NO. 2014-CI-APL-001

NOOKSACK COURT OF APPEALS
FOR THE NOOKSACK INDIAN TRIBE

SONIA LOMELI, ET AL.,
Appellants,

v.

ROBERT KELLY, ET AL.,
Appellees

ON APPEAL FROM THE NOOKSACK TRIBAL COURT
No. 2013-CI-CL-001

RESPONSE BRIEF OF APPELLEES

MORISSET, SCHLOSSER, JOZWIAK &
SOMERVILLE
Thomas P. Schlosser
Rebecca JCH Jackson
801 Second Avenue, Suite 1115
Seattle, Washington 98104-1509
206-386-5200
Attorneys for Appellees

OFFICE OF TRIBAL ATTORNEY
NOOKSACK INDIAN TRIBE
Grett Hurley
Rickie Armstrong
5047 Mt. Baker Hwy
P.O. Box 63
Deming, WA 98244
Attorneys for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

SUMMARY OF ARGUMENT

Appellants frivolously seek to challenge the Trial Court's interpretation of its Order referencing a Stipulation entered into between Appellants and Appellees. Underlying the Order are four disenrolled members who are not parties to this case and were not contemplated beneficiaries of the Stipulation. Appellees are immune from suit because Appellants failed to allege any unconstitutional actions, the Tribal Council's membership determinations are nonjusticiable political questions, and Nooksack law bars Appellants' requested relief. Appellants also lack standing to bring this cause of action; Appellants have suffered no injury due to the disenrollment of four tribal members. Appellees have fully complied with the Stipulation, and the Trial Court clearly did not abuse its discretion in denying Appellants' Motion for Order to Show Cause Re: Contempt.

STATEMENT OF CASE

In February of 2013, the Nooksack Indian Tribe began sending Notices of Intent to Disenroll to approximately 300 enrolled members. CP 100, Fourth Decl. of C. Bernard at ¶6. Each notice explained that a disenrollee was subject to automatic, involuntary disenrollment unless the individual submitted a written request for a meeting with the Tribal Council within 30 days. *See id.* at ¶7.

On March 18, 2013, the Trial Court held an initial teleconference in this case regarding whether any disenrollment meetings would take place prior to a hearing on a Temporary Restraining Order (TRO). CP 13, Findings from Teleconference. The Trial Court found that "based on assurances from the

attorneys for the Defendants that *none of the Plaintiffs* will be dis-enrolled before a TRO hearing . . .."[1] *Id.* (emphasis added). After the teleconference, Appellees' counsel sent a letter to Appellants' counsel memorializing the understanding reached during the teleconference. That letter states that "Disenrollment meetings before the Tribal Council have been requested by some of *your clients*, and these meetings or hearings will be held . . .. No person will be disenrolled before completion of the hearing *on his or her request*." CP 81, Decl. of G. Hurley in Supp. of Defendants' Mot. to Adopt Proposed Findings of Fact and Conclusions of Law Re: Parties and Effect of Stipulation of March 20, 2013 (Hurley Decl.) at Exh. 1 (emphasis added). The letter continues:

> Concerning the potential disenrollees who have not requested a meeting with the Tribal Council, your correspondence purports to request a meeting on their behalf. That request does not satisfy the procedure described in the Notice of Intent to Disenroll and we urge you to work with *your clients* to submit appropriate individual requests. Because the Notices were sent and received on various dates, the time for requesting a meeting will not expire before April 13, 2013. In any event, no person will be disenrolled before completion of the timely requested hearings."

Id. (emphasis added).

