No. 101384-1

SUPREME COURT
OF THE STATE OF WASHINGTON

MARGRETTY RABANG and ROBERT RABANG,

Petitioners,

v.

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

Respondents.

RESPONDENT RAYMOND G. DODGE JR.'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

For nearly six years, this litigation has plagued former Nooksack Tribal Court Judge Ray Dodge. Despite the fact that Dodge is shielded from suit for the alleged actions both as a former judge and Tribal official, the Rabangs have aggressively tried to litigate baseless claims against him. Now, even with the trial court determining twice—on both dismissal and reconsideration—that the Rabangs were precluded from litigating their claims, and the Court of Appeals affirming that dismissal, the Rabangs now ask this Court to reopen the case so that they can attempt to redefine the well-established rules of tribal sovereign immunity. They should not be permitted to do so. The Rabangs have failed to show any legitimate basis for this Court's review under RAP 13.4, and the Court should not grant discretionary review. Division I's Opinion is not in conflict with any Supreme Court decision, does not conflict with any published decision of the Court of Appeals, and does not involve any issue of substantial public interest. Consequently, the Rabangs have failed to establish that review is warranted, and this Court should deny the Petition and conclude this seemingly endless, six-year long nightmare for Respondent Dodge.

II. 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 then-Nooksack Tribal Court Chief Judge Raymond Dodge ("Respondent Dodge") and multiple other employees of the Nooksack

Indian Tribe ("Tribal Respondents") in Whatcom County Superior Court. Pet'rs' A-001–0013. 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 arise from the alleged efforts of Respondent Dodge and the Tribal Respondents to evict the Rabangs from their residence owned by the Nooksack Indian Housing Authority (NIHA).[1] Pet'rs' A-001–0013. With respect to Respondent 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 Mrs. Rabang's lawsuit, and issuing an eviction order and two orders to show cause for Mrs. Rabang. *Id.*

In March 2017, Respondent Dodge and the Tribal Respondents 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. A-0001-0012; A-

[1] To the extent they are relevant to the Court's decision to accept or deny review of this case, Respondent Dodge also incorporates the facts set forth in the Tribal Respondents' Statement of the Case as they apply to the Tribal property and Tribal Court eviction.

0013-0030. 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.

Tribal Respondent App. A-0229–0230.

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. *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.'" *Id.*

In light of the district court's decision and the Ninth Circuit's affirmance, Respondent Dodge and the Tribal Respondents jointly moved to lift the stay in Whatcom County Superior Court and for the court to dismiss the complaint. A-0031-0036. After briefing and oral argument, the Court found that the Rabangs' Complaint "alleges injury stemming directly

[2] In their Petition for Discretionary Review, 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. Pet. at 8–9. The district court previously rejected the Rabangs' position that the determination from Interior was still in effect. *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.").

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." Pet'rs' App. A-0042. Accordingly, the Court dismissed the case without prejudice. *Id.*

The Rabangs then moved for reconsideration, but 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." Pet'rs' App. A-0043. 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 then appealed both the Superior Court's Order dismissing their claims, and the Court's denial of their motion for reconsideration. After briefing and oral argument, the Court of Appeals affirmed the trial court's dismissal, but on different grounds. Pet'rs' App. A-0044–0055. The Court found that despite the Rabangs' contention that the claims were made against the Respondents in their personal capacities, the activities the Rabangs complained of, i.e., issuing and enforcing eviction orders, were actually official in scope. *Id.* As a result, the Court found that

Respondent Dodge and the Tribal Respondents were acting in their official capacities, and sovereign immunity therefore precluded state court jurisdiction over the Rabangs' claims. *Id.* The Court did not reach the other arguments asserted, including Respondent Dodge's assertion of judicial immunity. The Rabangs sought—and were denied—reconsideration. Pet'rs' App. A-0056.

Respondent Dodge now answers the Rabangs' Petition for Discretionary Review, urging the Court to deny their invitation to review Division I's Opinion affirming dismissal of the Complaint.

III. ARGUMENT

A. Review Is Not Warranted Under RAP 13.4(b)

The Rabangs seek review under three different subparts of Rule of Appellate Procedure (RAP) 13.4(b). First, they assert that the Court of Appeals' Opinion "stands in conflict with decisions by the Washington State Supreme Court and the U.S. Supreme Court." Pet. for Review at 13. Second, the Rabangs allege that the Opinion "conflicts with [Division I's] own published decisions." *Id.* Third, the Rabangs contend that the issues underlying this appeal are a matter of substantial public interest. *Id.* For the reasons set forth below, each of these arguments fails. There is no legitimate basis for discretionary review under RAP 13.4(b), and this Court should therefore decline the Rabangs' petition.

1. The Court of Appeals' Decision Is Not in Conflict with Any State or Federal Supreme Court Decision

The Rabangs argue that the Court of Appeals' Opinion is in conflict with the United States Supreme Court's opinion in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017) and other "decisions by the Washington Supreme Court," presumably referring to *Wright v. Colville Tribal Enter. Corp.,* 159 Wn.2d 108, 147 P.3d 1275 (2006). In *Lewis*, the Supreme Court held that a Tribal member who was sued in his individual capacity was not entitled to sovereign immunity, as he—and not the Tribe—was the real party in interest. 137 S.Ct. at 1289. The Court explained that to determine what immunity defenses are available to a government or tribal employee, the Court must determine who the real party in interest is: the sovereign, or the individual. *Id.* at 1290. If the former, then tribal sovereign immunity bars suit, whereas, if it is the latter, then only personal immunity defenses are available. *Id.* at 1287.

Importantly, the Court emphasized that "[i]n 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.* at 1290 (noting that "If, for example, an action is in essence against a State even if the State is not a named party, then the State is the real party in interest and is entitled to invoke the Eleventh Amendment's protection."). Similarly, in *Wright,* there were two holdings: first, that tribal governmental corporations conducting commercial enterprises outside the reservation were protected by tribal sovereign immunity, and second, that the supervisor sued in his official

capacity was immune from suit.[3] *Id.* at 116. Neither of these holdings is at odds with the Court of Appeals' Opinion in this case.[4]

Here, the Court of Appeals acted in line with the Supreme Court's guidance in *Lewis* by not simply relying on the Rabangs' self-serving assertion that the claims were made against the Respondents in their personal capacity, but considering the nature of the claims to identify the real party in interest. Just as the Supreme Court advised that this determination could not be based purely on the characterization of the parties in the complaint, the Court of Appeals correctly observed that "Plaintiffs . . . cannot circumvent tribal immunity through a mere pleading device." Pet'rs' App. A-0052. Accordingly, after determining that the basis for the Rabangs' claims was the issuing and enforcing of eviction orders, the Court rightly found that those actions were "squarely official in their scope" and that sovereign immunity therefore shielded the Respondents from suit. Pet'rs' App. A-0052–0055.

