 p.m. after a "*verbal* altercation" between Letoi and Tauave. CP 294. Of course, by Pitoitua's own complaint, there was no "preventing other security from investigating the incident or removing Tauve from the facility." Opening Br. at 13. In fact, Pitoitua criticizes respondents for not confronting or ejecting Tauave *in the very next sentence.* Relatedly, in the next paragraph, she complains that respondents did not physically separate them (and allowed them to leave) an

hour later. Put simply, Pitoitua's claim that the alleged "clearing" of the situation prevented respondents from intervening and "put [Letoi] in further peril" is belied by her own complaint/case theory, which blames respondents for alleged further inaction (despite their alleged ability to take action) *after* the situation was purportedly cleared.

Pitoitua's second "clearing" allegation makes even less sense. According to her appeal brief, Pitoitua alleges respondent Ingram "negligently 'cleared' the situation" during her 7:45 p.m. encounter with Letoi and Tauave. Opening Br. at 13 (citing CP 294). But the complaint makes no reference to the situation being "cleared" or casino staff being prevented from intervening, but instead again blames staff for not intervening. And the complaint further belies Pitoitua's argument that staff was prevented from intervening by Ingram, alleging two paragraphs later that three respondents were involved in following the couple into the parking lot from a distance. CP 294.

Ultimately, Pitoitua's flailing arguments about "clearing" the situation are falsehoods, contradicted by her own complaint. The Court should not afford them weight.

D. Pitoitua's *unpled* reliance on the voluntary rescue doctrine is unavailing.

Without a special relationship duty, Pitoitua devotes one paragraph to possible relief under the unpled voluntary rescue doctrine. Opening Br. at 13-14. Typically, liability for attempting a voluntary rescue has been found when the defendant makes the plaintiff's situation worse by: (1) increasing the danger; (2) misleading the plaintiff into believing the danger had been removed; or (3) depriving the plaintiff of the possibility of help from other sources. *Folsom v. Burger King*, 135 Wn.2d 658, 676, 958 P.2d 301 (1998). "If a rescuer fails to exercise such care and consequently increases the risk of harm to those he or she is trying to assist, the rescuer may be liable for physical damage caused." *Id.* (emphasis added).

Pitoitua's argument that respondents "took the affirmative act of 'clearing' the danger posed to Hana by Tauve [sic]" is disingenuous. Opening Br. at 13. Indeed, the entirety of Plaintiff's complaint is based upon tribal security's alleged *inaction*, including:

- "Defendants Gaube and Jeffreys spotted Tauave but did not confront him or ask him to leave [the casino.]" CP 294.
- Defendant Ingram "made contact with the couple at approximately 7:46 p.m." but "did not attempt to physically separate the couple despite the obvious threat to Hana at this point" and "allowed them to leave [the casino] together." CP 294.
- "Defendant Nguyen told Defendants Gaube and Norman to follow the couple, but only from a distance." CP 294.

The Tribal complaint also belies factual reliance on voluntary rescue doctrine. Therein, Pitoitua alleges that "[Defendant] Nguyen told Ms. Letoi 'You don't have to go with him,' but took no further steps to intervene." CP 120. Plaintiff likewise alleged that "[r]ather than separating the two and calling peace officers to report and de-escalate," multiple Defendants herein "watched Tauave continue to assault Ms. Letoi…." CP 119-20. Pitoitua cannot simultaneously argue that the respondents can be liable for allegedly (1) failing to act; and (2) negligently attempting a voluntary rescue.

Further, Pitoitua must not just prove or allege facts demonstrating that respondents were voluntary rescuers, but also as rescuers, the respondents "ma[de] the plaintiff's situation worse" by (1) increasing the danger, (2) misleading the plaintiff into believing the danger has been removed, or (3) depriving the plaintiff of possible help from others. *See Folsom*, 135 Wn.2d at 676.

But Pitoitua has alleged no facts that the respondents actions increased the danger to Letoi, misled Letoi into believing the danger had been removed, or deprived her of possible help from others.

Pitoitua likewise cannot allege that the respondents made the situation worse or increased the danger because her own complaint alleges that Tauave was violent toward Letoi both *before and after* the alleged rescue. (*Compare* complaint at 294 *with* complaint at 295). Likewise, she cannot reasonably argue that Letoi was misled into believing the alleged danger was removed when the complaint specifically notes that Tauave "yelled for [Ms. Letoi] to come with her," which she did prior to the alleged encounter in the car. CP 294. Nor has there been, or could there be, any claim that Letoi was deprived of help by others when she declined respondents' offers of assistance voluntarily walked toward Tauave thereafter. Simply put, respondents cannot be liable for Ingram

"allow[ing Tauve and Letoi] to leave TRC together"; the only action that increased Letoi's risk of harm was her voluntary decision to leave the TRC and enter Tauave's vehicle, which the respondent security officers had no authority—or duty—to prevent.

In sum, Pitoitua's voluntary rescue theory is inconsistent with state and Tribal complaints and therefore should not be the basis for reversing dismissal. *N. Coast v. Factoria P'ship*, 94 Wn. App. 855, 859, 974 P.2d 1257 (1999) (allowing only facts to be considered that are "consistent with the complaint"). And even if it was not, she has not alleged any facts—or even hypothetical facts—sufficient to impose voluntary rescuer liability. *Cf. Graham Thrift Grp. v. Pierce Cty.*, 75 Wn. App. 263, 267, 877 P.2d 228 (1994) (affirming CR 12 dismissal where plaintiff did "not allege[] a set of facts, hypothetical or otherwise," to support claim).

V. CONCLUSION

Based on the foregoing, the respondents respectfully request that the Court affirm the trial court's CR 12(c) dismissal judgment on the pleadings.

CERTIFICATION OF COMPLIANCE: The number of words contained in this document, exclusive of words contained in the table of contents, title sheet, table of authorities, certificate of service, and certificate of compliance is 5964.

Respectfully submitted this 21st day of December, 2022.

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 21, 2022, I caused to be served via email and first class mail a true and correct copy of the foregoing Brief of Respondents to:

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I declare under penalty of perjury that the foregoing is true and correct.

DATED at Seattle, Washington on December 21, 2022.

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