On March 20, 2013, counsel for the *Lomeli* parties entered into a Stipulation under which the parties agreed, in pertinent part, as follows:

> 1. On or before April 13, 2013, Galanda Broadman will furnish a list of those individuals for whom they are then authorized to act in this matter [*Lomeli*] and in the related proceedings regarding disenrollment of certain Nooksack Tribal members pursuant to Title 63. Defendants will treat Mr. Galanda's letter of March 15, 2013, to Chairman Kelly regarding the Notice

[1] Appellants allege that the Trial Court ordered that a disenrollment meeting be held "prior to *any* disenrollment." Opening Br. at 3-4. However, the Trial Court's findings referred only to Plaintiff-Appellants.

> of Intent to Disenroll as a timely request for meeting pursuant to Title 63.04.001(B)(2) before the Tribal Council for the individuals identified on that list.
>
> 2. No person will be disenrolled prior to completion of the meetings before the Tribal Council, regardless of whether that individual has requested a meeting with the Tribal Council.

CP 81, Hurley Decl. at Exh. 2.

On April 12, 2013, Appellants' Counsel, Galanda Broadman, submitted a letter and accompanying list of individuals it was authorized to represent in disenrollment proceedings. *Id.* at ¶5. Nadine Rapada, Rose Hernandez, Cody Narte, and Kristal Trainor (the four who were later disenrolled) were not on that list, and they did not request a meeting with the Council within 30 days of receipt of their respective Notices of Intent to Disenroll. *Id.* at Exh. 3; CP 100, Fourth Decl. of C. Bernard at ¶¶8-16. Galanda Broadman added Nadine Rapada, Rose Hernandez, Cody Narte, and Kristal Trainor to their representation list on May 13, 2013, which was well after the stipulated deadline for supplying a list of represented individuals. CP 100, Decl. of C. Bernard at ¶17. On August 8, the Tribal Council passed resolutions disenrolling Nadine Rapada, Rose Hernandez, Cody Narte, and Kristal Trainor.[2] *Id.* at ¶18.

The Stipulation provided that each of the disenrollees identified in the April 12, 2013 letter would have his or her disenrollment meeting, and none of

[2] Contrary to Appellants' statement that Nadine Rapada, Rose Hernandez, Cody Narte, and Kristal Trainor were disenrolled the day after Appellants filed a Notice of Appeal and emergency motion to stay, the four individuals were disenrolled four days prior to any Notice of Appeal or motion to stay. *See* Opening Br. at 3 n.9; CP 100, Decl. of C. Bernard at ¶18. This litigation began over one year ago, and the Council did not "fast-track" the automatic disenrollment proceedings.

them would be disenrolled until after his or her meeting had occurred – even if a listed disenrollee failed to timely request a meeting and would otherwise have been subject to automatic disenrollment without a meeting. *See* CP 81, Hurley Decl. at ¶8. The Stipulation has never applied to a disenrollee not identified in the April 12, 2013 Galanda Broadman representation list.

In *Roberts v. Kelly*, the plaintiffs sought an Order to Show Cause Re: Contempt on the same issue involved here. 2013-CI-CL-003, Motion for Order to Show Cause Re: Contempt (Sept. 20, 2013). The Trial Court denied the plaintiffs' Motion because the meaning of the Stipulation was before this Court in the initial *Lomeli* appeal and the Stipulation's effects were limited to the *Lomeli* matter. *Roberts,* 2013-CI-CL-003, Order Den. Mot. for Order to Show Cause Re: Contempt (Sept. 20, 2013). This Court upheld the Trial Court's denial—finding the *Roberts'* appellants' related assignment of error to be meritless. *Roberts v. Kelly,* 2013-CI-APL-003, Opinion at 10 and n.15.

After the Trial Court denied the plaintiffs' Motion for Order to Show Cause Re: Contempt in *Roberts*, Plaintiff-Appellants raised the same issue with the Trial Court under *Lomeli.* CP 92, Mot. for Order to Show Cause Re: Contempt (Sept. 25, 2013). The Trial Court first denied the Motion on November 13, 2013, because the Stipulation was already on appeal. CP 103, Order Den. Mot. for Order to Show Cause (Nov. 13, 2013). On November 19, 2013, Plaintiff-Appellants filed a Supplemental Notice of Appeal challenging the Trial Court's denial of the Motion for Order to Show Cause Re: Contempt. This Court rejected that Notice of Appeal and remanded the matter to the Trial Court.

