

No. 834568

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARGRETTY RABANG and ROBERT RABANG,

Plaintiffs-Appellants,

v.

RORY GILLILAND, MICHAEL ASHBY, ANDY GARCIA,
RAYMOND DODGE, and JOHN DOES 1-10,

Defendants-Appellees.

BRIEF OF RESPONDENT CHIEF JUDGE RAYMOND DODGE JR.

Rob Roy Smith, WSBA #33798
Rachel B. Saimons, WSBA #46553
KILPATRICK TOWNSEND & STOCKTON LLP
rrsmith@kilpatricktownsend.com
rsaimons@kilpatricktownsend.com
1420 Fifth Avenue, Suite 3700
Seattle, Washington 98101
Telephone: 206 467 9600
Facsimile: 206 623 6793

Attorneys for Defendant-Appellee Chief Judge Raymond G. Dodge Jr.

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I. STATEMENT OF THE CASE

On January 31, 2017, Margretty and Robert Rabang (“the Rabangs”) filed a complaint for intentional and negligent infliction of emotional distress against Nooksack Tribal Court Chief Judge Raymond Dodge (“Judge Dodge”) and multiple other employees of the Nooksack Indian Tribe (“Tribal Appellees”) in Whatcom County Superior Court. CP 1–13. At the same time that they filed their state tort complaint, the Rabangs also filed a lawsuit in federal district court alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), which has since been dismissed. *See Rabang v. Kelly*, C17-0088-JCC, 2017 WL 1496415, at *4 (W.D. Wash. Apr. 26, 2017), *aff’d*, 846 Fed. Appx. 594, 595 (9th Cir. 2021).

The Rabangs’ claims in the matter on appeal before this Court arise from the alleged efforts of Judge Dodge and Tribal Appellees to evict the Rabangs from their residence owned by the Nooksack Indian Housing Authority (NIHA).¹ CP 1–13. With respect to Judge Dodge, the Rabangs allege that he committed extreme and outrageous conduct and negligent infliction of emotional distress by “refusing to convene” lawsuits filed by Mrs. Rabang in Tribal Court, convening an “unlawful and invalid lawsuit” (i.e., the unlawful detainer action) against Mrs. Rabang, refusing to delay

¹ To the extent they are necessary to resolve the jurisdictional question at issue, Judge Dodge also incorporates the facts set forth in the Tribal Appellees’ Statement of the Case as they apply to the Tribal property and Tribal Court eviction.

Mrs. Rabang’s lawsuit, and issuing an eviction order and two orders to show cause for Mrs. Rabang. *Id.*

In March 2017, Judge Dodge and the Tribal Appellees separately moved to dismiss the Rabangs’ claims on the basis of judicial immunity, sovereign immunity, lack of subject matter jurisdiction, and failure to state a claim upon which relief can be granted. CP 489-500; CP 459–476. On April 21, 2017, the trial court issued an order in response to both motions to dismiss, finding that:

Currently the parties and the Nooksack Indian Tribe are engaged in litigation in the U.S. District Court for the Western District of Washington. The Court’s review of the pleadings filed in the federal litigation indicates that the issue of the Tribe’s authority will likely be resolved in that litigation. This Court will defer to the federal court proceedings on that issue. The parties are instructed to re-note the CR 12 motions pending in this Court for resolution after the U.S. District Court has issued its decision on the issue of the Tribe’s authority in the pending federal litigation.

CP 14–15.

In the companion federal case, the parties continued to litigate until the federal district court ordered a stay of proceedings pending a decision by the United States Department of the Interior (“DOI”) as to recognition of the Tribal Council after the Tribe’s scheduled elections. CP 37-44; *see Rabang v. Kelly*, 328 F. Supp. 3d 1164, 1166 (W.D. Wash. 2018), *aff’d*, 846 Fed. Appx. 594 (9th Cir. 2021).

On March 9, 2018, DOI issued an interim recognition of the Nooksack Indian Tribal Council. *See id.* at 1166–67. In light of that decision, on June 7, 2018, the district court ordered Plaintiffs to show cause

as to why their claims should not be dismissed for lack of subject matter jurisdiction. *Id.* at 1165. On June 11, 2018, DOI’s Principal Deputy Assistant Secretary-Indian Affairs wrote a letter to the Tribe’s new Chairman acknowledging his election and the election of the new Tribal Council members.² *Id.* at 1166. On July 31, 2018, after briefing from both parties, the district court dismissed Plaintiffs’ complaint on the basis that it no longer had subject matter jurisdiction to hear the case, pursuant to DOI’s recognition decision. *Id.* at 1170.