Moreover, even if, as the Rabangs assert, the focus of a court's inquiry in determining whether sovereign immunity applies should be on the relief that is sought rather than the nature of the claims, that analysis nonetheless yields the same finding. The Rabangs' Complaint requests relief in the form of a temporary restraining order and a preliminary and

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[3] To the extent the Rabangs rely upon the statement in *Wright* with respect to the application of sovereign immunity to a tribal employee sued in their personal capacity, the court's remark is not only dicta, but does not account for the need to identify the real party in interest through the analysis discussed in *Lewis* without relying solely on the characterization of the parties in the Complaint.

[4] Division I's closer examination into whether the lawsuit was a bona fide individual capacity suit or an official capacity suit masquerading as one is also consistent with the federal case law. *E.g., Cook v. AVI Casino Enterprises*, *Inc.,* 548 F.3d 718, 727 (9th Cir. 2008) ("[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.'").

permanent injunction, which "enjoins permanently and restrains during the pendency of this action, Defendants and other persons acting in concert with them from intentionally or negligently inflicting further emotional distress on Plaintiffs." Pet'rs' App. A-0011. But the actions that the Rabangs claim to have been intentionally or negligently inflicted—i.e., issuing and enforcing eviction orders—were initiated by the unlawful detainer action filed by the Nooksack Indian Housing Authority (NIHA), an undisputed arm of the Tribe.[5] Consequently, for the Respondents to be enjoined or restrained from issuing eviction orders, NIHA would have to withdraw its unlawful detainer action. Thus, the relief the Rabangs seek is in fact from the Tribe as a sovereign, rather than from Respondent Dodge or the Tribal Respondents in their individual capacities. Respondents are entitled to the protections of tribal sovereign immunity, just as the Court of Appeals found, and RAP 13.4(b)(1) does not provided a basis for review.

2. The Opinion Does Not Conflict with Other Division I Decisions

The Rabangs also claim that the Court of Appeals' Opinion conflicts with its published decision in *Long v. Snoqualmie Gaming Comm'n,* 7 Wn. App. 2d 672, 435 P.3d 339 (2019) and *Young v. Duenas,* 164 Wn. App. 343, 348–349 (2011), both of which, the Rabangs argue, require application of federal law to tribal sovereign immunity questions. Petition at 14, 15. *Long* makes clear that Washington courts "must and do apply federal law to resolve whether tribal sovereign immunity applies." 7 Wn. App. 2d at 681. But there is no indication from the Opinion nor any evidence from the

[5] The Rabangs admit in their Complaint that the Nooksack Indian Housing Authority is "a subordinate body of the Nooksack Tribal Council." Pet'rs' App. A-0003.

Rabangs that the Court of Appeals did ***not*** apply federal law in its analysis. In fact, the Opinion illustrates the opposite.

As the Rabangs concede, Division I cites to *Young* in reciting the well-established rule that "[u]nder federal law, tribal sovereign immunity comprehensively protects recognized American Indian tribes from suit absent explicit and unequivocal waiver or abrogation by congress." Pet'rs' App. A-0051. The Opinion thus plainly acknowledges that the protections of sovereign immunity are provided under federal law. And, in the *Young* case, when discussing the application of tribal sovereign immunity, the Court of Appeals cited to *Wright v. Colville Tribal Enter. Corp.*—the very case that the Rabangs claim the Court of Appeals failed to consider. Pet. at 19. Although Division I may have cited state court cases, those cases invariably relied upon federal law in their analysis of sovereign immunity. The fact that the Court of Appeals did not cite to every possible federal court case addressing sovereign immunity does not result in the conclusion that the court "overlooked" those cases or the analysis therein; for example, *Long* does not reference *Pistor*, despite being one of two cases that the Rabangs claim must be applied to tribal sovereign immunity analyses. Pet. at 14.

The Rabangs have failed to establish that Division I's decision is inconsistent or in conflict with its other published decisions, as is required for discretionary review under RAP 13.4(b)(2).

3. This Case Does Not Involve an Issue of Substantial Public Interest

Finally, the Rabangs argue that review is warranted under RAP 13.4(b)(4) because "whether tribal sovereign immunity should be expanded as a result of the Opinion is a matter of substantial public interest." Pet. at

13. Their argument on this point is scant, appearing to be limited a single footnote in which they assert that the Respondents have agreed that the case is of substantial public interest because of certain statements made within a Motion to Publish the Court of Appeals' Decision. Pet. at 14, n.1. This is, quite simply, not true.

To begin with, Respondent Dodge was not among the Respondents who moved to publish the decision. Therefore, the statements and/or arguments made in the motion cannot be attributed to him. Second, in the Motion to Publish, the Tribal Respondents argued that ***publication*** of the decision was in the general public's interest; that is not the same as arguing that this Court should review Division I's Opinion because the case presents a matter of substantial public interest. A-0044.

To determine whether an issue involves a substantial public interest, the Court considers the public or private nature of the question, the need for future guidance provided by an authoritative determination, and the likelihood of recurrence. *Eide v. State, Dep't of Licensing*, 101 Wn. App. 218, 223, 3 P.3d 208, 210 (2000). A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue. *In re Flippo*, 185 Wn.2d 1032, 380 P.3d 413, (Mem)–414 (2016). By contrast, cases do not present an issue of substantial public interest when they are limited to their specific facts. *State v. Beaver*, 184 Wn.2d 321, 331, 358 P.3d 385, 390 (2015).

For example, among the issues this Court has recently found to involve a matter of sufficient public interest are: the impact of COVID-19 on correctional facilities and the Department of Corrections' response to the virus and its threat, *Matter of Williams*, 197 Wn.2d 1001, 484 P.3d 445, 447 (2021); whether the Residential Landlord Tenant Act applies to tenants contesting default judgments, *Randy Reynolds & Associates, Inc. v. Harmon*, 193 Wn.2d 143, 153, 437 P.3d 677, 682 (2019); and the adoption of a "horizontal state decisis" rule which "wholly reinvented the traditional duties of a Court of Appeals division," *Matter of Arnold*, 189 Wn.2d 1023, 408 P.3d 1091, 1092 (2017). In each of these cases, the issue was one which broadly stood to impact a significant number of people and cases.

Here, the issues do not present a matter of substantial public interest. Despite the Rabangs' attempt to expand the legal issue on appeal by claiming that Division I broadly concluded that "tribal employees stand immune from tort suit when they act within their employment scope," Pet. at 2, the question on appeal is a much narrower one. The dispositive issue is whether the Rabangs, disenrolled Nooksack Tribal Members, can sue Nooksack Tribal officials and employees in state court for certain alleged actions related to an unlawful detainer suit filed against the Rabangs in Nooksack Tribal Court by the Nooksack Indian Housing Authority for a house located on Nooksack Tribal trust lands. This is a highly fact-specific case; the alteration of any of these details could change the entire legal analysis. For the same reason, a decision in this case will not have a

significant or far-reaching impact, as it is likely to affect few—if any—proceedings in the lower courts and is unlikely to recur.