Lomeli, 2013-CI-APL-002, Order on Supplemental Appeal (Jan. 22, 2014). The Trial Court denied Plaintiff-Appellants' Motion on February 7, 2014. CP 104, Order Den. Mot. for Order to Show Cause Re: Contempt at 2:2-3 (Feb. 7, 2014).

ARGUMENT

I. Appellees Are Immune From Suit, and This Court Lacks Jurisdiction.

Because there is no claim of acts violating tribal law, the Nooksack Indian Tribe, the Council, and tribal officials are immune from suit, and this Court lacks jurisdiction. An Indian tribe is immune from suit because it is a sovereign entity with common law immunity. *Cline v. Cunanan*, Case No. NOO-CIV-02/08-5, 5-6 (Nooksack Ct. App. 2009); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Sovereign immunity acts as a jurisdictional bar to bringing suits against tribes unless Congress has authorized the lawsuit or a tribe has waived its immunity. *Martinez*, 436 U.S. at 58-59; *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Waivers of immunity must be clear, express, unequivocal, and cannot be implied. *Olson v. Nooksack*, 6 NICS App. 49, 52-53 (Nooksack Ct. App. 2001) (citing *Martinez*, 436 U.S. at 60). Sovereign immunity also applies to tribal officials and employees acting within the scope of their authority. *Cline*, Case No. NOO-CIV-02-08-5, at 6; *see also Mitchell v. Pequette*, CV-07-38, 2008 WL 8567012 at *7-9 (Leech Lake Tribal Court May 9, 2008). Tribal sovereign immunity "extends to actions brought against tribes in tribal court." *Olson*, 6 NICS App. at 51.

This Court has held that the Tribal Court lacks subject matter jurisdiction over matters concerning "the establishment and functions of the tribal

government" unless the Tribe waives its sovereign immunity. *Lomeli v. Kelly*, 2013-CI-APL-002, Opinion at 11 (Jan. 15, 2014). This Court explained that "[e]lected Council members, and the Tribe's agents, must be free from intimidation, harassment and the threat of lawsuits in executing the functions of tribal government." *Id.* The "Tribe's officers necessarily enjoy the discretion to determine the manner and method in which it administers the Tribe's governmental functions." *Id.*

The Tribal Court does have jurisdiction over "civil matters concerning members of the Nooksack Indian Tribe." *Id.* at 12. When an officer, employee, or agent, "acting in his or her official capacity, enforces or threatens to enforce an unconstitutional law or policy," sovereign immunity does not protect the officer, employee, or agent because there is no authority "to enforce laws that do not comply with the Constitution." *Id.* at 13. That is, when:

> a suit is brought by a Tribal member against an officer, employee or agent of the Tribe acting in his or her official capacity and alleges the law or policy the officer, employee or agent is enforcing or threatening to enforce is unconstitutional, the Tribal Court has subject matter jurisdiction . . . to order declaratory or injunctive relief.

Id. at 14. In this instance, the "Tribal Court must make a threshold finding on the constitutionality of the law or policy the member seeks to have the Tribal officers or employees enjoined from enforcing." *Id.* This threshold finding may not be made when nonjusticiable political questions are at issue. *See id.* at 21-22. A political question may arise when there is:

> 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the

> impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government[.]...'

Id. at 21 n.26.

In this appeal, Appellants do not allege that Appellees have violated the Constitution or any tribal law. *See* Opening Br. Appellants only claim that Appellees violated the Stipulation by disenrolling four nonparties—Nadine Rapada, Rose Hernandez, Cody Narte, and Kristal Trainor—without holding a disenrollment meeting that they did not request. *See id.* When there is not even an allegation of unconstitutionality, Appellees retain sovereign immunity, and this Court lacks jurisdiction. *See Lomeli,* 2013-CI-APL-002, Opinion at 11-14.