The Rabangs appealed the district court’s decision to the Ninth Circuit Court of Appeals. *Rabang v. Kelly*, 846 Fed. Appx. 594, 595 (9th Cir. 2021). On May 4, 2021, the Ninth Circuit affirmed the district court’s determination that it lacked subject matter jurisdiction over the case and that dismissal was therefore proper. Specifically, the Court held that “[b]ecause the Nooksack Indian Tribe has a full tribal government that has been recognized by the DOI . . . Rabang’s case no longer falls under the futility exception to the tribal exhaustion requirement, which ‘applies narrowly to only the most extreme cases.’”

² It is noteworthy that the Rabangs address only DOI’s temporary order from December 23, 2016 regarding the eviction orders, while deceptively omitting any mention of DOI’s subsequent recognition of the Tribe’s government. Further, the district court has previously expressly rejected the Rabangs’ position that “Interior’s determination remains in effect today,” Opening Br. at 4 n.3, in *Rabang v. Kelly*, 328 F. Supp. 3d at 1169 (“Plaintiffs assert that the DOI’s recognition decision did not undue [*sic*] its previous opinions concluding that the Tribal Council and Tribal Court had acted without authority. The Court disagrees.”).

In light of the district court's decision and the Ninth Circuit's affirmance, Judge Dodge and the Tribal Appellees jointly moved to lift the stay in Whatcom County Superior Court and for the court to dismiss the complaint. CP 27-32. After briefing and oral argument, the Court found that the Rabangs' Complaint "alleges injury stemming directly from the Nooksack Tribal Court's issuance of an eviction order and the Nooksack Tribal Police's execution of the same," and that accordingly "the Complaint suffers from the need to resolve matters of tribal governance outside the subject matter jurisdiction of this Court." CP 84. Accordingly, the Court dismissed the case without prejudice. *Id.* The Rabangs then moved for reconsideration. The Court denied the motion, further finding that the Rabangs' claims "originate from and depend upon (1) the plaintiffs' right to continue residency in Tribal housing located on Tribal trust land, and (2) the propriety of the Tribe's manner of eviction." CP 166. To adjudicate the claims, the Court determined, "a state court would necessarily pass judgment on the Plaintiff's right to possession of real property belonging to the Nooksack Indian Tribe and held in trust by the United States. Such jurisdiction is flatly prohibited by RCW 37.12.060. It is for the Nooksack Tribe, not this Court, to resolve these claims." *Id.*

The Rabangs now appeal both the Superior Court's Order dismissing their claims, and the Court's denial of their motion for reconsideration.

II. SUMMARY OF ARGUMENT

This Court should affirm the trial court's dismissal of the Rabangs' Complaint for lack of jurisdiction for two reasons. First, the trial court correctly determined that it lacked jurisdiction to adjudicate the Rabangs' dispute because it would impermissibly require the court to construe and interpret Nooksack Tribal law, in contravention of well-established principles of tribal sovereignty. Second, on reconsideration, the court further correctly found that it lacked subject matter jurisdiction under RCW 37.12.060, which precludes the adjudication by a state court of the ownership or right to possession of any real property belonging to an Indian Tribe and held in trust by the United States. Both of these findings are well supported by the applicable law, and there is no adequate basis for reversal. The Court should affirm the trial court's dismissal of the Rabangs' Complaint.

III. ARGUMENT

A. Standard of Review

Whether a court has subject matter jurisdiction is a question of law reviewed de novo. *State v. Manuel*, 14 Wn. App. 2d 455, 459, 471 P.3d 265, 268 (2020).

B. The Court Should Affirm the Trial Court's Dismissal of the Rabangs' Complaint for Lack of Jurisdiction

1. The Court Lacks Jurisdiction to Adjudicate This Dispute Because It Would Require the Construction and Interpretation of Nooksack Tribal Law

In dismissing the Rabangs' Complaint, the trial court correctly found that it "alleges injury stemming directly from the Nooksack Tribal Court's issuance of an eviction order and the Nooksack Tribal Police's execution of the same," and that it therefore "suffers from the need to resolve matters of tribal governance outside the subject matter jurisdiction of this Court." CP 84.

Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory," and are "a separate people" possessing the power of regulating their internal and social relations." *U. S. v. Mazurie*, 419 U.S. 544, 557 (1975) (quoting *United States v. Kagama*, 118 U.S. 375, 382 (1886)). Tribes retain "attributes of sovereignty over both their members and their territory." *Id.* Thus, "a State may not act in a manner that infringes on the right of reservation Indians to make their own laws and be ruled by them." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986); *see also Williams v. Lee*, 358 U.S. 217, 220 (1959) ("Essentially, absent governing Acts of Congress, the 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."). Accordingly, if state court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, state courts are generally divested of jurisdiction as a matter of federal law. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987).

It is not possible for a state court to adjudicate or resolve the Rabangs' Complaint without interfering with the Tribe's ability to self-govern. The Rabangs allege, for example, that the Tribal Council "passed Tribal Council Resolution No. 16-83 to disenroll Mrs. Rabang from the Tribe," that the Nooksack Indian Housing Authority (NIHA) then informed her that "it would unilaterally terminate her [lease] based on Mrs. Rabang's purported disenrollment from the Tribe," and that the Tribal Council's "purported disenrollment" of Mrs. Rabang was invalid. CP 4–5. Addressing these allegations would require the Court to wade into the propriety of the Tribe's enrollment decisions, which are well-established to be within the exclusive province of the Tribe's jurisdiction. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."); *Lewis v. Norton*, 424 F.3d 959, 963 (9th Cir. 2005) ("[T]ribes, not the federal government, retain authority to determine tribal membership.").

The Rabangs also make allegations against Judge Dodge specifically which would impermissibly require the Court to involve itself in Tribal affairs. Among them, they claim that Judge Dodge "refuse[d] to convene Mrs. Rabang's lawsuit filed on April 29, 2016," "refus[ed] to convene Mrs. Rabang's lawsuit filed on October 11, 2016, in the Tribal Court," "issu[ed] the unlawful and invalid Eviction Order on December 14, 2016," and "issu[ed] the unlawful and invalid" first and second Show Cause

Orders on December 19, 2016 and December 22, 2016, respectively. CP 9–10. A state court cannot determine whether or not the actions taken by Judge Dodge were, as the Rabangs allege, “unlawful and invalid,” without interpreting and construing Tribal law and injecting itself into the affairs of a separate sovereign’s judicial system. State courts do not have the jurisdiction to make such interpretations of Tribal law. *See Rodriguez v. Wong*, 119 Wn. App. 636, 643, 82 P.3d 263, 267 (2004) (Indian tribes retain the authority necessary to protect tribal self-government or to control internal relations).

As this case cannot be resolved without the Court second-guessing determinations made by Tribal Officials under Nooksack Tribal law, the Court of Appeals should affirm the trial court’s dismissal for lack of jurisdiction.

2. The Court Also Lacks Subject Matter Jurisdiction Under RCW 37.12.060

As all parties acknowledge, Washington has statutorily assumed civil jurisdiction over certain matters under Public Law (“PL”) 280. Opening Br. at 6. When enacted by Congress in 1953, PL 280 transferred the legal authority from the federal government to certain state governments to exercise civil and criminal jurisdiction over tribal lands within those respective states. Some states were involuntarily given that authority, making them “mandatory” PL 280 states, while others such as Washington were given the choice as to whether to assume such jurisdiction. Cohen’s Handbook of Federal Indian Law § 6.04[3][a] at 537 (Nell Jessup Newton

ed. 2012). Washington then adopted enabling legislation, RCW 37.12.010 *et. seq.*, through which it assumed partial criminal and civil jurisdiction within Indian Country.

However, in enacting PL 280, Washington also set forth certain exceptions and limitations to its own exercise of jurisdiction. Most relevant to the present case is RCW 37.12.060 (“Chapter limited in application”), which specifically provides that certain legal issues are excluded from PL 280’s application:

Nothing in this chapter shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights and tidelands, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; **or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein . . .**

(emphasis added).