Further, the case law on tribal sovereign immunity is well-established, robust, and adequate as it currently exists, as evidenced by the many cases cited between the Rabangs' Petition and the Respondents' respective Answers. Tribal sovereign immunity is not in need of legal review or reform at this time. Even if this Court were to believe that sovereign immunity were in need of review, this case would not be the right choice for reconsidering that doctrine. Among other reasons, the factual history in this case is particularly complicated with the Rabangs' disenrollment, the Department of Interior's prior involvement, and the simultaneously-filed federal case. Review of this case by this Court would likely have limited application and utility to other litigation.

As the Rabangs have failed to establish that discretionary review in this case is warranted, the Court should deny their Petition.

IV. CONCLUSION

Division I's Opinion correctly affirmed the trial court's dismissal of this case. The Court should decline review.

This document contains 3150 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED: October 31, 2022

Respectfully submitted,

KILPATRICK TOWNSEND & STOCKTON LLP

By: */s/ Rob Roy Smith*
Rob Roy Smith

Attorneys for Respondent Raymond G. Dodge Jr.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on the October 31, 2022, I caused to be served a copy of the foregoing on the following persons via the Court's E-Filing system:

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Respondent Raymond G. Dodge Jr. s Answer to Petition for Discretionary Review and Appendix

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No. 101384-1

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APPENDIX TO RESPONDENT RAYMOND G. DODGE JR.'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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APPENDIX INDEX

The Honorable Deborra E. Garrett

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

MARGRETTY RABANG, and ROBERT RABANG,

Plaintiffs,

v.

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

Defendants.

Case No.: 17-2-00163-1

DEFENDANT CHIEF JUDGE RAYMOND G. DODGE JR.'S MOTION TO DISMISS

I. RELIEF REQUESTED

COMES NOW, Defendant Nooksack Tribal Court Chief Judge Raymond G. Dodge, Jr. ("Judge Dodge"), and hereby respectfully moves the Court to dismiss plaintiffs' claims as to him with prejudice under CR 12(b)(1) or CR 12(b)(6).

II. STATEMENT OF FACTS

Judge Dodge assumes as true for purposes of the CR 12(b)(6) motion plaintiffs' factual allegations in their complaint. *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985) (internal citation omitted). However, labels, conclusions, formulaic recitations of the elements of a cause of action, and naked assertions devoid of factual enhancement are not taken as true. *E.g.*, *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

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III. STATEMENT OF ISSUES

1. Whether the doctrine of judicial immunity bars plaintiffs' claims asserted against Judge Dodge for routine judicial conduct.

2. Whether the Court lacks subject matter jurisdiction over plaintiffs' claims that require interpretation and construction of the laws of the Nooksack Indian Tribe.

3. Whether plaintiffs have failed to sufficiently plead facts supporting each element of their intentional infliction of emotional distress tort claim.

4. Whether plaintiffs have failed to sufficiently plead facts supporting each element of their negligent infliction of emotional distress tort claim.

5. Whether the Court should award Judge Dodge his attorneys' fees under RCW 4.84.185 should he prevail in this motion.

IV. EVIDENCE RELIED UPON

Judge Dodge relies upon the complaint, as well as his declaration and the exhibits attached thereto filed herewith.[1]

V. AUTHORITY

A. Plaintiffs' Complaint Should Be Dismissed Under CR 12(b)(1)

Plaintiffs' complaint should be dismissed with prejudice because the suit against Judge Dodge is barred by judicial immunity. *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn.App. 799, 292 P.3d 147, 151 *review granted*, 304 P.3d 115 (2013) (finding that on a CR 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the party asserting jurisdiction bears the burden of establishing subject matter jurisdiction). In addition, plaintiffs are asking the Court to second guess the Nooksack Tribal Court and intervene in intra-tribal disputes involving Nooksack Tribal laws that lie outside of the Court's subject matter jurisdiction.

[1] Where a plaintiff founds allegations in a complaint on specific documents, but does not physically attach those documents to the complaint, said documents may be considered in ruling on a CR 12(b)(6) motion. *Sebek v. City of Seattle*, 172 Wn. App. 273 n.2, 290 P. 3d 159 (2012).

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1. Judge Dodge is Entitled to Judicial Immunity

a. Judge Dodge, Like All Jurists, Has Absolute Immunity for Actions Taken in His Judicial Capacity

It is well-settled under common law that judges are absolutely immune from suits in tort that arise from acts performed within their judicial capacity. *Lallas v. Skagit Cty.*, 167 Wn.2d 861, 864, 225 P.3d 910, 911 (2009). This liability extends to protecting judges even where they are accused of acting maliciously and corruptly. *Filan v. Martin*, 38 Wn. App. 91, 96, 684 P.2d 769, 772 (1984). Judicial immunity protects judicial officials from suit in their personal capacity. *See Babcock v. State*, 116 Wn.2d 596, 620–21, 809 P.2d 143, 156 (1991) (immunity is a personal defense because it applies to all members of a class as a matter of public policy). Although Washington State has not addressed judicial immunity for tribal court judges, other jurisdictions have held that they are entitled to the same absolute judicial immunity that shields state and federal court judges. *Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003).

Judicial immunity rests on considerations of public policy. *Adkins v. Clark Cty.*, 105 Wn.2d 675, 677, 717 P.2d 275, 276 (1986). It exists to protect justice by ensuring that judges can "administer justice without fear of personal consequences." *Kelley v. Pierce Cty.*, 179 Wn. App. 566, 573, 319 P.3d 74 (2014); *Adkins*, 105 Wn.2d at 677. A judge has the duty to decide all cases that are brought before him, "including controversial cases that arouse the most intense feelings in the litigants." *Filan*, 38 Wash. App. at 96 (quoting *Burgess v. Towne*, 13 Wn. App. 954, 957, 538 P.2d 559, 561 (1975)). Thus, a judge "should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption" because that fear "would contribute not to principled and fearless decision-making but to intimidation." *Filan*, 38 Wn. App. at 96; *see also Taggart v. State*, 118 Wn.2d 195, 203, 822 P.2d 243, 247 (1992) ("If disgruntled litigants could raise civil claims against judges, then 'judges would lose that independence without which no judiciary can either be respectable or useful.'").

Plaintiffs have sued Judge Dodge in his personal capacity for actions alleged to have occurred while he was acting as Chief Judge of the Nooksack Tribal Court. Compl. ¶ 11.

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Plaintiffs assert "extreme and outrageous" conduct and the intentional infliction of emotional distress based on a series of alleged acts by Judge Dodge relating to the unlawful detainer action to which Ms. Rabang was a party. *Id.* ¶ 39. Among other acts, Plaintiffs allege wrongdoing by Judge Dodge for: hearing the unlawful detainer lawsuit against Ms. Rabang; refusing to delay the unlawful detainer trial; issuing an eviction order; and issuing two orders to show cause. *Id.* Each of these actions is alleged to have occurred after Judge Dodge was appointed as Chief Judge by the Nooksack Tribal Council on June 13, 2016. *Id.* ¶ 15. Accordingly, Judge Dodge is immune from both suit and liability for these and any other actions taken in his judicial capacity.

b. Plaintiffs Have Failed to Establish That Judge Dodge Was Acting Outside His Judicial Capacity or in the Clear Absence of Jurisdiction

Judicial immunity applies to judges only when they are acting in a judicial capacity and with color of jurisdiction. *Adkins,* 105 Wn.2d at 677–78. To determine whether immunity applies, Washington courts have adopted a "functional approach" whereby they review the function being performed rather than the person who is performing it. *Lallas,* 167 Wn.2d at 865; *Taggart,* 118 Wn.2d at 210. Acts by a judge or judicial officer will therefore be protected by immunity from civil action for damages if they are "intimately associated with the judicial process." *Mauro v. Kittitas Cy.,* 26 Wn.App. 538, 540, 613 P.2d 195, 196 (1980). Conversely, when a judge takes actions that are ministerial and not judicial in nature, judicial immunity does not attach. *Mauro,* 26 Wn. App. at 541 (judicial immunity did not shield county from suit based on employee who failed to deliver judge's signed order); *Lallas*, 167 Wn.2d 861 (sheriff's deputy not entitled to immunity for escorting a prisoner to jail).