Even if Appellants alleged unconstitutionality, the Council's membership determinations are nonjusticiable political questions, because the Constitution reserved membership determinations to the Council alone. *Const.* art. II, §§ 2, 4. Title 63 also makes clear that the Council's membership determinations are final, and the "Nooksack Tribal Court shall not have subject matter jurisdiction to hear cases under this ordinance." §§ 63.04.001(B)(2), 63.00.003. Additionally, Title 10, Section 10.05.100(c) prohibits the Court's contempt power from being used against Appellees. Title 10 also limits the remedies in a suit against the Tribe's agent or employee to declaratory and prospective injunctive relief, which means there is no relief available to Appellants. *See* § 10.00.100(b)(1). Appellants cannot use a contempt motion to obtain relief that is barred by Nooksack law.

II. Appellants Lack Standing.

This Court has held that standing "requires that a plaintiff allege a concrete injury, that there is a causal connection between the injury and the conduct complained of, and that the injury will likely be redressed by a favorable decision." *Lomeli*, 2013-CI-APL-002, Opinion at 22. This Court favorably cited the federal Supreme Court's *Lujan v. Defenders of Wildlife* decision,[3] which explains that standing requires a plaintiff to show a "concrete and particularized" injury that is "actual or imminent[.]" 504 U.S. 555, 560 (1992). Furthermore, "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.* at 563 (internal citations omitted). A plaintiff raising just a generalized grievance "about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state [a]... case or controversy." *Id.* at 573-74.

Federal courts also require prudential standing. Prudential standing requires courts to consider "whether the alleged injury is more than a mere generalized grievance, whether [plaintiffs] are asserting [their] own rights or the rights of third parties, and whether the claim falls within the zone of interests to be protected or regulated by the constitutional guarantee in question." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009).

The Ninth Circuit has found that "[o]nly the real parties in interest may institute a civil contempt action." *Spangler v. Pasadena City Bd. of Educ.*,

[3] *Id.*

537 F.2d 1031, 1032 (9th Cir. 1976). In *Spangler*, a father sought to enforce a desegregation order through contempt proceedings, but the Ninth Circuit held that the father was "not within the zone of interests protected by the equal protection clause of the Fourteenth Amendment[,]" because the underlying case protected schoolchildren and not parents of those schoolchildren. *Id.* at 1033-34. The Court went on to explain that "[t]his is not a case where a litigant has standing to assert the rights of others because a relationship existing between the litigant and the person whose rights are allegedly violated is adversely affected." *Id.* at 1034.

This Court has held that the six[4] named Plaintiff-Appellants are the only parties in this matter. *Lomeli*, 2013-CI-APL-002, Opinion at 14-17. Thus, events concerning nonparties such as Nadine Rapada, Rose Hernandez, Cody Narte, and Kristal Trainor cannot be governed by a stipulation between Appellants and Appellees. Appellants' challenge here is similar to a recent effort to force the Tribal Council to call a special meeting requested by two nonparties; this Court held that Appellants lacked standing, because a general interest in adherence to the Bylaws was insufficient. *Lomeli*, 2013-CI-APL-002, Opinion at 22.

Appellants lack standing here. Appellants fail to assert any injury on their own behalf. Appellants state that "Appellants' kin [] have gone without 'tribal housing, medical facilities, treaty-protected fishing or hunting rights, or any other rights reserved to Nooksack tribal members' since August 2013." Opening Br. at 4-5. While Nadine Rapada, Rose Hernandez, Cody Narte, and Kristal Trainor have experienced disenrollment, Appellants have not suffered any injury due to

[4] Plaintiff-Appellant Sonia Lomeli recently passed away, which means there are now five named Plaintiff-Appellants.

the disenrollment of those four former members. As in *Spangler*, there is no damage to the relationship between Appellants and the four disenrolled members, and Appellants' unsupported claimed relationship with the four disenrolled members is far more attenuated than that of a father and his children. Appellants sit in the same position as every other member of the Nooksack Tribe, and there is no standing.[5] The Trial Court rightly found that Appellants "have not themselves suffered the injury necessary to bring this *Motion*." CP 104, Order Den. Mot. for Order to Show Cause Re: Contempt at 3:2-3.