This exception is consistent with the federal PL 280 statute, which contains nearly identical language indicating that a state is not authorized by the law to alienate, encumber, or tax any real or personal property belonging to an Indian or Indian tribe that is held in trust by the United States or is subject to a restriction imposed by the United States nor to “adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.” 28 U.S.C. § 1360(4)(b);

25 U.S.C. § 1322(b). The United States Supreme Court broadly interpreted this restriction on state court jurisdiction in *Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373, 392–393 (1976), explaining that “in construing this ‘admittedly ambiguous’ statute, we must be guided by that ‘eminently sound and vital canon,’ that ‘statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.’” (internal citations omitted). Thus, pursuant to both state and federal law, state courts unequivocally lack jurisdiction to adjudicate the ownership or right to possession of any real or personal property belonging to any Indian Tribe that is held in trust by the United States.

The property at issue in the Rabangs’ claims, 5913 Johnny Drive, is held in trust for the benefit of the Nooksack Indian Tribe. CP 367. Consequently, no state court may adjudicate the ownership or right to possession thereto. The Rabangs attempt to overcome this limitation by arguing that they have not asked the Court to adjudicate its ownership or right to possession, but instead are asking the Court only to resolve their tort claims for intentional and negligent infliction of emotional distress. Opening Br. at 9–10. “[B]y exercising jurisdiction over Appellants’ claims,” they argue, “the trial court would not be determining the ownership of Appellants’ home, but instead ruling on whether the Appellees have committed state torts through actions taken off the Nooksack Indian Reservation.” *Id.* at 10. But the Rabangs’ attempt to recharacterize their

claims and narrowly construe the statutory language so as to exempt them from the reach of RCW 37.12.060 must fail.

The Rabangs' claims unquestionably center on, and arise from, what they allege to have been an unlawful attempt to evict them from Tribal housing. They allege, for example, that Judge Dodge engaged in intentional infliction of emotional distress by issuing an eviction order and two orders to show cause, and "threatening Plaintiffs that their Home would be forcibly entered." CP 10. By way of remedy, the Rabangs seek in part "a temporary restraining order, [and] a preliminary and permanent injunction, which enjoins permanently and restrains during the pendency of this action, Defendants and other persons from intentionally or negligently inflicting further emotional distress on Plaintiffs." *Id.* at 11. In other words, the Rabangs asked the trial court to stop Judge Dodge and the Tribal Appellees from taking any further action on the eviction.

But the trial court could not issue an order restraining or enjoining Judge Dodge or the Tribal Appellees from such actions without first determining whether the Rabangs have the lawful right to possession of 5913 Johnny Drive. Without that determination, there would be no basis for enjoining the eviction or awarding any relief. State courts plainly do not have jurisdiction to adjudicate that issue, and the Rabangs cannot overcome this insurmountable obstacle by simply pleading state tort claims. Accordingly, the trial court's dismissal of the Rabangs' Complaint should be affirmed.

IV. CONCLUSION

This Court should affirm the judgment of the Whatcom County Superior Court. This document contains 2668 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED: April 6, 2022

Respectfully submitted,

KILPATRICK TOWNSEND &
STOCKTON LLP

By: /s/ Rob Roy Smith
Rob Roy Smith

Attorneys for Defendant-Appellee
Chief Judge Raymond Dodge

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on the 6th day of April 2022, I caused to be served a copy of the foregoing on the following persons via first class mail and email at the following address(es):

Gabriel S. Galanda
Matthew J. Slovin
GALANDA BROADMAN, PLLC
8606 35th Avenue NE, Ste. L1
P.O. Box 15146
Seattle, WA 98115
gabe@galandabroadman.com
matt@galandabroadman.com

Charles Hurt
Rickie Armstrong
NOOKSACK INDIAN TRIBE
OFFICE OF TRIBAL
ATTORNEY
5047 Mt. Baker Hwy
P.O. Box 63
Deming, WA 98244
churt@nooksack-nsn.gov
rarmstrong@nooksack-nsn.gov

By:

/s/ Rob Roy Smith
Rob Roy Smith

KILPATRICK TOWNSEND & STOCKTON LLP

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- ryan@galandabroadman.com

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Address:
1420 5TH AVE STE 3700
SEATTLE, WA, 98101-4089
Phone: 509-575-8500

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