A judge must also be acting within the color of jurisdiction for immunity to apply. A judge is immune from civil suit if he performs a judicial act with "jurisdiction over the subject matter and person." *Burgess*, 13 Wn. App. at 958. Jurisdiction, for purposes of judicial immunity, should be construed broadly so that a judge will not be subject to possible liability unless he acts without color of authority. *Id.* Thus, even where a judge or judicial officer is

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without ***actual authority*** to perform an act, if it is within the "color of her authority" to do, the judge will be immune from suit and liability for that act. *Adkins*, 105 Wn.2d at 678 (bailiff who improperly provided dictionary to jury was protected by judicial immunity for liability from damages caused by mistrial).

Although there are few Washington cases which further interpret this requirement, the Washington test is similar if not identical to the federal test, which applies immunity to actions which are not taken in the "complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 12 (1991). At the federal level, circuit courts have found that a judicial officer acts in the clear absence of jurisdiction only if he "knows that he lacks jurisdiction, or acts despite a clearly valid statute or case law expressly depriving him of jurisdiction." *Mills v. Killebrew*, 765 F.2d 69, 71 (6th Cir. 1985) (citing *Rankin v. Howard,* 633 F.2d 844, 849 (9th Cir. 1980)). Thus, courts have held that judges enjoy judicial immunity even when there are procedural defects in their appointment where they are "discharging the duties of that position under the color of authority." *White by Swafford v. Gerbitz,* 892 F.2d 457, 462 (6th Cir. 1989); *see also Wagshal v. Foster*, 28 F.3d 1249, 1254 (D.C. Cir. 1994).

Here, plaintiffs fail to allege that the actions taken by Judge Dodge were outside the scope of his judicial capacity or taken in the clear absence of all jurisdiction. Using Washington's approach of reviewing the function performed rather than the person performing it reveals that the actions taken by Judge Dodge are indeed "intimately associated with the judicial process." The acts complained of by plaintiffs are routine judicial tasks that are typical to an unlawful detainer action, including convening a lawsuit and issuing orders. Moreover, even the alleged acts which ostensibly fall outside the scope of the unlawful detainer action—such as allegedly "rejecting Mrs. Rabang's responsive pleadings"—is still judicial in nature. Compl. ¶ 39. Even if the allegations against Judge Dodge are taken as asserted and assumed to be driven by malice and corruption, they are nonetheless well within the scope of a judge's authority.

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Further, plaintiffs fail to allege that Judge Dodge acted outside the color of his authority. Although plaintiffs allege as a matter of law that Defendant Dodge's appointment was *ultra vires* and *void ab initio*, they have not alleged that he acted with the knowledge that he lacked jurisdiction or in spite of a clearly valid statute or case depriving him or jurisdiction. *Id.* ¶15. Further, the complaint alleges that Ms. Rabang sought declaratory judgments from the court regarding the authority of the Nooksack Tribal Council on at least two separate occasions. *Id.* ¶¶ 16, 20. The second time Ms. Rabang states she sought such a judgment was in October 2016, shortly after she had been served with an order which she now alleges as part of the basis for her tort claim against Judge Dodge. The fact that Ms. Rabang sought an order from Judge Dodge in one matter, but now asserts that the same court and judge lacked jurisdiction to issue orders in the unlawful eviction case to which she was a party is simply untenable.[2] It does not comport with reason that Judge Dodge could properly exercise jurisdiction to resolve certain disputes in Nooksack Tribal Court while simultaneously lacking any and all jurisdiction to resolve other routine matters involving the same parties during the same timeframe.

Judge Dodge is entitled to judicial immunity for each of the actions alleged in the Complaint,[3] and this lawsuit should be dismissed with prejudice pursuant to Rule 12(b)(1).

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[2] In fact, in a Federal case filed by these plaintiffs against various Tribal officials including, Judge Dodge, expressly allege that the Nooksack Tribal Court exists for "the legitimate business purpose of providing a forum for the Tribal community to resolve disputes" and that Judge Dodge and other Court staff "have had and do have legitimate governmental business" in that capacity. *See Rabang, et al. v. Kelly, et al.*, No. 2:17-cv-00088-JCC (W.D. Wash., amended Compl. filed Feb. 2, 2017, ¶ 104) (alleging RICO violations). *See* Ex. D to Dodge Decl. Plaintiffs are trying to have it both ways by splitting their causes of action and alleging conflicting facts in two different fora. Many of the same action of Judge Dodge in this case are used as a basis for RICO relief in the Federal matter. *See id.* ¶¶ 49, 67-68.

[3] There is no allegation that Ms. Rabang appealed the Tribal Court order. In fact, this Court may take judicial notice of the fact that Ms. Rabang already filed a collateral attack in Whatcom County Superior Court, alleging claims of trespass and seeking a writ of restitution restoring her to her property. The Whatcom County Superior Court dismissed Ms. Rabang's suit for lack of subject matter jurisdiction. *Rabang v. Gilliland, et al.*, No. 16-2-02029-8. Ms. Rabang did not appeal the dismissal.

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2. Plaintiffs' Complaint Requires Resolution of Tribal Law Matters

The Court should refuse to exercise jurisdiction over plaintiffs' tort claims in this case because, at bottom, plaintiffs are complaining about various judicial actions taken Judge Dodge pursuant to his appointment by the Nooksack Tribal Council under Nooksack Tribal law, to which state law does not apply and this Court lacks jurisdiction to enjoin or overturn.[4] Compl. ¶¶ 14-15, 23-34, 39. The judicial actions taken by Judge Dodge lie outside of the reach of this Court, and are not subject to collateral attack. *See* RCW 37.12.060; *Milam v. U.S. Dep't of Int.*, 10 Indian L. Rep. 3013, 3015 (D. D.C. 1982) (ordinarily, disputes "involving intratribal controversies based on rights allegedly assured by tribal law are not properly the concerns of the federal courts"); *Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985) (affirming district court's holding that "resolution of . . . disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the . . . court"); *Sac & Fox Tribe of the Mississippi in Iowa, Election Bd. v. Bureau of Indian Affairs*, 439 F.3d 832, 835 (8th Cir. 2006) (holding "Jurisdiction to resolve internal tribal disputes [and] interpret tribal constitutions and laws . . . lies with Indian tribes and not in the district courts"); *Lewis v. Norton*, 424 F.3d 959, 960 (9th Cir. 2005) (recognizing that Indian tribes are distinct, independent political communities that retain their natural rights in matters of local self-government). The claims should be dismissed with prejudice.