In addition, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (internal citations omitted). In *Lyons*, the plaintiffs alleged that they were subject to discriminatory criminal justice practices, and the federal Supreme Court held that previous exposure to those alleged practices did not give standing when the threat to plaintiffs hinged on being arrested, charged, and tried anew. *Id.* at 102-03. Even if Appellants were injured by the disenrollment of Nadine Rapada, Rose Hernandez, Cody Narte, and Kristal Trainor—which they were not—Appellants lack standing because there is no actual or imminent threat.

[5] Appellants cite cases in which a parent brought contempt proceedings against another parent for an alleged violation of a stipulation regarding a parenting plan, but these cases are not on point. *See e.g.*, Opening Br. at 5 n.16, 6 n.17. The four disenrolled members were not the subject of the Stipulation, and Appellants have suffered no injury due to the disenrollments of those members. In contrast, one parent is obviously injured if another parent allegedly violates a parenting plan.

III. Appellees Have Complied with the Stipulation.

Under Nooksack law, a contempt finding may be warranted where a person engages in "[r]epeated, willful disregard of court procedures demonstrating utter lack of respect for the court's authority and function." Title 10, § 10.05.100(a)(2).[6] In order to establish civil contempt under federal law, the moving party must establish that the non-moving party knowingly violated a definite and specific order of the court requiring it to perform or refrain from certain acts. *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002). For contempt purposes, "a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought, and the facts found must constitute a plain violation of the decree so read." *Terminal R. Ass'n of St. Louis v. United States* (*Terminal*), 266 U.S. 17, 29 (1924). The federal Supreme Court has explained that:

> The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid.

Int'l Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76 (1967). Moreover, "a person should not be held in contempt if his action 'appears to be based on a good faith and reasonable interpretation of the [court's order].'" *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993) (internal citations omitted).

---

[6] As explained *supra* in Section I, the contempt rule does not apply to the Nooksack tribe or its employees, agents, or officers.

Even if Appellees were not immune and Appellants had standing, Appellees cannot be held in contempt because they have not willfully disregarded court procedures or violated a specific and definite order. The Trial Court's Order from Scheduling Hearing stated that:

> [t]he attorneys filed a Stipulation on March 20, 2013 setting out a schedule for filings in the *Motion for a Temporary Restraining Order*. The Court approves this Stipulation and incorporates it by reference. Therefore, the Defendants shall file responsive papers to the Motion by April 11, 2013 and the Plaintiffs shall file a reply by April 18, 2013.

CP 21 at 1. The Trial Court's approval and incorporation of the Stipulation did not turn it into a restraining order; rather, the Stipulation meant the Trial Court accepted the parties' proposed dates for the Motion for TRO knowing that the Plaintiff-Appellants and others represented by Galanda Broadman would not be disenrolled without a meeting.[7] None of the Plaintiff-Appellants or those members on the April 12, 2013 Galanda Broadman representation list have been disenrolled.

Appellees have fully complied with the Stipulation, and Appellants mischaracterize the Stipulation in arguing that it applies to Nadine Rapada, Rose Hernandez, Cody Narte, and Kristal Trainor. When construing the Stipulation, the intent of the parties at the time they entered into the Stipulation should govern. *Operating Engineers' Pension Trust Fund v. Clark's Welding & Mach.*, 688 F. Supp. 2d 902, 910 (N.D. Cal. 2010); *see also Stolt-Nielsen S.A. v. AnimalFeeds*

---

[7] Plainly, paragraph 2 of the Stipulation refers to the people described in paragraph 1 of the Stipulation. The canon of construction, *noscitur a sociis*, requires "that 'words grouped in a list should be given related meaning.'" *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990) (internal citations omitted).