B. Plaintiffs Complaint Should Be Dismissed for Failure to State a Claim

Even if this Court deems that it may exercise subject matter jurisdiction over the complaint, plaintiffs' complaint should be dismissed under CR 12(b)(6) for failure to state a claim as to Judge Dodge.

Under CR 12(b)(6), a trial court may grant dismissal for failure to state a claim only if "'it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the

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[4] Litigation challenging the actions of the United States upon which plaintiffs rely to allege invalidity of Judge Dodge's actions (Compl. ¶¶ 26, 34) is currently pending in Federal Court in Seattle. *See Nooksack Indian Tribe v. Haugrud, et al.*, No. 17-219-TSZ (W.D. Wash., filed Feb. 13, 2017).

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complaint, which would entitle the plaintiff to relief.'" *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985) (internal citation omitted). Such is the case here. Washington law requires a plaintiff to prove ***all*** elements of the cause of action. *See, e.g., Western Wash. Laborers-Employers Health & Sec. Trust Fund v. Merlino*, 29 Wn. App. 251, 255, 627 P.2d 1346 (1981). As explained below, plaintiffs have not sufficiently plead facts supporting each element of intentional infliction of emotional distress ("IIED") and negligent infliction of emotional distress ("NIED").

1. Plaintiffs Fail to Sufficiently Plead Facts Supporting IIED

To recover for intentional infliction of emotional distress, a plaintiff must prove (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual severe emotional distress on the plaintiff's part. *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 242, 35 P.3d 1158 (2001). Liability for intentional infliction of emotional distress exists when conduct is so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). Consequently, IIED "'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' In this area plaintiffs must necessarily be hardened to a certain degree of rough language, unkindness and lack of consideration." *Id.* (quoting Restatement (Second) of Torts § 46 cmt. d).

Plaintiffs' IIED claim fails for two reasons. First, none of the actions described in the complaint reach the required extreme or outrageous conduct. Holding court and issuing orders, even if those orders issue a few days before a federal holiday, are not close to sufficient.[5] Compl. ¶¶ 33, 39. No reasonable person could conclude from the allegations that Judge Dodge's

[5] In addition, Judge Dodge, by plaintiffs' own pleading, could not have taken some of the actions. Plaintiffs allege Judge Dodge was appointed on June 13, 2016. Compl. ¶ 15. Inexplicably, plaintiff then assigns blame to Judge Dodge for not holding a hearing on April 29, 2016 (almost two months ***before*** his appointment). *Id.* ¶¶ 16, 39. Moreover, judges do not "convene" lawsuits; plaintiffs do, by filing complaints. *Id.* ¶¶ 20, 23.

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judicial conduct was "outrageous." Simply saying as much – or being subject to court orders that rule against you – does not make it so. Being subject to litigation does not make for an intentional tort. *See Grimsby*, 85 Wash.2d at 59 (noting that filing suit alleging sexual abuse by a physician, even with malicious intent, is not "so outrageous in character, [and] so extreme in degree, as to go beyond all possible bounds of decency" and to be "utterly intolerable in a civilized community.") (internal citation omitted). As our courts have observed, "Our experience tells us that mental distress is a fact of life." *Hunsley v. Giard*, 87 Wash.2d 424, 434-35, 553 P.2d 1096 (1976) ("Not every act which causes harm results in legal liability.").

Second, simply alleging "Plaintiffs suffered legally compensable emotional distress damages" is insufficient for the damages element. Compl. ¶ 39. The complaint is silent as to how Judge Dodge holding court and issuing orders intentionally and proximately caused harm to each of the plaintiffs, or what that emotional harm might be. *Id.* ¶ 5.5.1; *see also* Exs. to Dodge Decl. Emotional distress includes "'all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.'" *Kloepfel v. Bokor*, 149 Wn.2d 192, 197-98, 66 P.3d 630 (2003) (intentional infliction of emotional stress when, under a no-contact order, defendant threatened to kill his former girlfriend, threatened to kill the man she was dating, watched her house, called her home 640 times, called her work 100 times, and called the homes of men she knew numerous times, causing her great distress and forcing her to spend weekends away from home to avoid defendant); *but see Womack v. Von Rardon*, 133 Wn.App. 254, 257, 261, 135 P.3d 542 (2006) (no intentional infliction of emotional stress when three juveniles took appellant's cat from her front porch to a nearby school and, using gasoline, set the cat on fire). Alleging "debilitating fear" from routine court orders that would have to be carried out by others is not the severe emotional harm required by the tort. Compl. ¶37. Importantly, plaintiffs have not alleged that any eviction has actually taken place – it appears that Ms. Rabang has neither vacated the premises nor been removed.

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Judge Dodge simply issued orders at the end of the calendar year with which plaintiffs disagree. If that were a tort, every losing litigant could be a plaintiff, and every judge and opposing counsel defendants. The claim should be dismissed.

2. Plaintiffs Fail to Sufficiently Plead Facts Supporting NIED

To recover for negligent infliction of emotional distress, plaintiffs must prove the negligence elements of duty, breach, causation, and damages, as well as objective symptomatology. *Kloepfel*, 149 Wn.2d at 199. Plaintiffs fail at least three of these elements.

To satisfy the objective symptomatology requirement, "a plaintiff's emotional distress must be susceptible to medical diagnosis and proved through medical evidence." *Hegel v. McMahon*, 136 Wn.2d 122, 135, 960 P.2d 424 (1998). Plaintiffs allege no facts indicating objective symptomatology. There are no allegations of medical evidence, let alone facts indicating what emotional distress plaintiffs have actually suffered.

In addition, plaintiffs also fail to sufficiently plead the damages element. Again, simply stating that "Plaintiffs suffered legally compensable emotional distress damages" is insufficient for the damages element. Compl. ¶ 46. Washington courts have attempted to limit NIED recovery to those individuals who are most likely to be severely impacted by "'the shock caused by the perception of an especially horrendous event'," and plaintiffs fall outside of this narrow category. *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 54, 176 P.3d 497 (2008).

Plaintiffs also fail to plead duty. Plaintiff simply state that all "Defendants' owed a duty to Plaintiffs to act as reasonable, prudent persons." *Id.* ¶¶ 43, 44. But, duty is more than this. "The existence of a duty is a question of law and depends on mixed considerations of 'logic, common sense, justice, policy, and precedent.'" *Lords v. N. Auto. Corp.*, 75 Wn.App. 589, 596, 881 P.2d 256 (1994) (internal quotation omitted). Plaintiffs fail to clearly articulate what duty they would have the Court impose on Judge Dodge. There is no duty for trial court judge to provide litigants with a stress free environment. For all these reasons, the negligent infliction claim should be dismissed.

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C. Judge Dodge Is Entitled to Attorneys' Fees

RCW 4.84.185 authorizes this Court to award the prevailing party reasonable expenses, including attorney fees, for opposing a frivolous "action, counterclaim, cross-claim, third party claim, or defense." *See Biggs v. Vail*, 119 Wn.2d 129, 133, 830 P.2d 350 (1992). In the event the Judge Dodge's motion to dismiss is granted, and the Court makes findings that plaintiffs' claims lack merit, attorneys' fees are appropriate as the claims advanced in this action are nothing short of abusive.

VI. CONCLUSION

For the foregoing reasons, Judge Dodge respectfully requests that the Court enter his [Proposed] Order and dismiss the complaint as to him with prejudice. Judge Dodge further request that the Court order an award of attorneys' fees under RCW 4.84.185 in its discretion.

DATED this 9th day of March, 2017.

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CERTIFICATE OF SERVICE

I certify that on March 9, 2017, I caused to have served a true and correct copy of **DEFENDANT CHIEF JUDGE RAYMOND G. DODGE JR.'S MOTION TO DISMISS**, on the following by the method(s) indicated below:

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DATED this 9th day of March, 2017.

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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF WHATCOM

RABANG, Plaintiff v. GILLILAND, et al., Defendants.	No. 17-2-00163-1 DEFENDANTS' MOTION TO DISMISS PURSUANT TO CR 12(b)(1) AND 12(b)(6)

COME NOW, Defendants in the above-entitled action, by and through the Office of Tribal Attorney, without waiving defenses and objections, and provide this Motion to Dismiss pursuant to CR 12(b)(1) and (12)(b)(6).

I. INTRODUCTION

This complaint is the latest in a long line of complaints against the Nooksack Indian Tribe (Tribe"), its councilmembers and its employees, made to various courts and administrative bodies in multiple jurisdictions by plaintiffs and their counsel to delay the disenrollment of individuals and discontinue erroneously or fraudulently obtained benefits. The Plaintiffs' efforts are aimed at disrupting the legitimate functions of the Nooksack Tribal government. Because this is nothing more than an intra-tribal dispute masked as a state tort action, the Court lacks

jurisdiction and must dismiss plaintiffs' claims against defendants Gilliland, Ashby, and Garcia ("Defendant Tribal Employees") pursuant to CR 12(b)(1). Alternatively, this Court must dismiss pursuant to CR 12(b)(6) because the Plaintiffs' failed to plead sufficient facts to justify relief.

The current matter stems from the Tribe's ownership of a trust parcel and the Tribe's eviction of the Plaintiff from that parcel. *See generally*, *Rabang v. Gilliland*, No. 16-2-02029-8 (What. Cnty. Super. Ct. Dec. 20, 2016). Plaintiff previously brought an action in trespass claim against Defendants Gilliland and Ashby less than two months ago. *Id.* This Court dismissed that action for lack of jurisdiction. The underlying facts have not changed, but the Plaintiffs' efforts to disrupt the legitimate activities of the Tribal government. This Court should end Plaintiffs' malicious efforts.

II. RELEVANT FACTS

The Tribe is a federally-recognized, sovereign Indian tribe located in Deming, Washington. 84 FR 4915, 4917 (Jan. 17, 2017). The Tribe has long provided law enforcement, judicial, planning and housing services to its members and the surrounding community. Over twenty years ago, the Tribe empowered its Housing Department a/k/a Nooksack Indian Housing Authority ("NIHA") to manage the Nooksack housing stock, including the authority to enter into leasing and other agreements and pursue evictions. Exh. 2, Decl. of C. Bernard, Chief of Staff (Reso. No. 05-83, Adoption of Amended Nooksack Indian Housing Authority Policies (Oct. 25, 2005)). NIHA's services include managing its rental unit inventory, inspections, and rehabilitation of its rental inventory. *Id.* The Nooksack Tribe's Police Department ("NPD") is empowered to enforce all tribal laws, including service of process, the provision of civil standby services, and assistance in the peaceful execution of various court orders. *See* Exh. 1, Decl. of M. Ashby.

The Tribe is the beneficial owner of land held in trust by the federal government wherein the Rutsatz Housing Site is located ("Tribal Property"). Decl. of M. Ashby at 2. The common address of 5913 Johnny Drive, Deming, Washington ("Tribal Rental Unit") is one of the rental units located within the Tribal Property. *Complaint (Compl.)*, ¶¶ 30-31. The Plaintiffs currently occupy the Tribal Rental Unit. *Compl.* ¶ 12. On August 19, 2016, NIHA caused Plaintiff Margretty Rabang to be served with a Notice of Eviction. Exh. 9, Decl. of Lieutenant Mike Ashby. On October 3, 2016, NIHA issued a 14-day Notice to Vacate. Exh. 10, Decl. of Lieutenant Mike Ashby. At approximately 7:00 p.m., Officer D. Cooper of the NPD personally served Plaintiff Margretty Rabang with a copy of the Notice in accordance with Tribal law. *Id.*

In November 2016, NIHA filed a Complaint for a Writ of Restitution against Plaintiff Margretty Rabang, commencing an Unlawful Detainer action in the Nooksack Tribal Court, seeking eviction under Nooksack law. *Compl.*, ¶ 22. On or about November 10, 2016, the Court held the initial hearing on the NIHA's Complaint. Decl. of M. Ashby at 5. In accordance with long-standing Court-ordered security measures, the Court informed the parties that the Courthouse could only accommodate a limited number of guests and observers. *See* Exhs. 4-8, Decl. of M. Ashby. The NPD was responsible for ensuring the court orders were complied with and regulating the number of persons who could attend the hearing. *See id.* Shortly before the hearing, the Court Clerk notified NPD of certain identified attendees permitted into the Courthouse. Decl. of M. Ashby at 5. Pursuant to the Court's orders, no other persons were permitted in the Courthouse, including Mr. Galanda and Mr. Dreveskratch, as neither individual was recognized by the Court as being able to practice law within the jurisdiction of the Nooksack Indian Tribe. *Id.* Plaintiff Margretty Rabang appeared in Tribal Court, answered the Complaint, and contested the unlawful detainer action. *Compl.* ¶ 25.

On December 14, 2016, the Tribal Court held a summary eviction proceeding on the Tribe's Complaint. *Compl.* ¶ 30. Following hearing, the Court entered an "Order Allowing Entry, Order of Eviction and Writ of Restitution," restoring NIHA's possession of the premises, granting NIHA entry into the unit for the purposes of an inspection[1], and permitting the eviction of Plaintiff Margretty Rabang, and all members of the household, from the premises. *Id.*

On or about December 19, 2016, at approximately 12:00 p.m., NIHA employee, Defendant Garcia, arrived at the Tribal Rental Unit in order to conduct an inspection as authorized by the Tribal Court. Decl. of A. Garcia at 2. Officer Seixas of the NPD met Defendant Garcia in front of the residence on Johnny Court in order to provide civil standby services in the event such services were needed. Exh. 11, Decl. of M. Ashby. Defendant Garcia approached the residence from the common walkway and was confronted by Plaintiff Robert Rabang. Decl. of A. Garcia at 2-3. Three additional adult males also confronted Defendant Garcia, at which point Plaintiff Robert Rabang refused Defendant Garcia access to the residential unit for purposes of an inspection. *Id.* Defendant Garcia then departed from the premises. *Id* at 3.