International Corp., 559 U.S. 662, 682 (2010) ("as with any other contract, the parties' intentions control"). The Stipulation could not have applied to the four disenrolled members, because by its own terms, the Stipulation only concerned Appellants and those members included on the April 12, 2013 Galanda Broadman representation list. *See* CP 81, Hurley Decl. at ¶¶ 4-9 (explaining Appellees' counsel's interpretation of the Stipulation). In *Roberts*, this Court held that an attempt to hold the *Roberts* defendants in contempt for allegedly violating the Stipulation was meritless,[8] and this same attempt is meritless here as well.

Even if Appellants' mischaracterization of the Stipulation were correct, Appellees have not repeatedly and willfully disregarded court procedures as required under Section 10.05.100 of Title 10. Moreover, the Tribal Council's actions to disenroll certain members who failed to timely request a meeting with the Council at least fall within a good faith and reasonable interpretation of the Stipulation, so this Court should not hold Appellees in contempt.

IV. A Contempt Finding Is Discretionary.

Title 10 states that the Tribal Court "may" hold a person in contempt if that person repeatedly and willfully disregards court procedures. Title 10, § 10.05.100(a). The Trial Court did not abuse its discretion in refusing to hold Appellees in contempt. On the contrary, the Trial Court relied on the sound legal principle of standing to deny the Motion for Order to Show Cause Re: Contempt. *See* CP 104,Order Den. Mot. for Order to Show Cause Re: Contempt.

---

[8] *Roberts*, 2013-CI-APL-003, Opinion at 10 and n.15.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court affirm the Trial Court's denial of Appellants' Motion for Order to Show Cause Re: Contempt.

Respectfully submitted this 18th day of April, 2014.

for Tom Schlosser

Thomas P. Schlosser
Rebecca JCH Jackson
Attorneys for Appellees
Morisset, Schlosser, Jozwiak & Somerville
801 Second Avenue
1115 Norton Building
Seattle, WA 98104
Phone: 206-386-5200

Grett Hurley, Senior Tribal Attorney
Rickie Armstrong, Tribal Attorney
Attorneys for Appellees
Office of Tribal Attorney
Nooksack Indian Tribe

T:\WPDOCS\0282\09738\Lomeli Contempt Appeal-Response Brief FILE.docx
rsj:4/16/14

IN THE TRIBAL COURT OF APPEALS FOR THE NOOKSACK INDIAN TRIBE

LOMELI, et al., Plaintiffs, and KELLY, et al., Defendants.	Case No. 2013-CI-CL-001 App. No. 2014-CI-APL-001 DECLARATION OF SERVICE COPY

I Declare:

That I am over the age of 18 years, competent to be a witness, and not a party to this action.

On April 16, 2014, I duly mailed by first class mail, a copy of the Response Brief of Appellees to Galanda Broadman PLLC, Attn: Gabriel S. Galanda, P.O. Box 15146, Seattle, Washington 98115.

Also, on April 16, 2014, I emailed Gabriel Galanda at gabe@galandabroadman.com a courtesy copy of the Response Brief of Appellees.

I declare under the penalty of perjury, under the laws of Nooksack Indian Tribe, that the foregoing is true and correct.

Signed at Deming, Washington on April 16, 2014.

Susan Steadle, Legal Assistant
Office of Tribal Attorney, Nooksack Indian Tribe

Nooksack Indian Tribe
Office of Tribal Attorney
P.O. Box 63
5047 Mt. Baker Hwy.
Deming, WA 98244
Tel. (360) 592-4158
Fax (360) 592-2227