Following entry of the Tribal Court's Writ of Restitution, the Plaintiff Margretty Rabang ran to this Court to obtain an ex parte restraining order, restraining Defendants Gilliland and Ashby from entering onto or attempting to remove Plaintiff from the Tribal Rental Unit. *Compl.*, *Rabang v. Gilliland*, No. 16-2-02029-8 (Whatcom Cnty. Super. Ct. Dec. 20, 2016). Shortly thereafter, on January 27, 2017, this Court dismissed the underlying action, for want of jurisdiction. *Order of Dismissal*, *Rabang v. Gilliland*, No. 16-2-02029-8. The Plaintiffs have

[1] Pursuant to NIHA Policies and Procedures, NIHA has the authority to enter residences for the purposes of inspection. Exh. 2, Decl. of C. Bernard.

now restyled their earlier complaint for this action, in another effort aimed to harass tribal officials and employees in the course of legitimate tribal business.

III. ISSUES

A. PLAINTIFFS' CLAIMS MUST BE DISMISSED AS THIS COURT LACKS SUBJECT MATTER JURISDICTION PURSUANT TO CR 12(b)(1).

B. THIS COURT MUST DISMISS THIS ACTION PURSUANT TO 12(b)(6) FOR FAILURE TO STATE A CLAIM FOR BOTH OUTRAGE AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

IV. ARGUMENT

A. PLAINTIFFS' CLAIMS MUST BE DISMISSED AS THIS COURT LACKS SUBJECT MATTER JURISDICTION PURSUANT TO CR 12(b)(1).

The Plaintiffs' claims should be dismissed because this Court lacks subject matter jurisdiction. *State v. Barnes*, 146 Wash. 2d 74 (2002) (tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate). Civil Rule 12(b)(1) sets forth a defense for "lack of jurisdiction over the subject matter[.]" "Without subject matter jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal." *Inland Foundry Co., Inc. v. Spokane County Air Pollution Control Auth.*, 98 Wn.App. 121, 123–24 (1999). In resolving a factual challenge to subject matter jurisdiction, the trial court must weigh evidence to resolve disputed jurisdictional facts. *Outsource Services Management*, 172 Wn. App. at 806-07. Once challenged, the party asserting subject matter jurisdiction bears the burden of proof on its existence. *Id.*

Here, the Court lacks jurisdiction because asserting jurisdiction over this matter would infringe on the rights of the tribe to make its own laws and be ruled by them. *Outsource Services*

Management, at 276-77; *Williams v. Lee*, 358 U.S. 217, 223 (1959). Additionally, the Court lacks jurisdiction because Tribal sovereign immunity protects employees of the Tribal government acting in their official capacity. *Wright v. Colville Tribal Enterprise Corp.*, 159 Wn.2d 108 (2006); *see also Pearson v. Director of Department of Licensing*, 2016 WL 3386798 at 4 (2016)(complaint against individually named tribal law enforcement officer dismissed on sovereign immunity grounds).

1. This Court lacks jurisdiction over this matter as it would infringe on the rights of the tribe to make its own laws and be ruled by them.

Absent federal legislation to the contrary, Indian tribes retain jurisdiction over persons, property, and events in Indian country. *Worcester v. Georgia*, 31 U.S. 515, 555 (1832). Although the federal government authorized, and the state of Washington assumed, nonconsensual jurisdiction some "over civil causes of action" "in the areas of Indian country" within Washington State, Washington Courts still cannot assert jurisdiction over civil disputes in Indian Country when doing so would infringe on the rights of the tribe to "make their own laws and be ruled by them." *Outsource Services Management*, 181 Wn.2d at 276-277 (quoting *Williams v. Lee*, 358 U.S. at 200; *see also Tohono O'odham v. Schwartz*, 837 F.Supp. 1024 (D.C. Ariz. 1993).

The Supreme Court has repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. *See, e. g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138, n. 5 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-144, and n. 10 (1980); *Williams v. Lee*, 358 U.S. at 220-221. This

policy reflects the fact that Indian tribes retain "attributes of sovereignty over both their members and their territory," *United States v. Mazurie*, 419 U.S. 544, 557 (1975), to the extent that sovereignty has not been withdrawn by federal statute or treaty. The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute. "[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." *Williams v. Lee*, 358 U.S. at 220. On matters of federal law such as this, Washington courts are bound by the decisions of the U.S. Supreme Court and give "great weight" to decisions of the federal circuit courts. *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 62 (2014).

Tribal courts play a vital role in tribal self-government, *cf. United States v. Wheeler*, 435 U.S. 313, 332 (1978), and the Federal Government has consistently encouraged their development. If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law. *See Fisher v. District Court*, 424 U.S. 382 (1976); *Williams v. Lee*, *supra*. Tribal courts have inherent power to adjudicate civil disputes affecting important personal and property interests of both Indians and non-Indians which are based upon events occurring in Indian Country. *Montana v. United States,* 450 U.S. 544, 565–66 (1981); *Santa Clara Pueblo,* 436 U.S. at 65. "The power to hear and adjudicate disputes arising on Indian land is an essential attribute of [tribal] sovereignty." *Weeks Construction, Inc. v. Oglala Sioux Housing Authority,* 797 F.2d 668, 673 (8th Cir. 1986).

Here, tribal and federal law governs ownership and lease of parcels held in trust for the benefit of the Tribe. 25 U.S.C. § 465; 25 C.F.R. Part 162. The Tribal Housing Policies and

Procedures govern Tribal rental housing units located on Tribal trust lands and notices to terminate the same. Exh. 2, Decl. of C. Bernard. Tribal, not state, law governs unlawful detainer actions and civil procedure including service of legal documents and court orders. *Compl.*, ¶ 30-31.

The exercise of jurisdiction by the state court in this instance would encroach upon tribal self-government and is thereby preempted. Here, the Plaintiffs' invitation to this Court to interfere in internal matters of the Tribe which concern the Tribe's enforcement of Tribal Court judgments and the exercise of dominion and control over its trust lands must be dismissed. The current Complaint is the second collateral attack of a Tribal Court eviction order in the past several months. The Plaintiffs' current attempt alleged tortious conduct by various Tribal employees performing duties in their official capacities in accordance with Tribal law and Tribal Court orders. This complaint is based upon the same set of facts utilized in the Plaintiff Margretty Rabang's previous unsuccessful attempt to interfere on internal matter of the Tribe.

In this case, the Plaintiff was a party to the underlying Tribal Court proceeding wherein the Tribal Court ordered the Plaintiff vacate the Tribal Rental Unit for violation of Tribal Housing law and Tribal Housing Policies. Pursuant to the Tribal Court's orders, NPD was empowered to assist in the execution of the writ in order to keep the peace. Any interference with the Tribal Court proceedings by this Court would infringe upon the Tribe's right to self-govern.

This matter, if allowed to proceed, would place the Court in the position of construing Nooksack tribal law regarding the right to possess tribal rental housing located on Tribal trust property, where the Nooksack Tribal Court has already decided the matter, and the Whatcom

County Superior Court has already concluded it lacks subject matter jurisdiction. A decision by this Court under those circumstances would interfere with the Tribe's sovereignty and self-government, in violation of well-established law, and cannot be permitted.

2. This Court must dismiss this action as the Defendants possess sovereign immunity.

The Nooksack Indian Tribe is a domestic dependent sovereign, possessed of all the sovereignty under American law not otherwise limited by federal law. Where Congress has not abrogated tribal authority, the United States Supreme Court has repeatedly recognized that Indian tribes "retain[ ] their original natural rights" as sovereign entities. *Worcester v. Georgia*, 31 U.S. at 559; *see also Holden v. Joy*, 84 U.S. (17 Wall.) 211, 242 (1872); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512-13 (1940). In keeping with their sovereign status, it is well settled that Indian tribes enjoy the common-law immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58. Whether tribal sovereign immunity applies is a question of federal law. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Absent the tribe's express waiver of immunity or congressional authorization, an Indian tribe may not be subjected to suit in state or federal courts. *Id.*

Sovereign immunity extends to tribal officials and employees acting within the scope of their authority. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *U.S. v. Yakima Tribal Court*, 806 F.2d 853, 861(9th Cir. 1998); *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008); *Miller v. Wright*, 705 F.3d 919 (9th Cir. 2012).

Recently, the Ninth Circuit permitted cases to proceed against tribal employees who were sued in their individual capacities for money damages, even though the employees were acting in the course and scope of their employment. *Maxwell v. County of San Diego*, 708 F.3d 1086-90

(9th Cir. 2013). Under the Ninth Circuit's new "remedy-focused analysis", ***a Court must consider whether "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act."*** *Id.* at 1088 (quoting *Shermoen v. U.S.*, 982 F.2d 1312 (9th Cir. 1992)(emphasis added). Here, utilizing the Ninth Circuit's "remedy-focused analysis", it is clear that Plaintiffs' complaint is an individual-capacity suit in caption only; in reality, this case is an official capacity suit barred by tribal sovereign immunity.

"[A] Plaintiff cannot circumvent tribal immunity by the simple and expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity...." *Wright*, 705 F.3d at 928 (quoting *AVI Casino Enterprises, Inc.*, 548 F.3d at 727. In such cases, "the sovereign entity is the 'real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.'" *Cook*, 709 F.3d at 727 (quoting *Regents of University of California v. Doe*, 519 U.S. 425, 429 (1997). Even under the recent "remedy-focused analysis", a plaintiff cannot circumvent tribal immunity by the simple and expedient of naming the officer in his individual capacity, rather than his official capacity. *Pearson v. Director of Department of Licensing*, 2016 WL 3386798 at 4 (W.D. Wn. 2016). ***In the case cited by Plaintiffs as support for this Court's jurisdiction, the federal court for the Western District of Washington dismissed an individual capacity lawsuit against two tribal law enforcement officers seeking relief from a tribal court forfeiture order on the basis of sovereign immunity.*** *Id.*

Here, the Plaintiffs allege Defendant Tribal Employees committed the torts of outrage and negligent infliction of emotional distress based on four (4) distinct acts.[2] Of the complained

[2] (1) an unnamed law enforcement officer, acting pursuant to Defendant Gilliland's order, served the Plaintiff

of actions, none could be fairly characterized as tortious, and all of the alleged actions were committed by Defendant Tribal Employees performing job duties within the course and scope of their Tribal employment, pursuant to Tribal law and Tribal Court orders. The Plaintiffs' allegations make clear that the Defendant Tribal Employees were simply employees executing tribal policies, tribal laws, and enforcing Tribal Court orders in place long before March 24, 2016. Further, even the Plaintiffs' complaint alleges actions of a "John Doe" defendant were committed in his official capacity, as an "Officer." *Compl.* at ¶¶ 18, 32. And finally, the Plaintiffs' primary relief sought is injunctive relief from actions in furtherance of the Tribal policies, Tribal laws, and Tribal Court orders. *Compl.*, Prayer for Relief, ¶ 1.

The Plaintiffs' theory relies upon the argument that: (1) the Tribal Court lacked jurisdiction over an unlawful detainer action concerning a tribal rental unit located upon real property held in trust for the Nooksack Indian Tribe and (2) the Tribal Employee Defendants lacked the authority to enforce the Tribal Court orders concerning the Tribal Rental Unit. However, the Plaintiffs failed to name (or join) the Tribe as a party even though the Plaintiffs' theory of the case requires determinations that the Tribal Court lacked jurisdiction over the underlying matter. The Plaintiffs' intentional omission of the Tribe as a defendant was an effort to avoid the defense of sovereign immunity. By doing so, the Plaintiffs' efforts cause a separate but related insurmountable barrier to surviving a motion to dismiss; that is, the Plaintiffs failed to join a necessary party pursuant to CR 19. *Shermoen*, 982 F.2d at 1317. The Plaintiffs' efforts accentuate that the Plaintiffs' case is not an individual-capacity suit against Tribal Employee

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Margretty Rabang with a Notice of Eviction; *Compl.*, ¶ 18.
(2) an unnamed law enforcement officer, acting pursuant to Defendant Gilliland's order, served the Plaintiff Margretty Rabang with a Notice of Vacate; *Compl.*, ¶ 19.
(3) Defendant Tribal Law Enforcement denied several nonparties to this case, access to the Tribal Court; *Compl.*, ¶ 25; and finally,
(4) Defendant Garcia, and an unnamed law enforcement officer, "confronted" Plaintiff Robert Rabang to perform an inspection in accordance with the Tribal Court Eviction Order, but ultimately, did not make entry into the home. *Compl.*, ¶ 32.

Defendants, but is a thinly-guised action against the Tribe itself and an official-capacity suit against the Tribe's employees. As such, this Court should dismiss Plaintiffs' claims with prejudice based upon tribal sovereign immunity.

B. THIS COURT MUST DISMISS THIS ACTION PURSUANT TO 12(b)(6) FOR FAILURE TO STATE A CLAIM FOR BOTH OUTRAGE AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

The Tribal Employee Defendants hereby move this Court for judgment on the pleadings on the basis that Plaintiffs' complaint fails to state facts sufficient to constitute a cause of action against Tribal Employee Defendants pursuant to CR 12(b)(6). The purpose of the 12(b)(6) motion is to determine if a plaintiff can prove any set of facts that would justify relief. *Halvorson v. Dahl,* 89 Wn.2d 673 (1978). A court should dismiss a complaint under CR 12(b)(6) if "it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery." *Tenore v. AT & T Wireless Servs.,* 136 Wn.2d 322 (1998).

The Plaintiffs have plead the tort of outrage, which requires the Plaintiffs prove: (1) the extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress, and (3) actual result to the plaintiff [of] severe emotional distress. *Rice v. Janovich*, 109 Wn.2d 48, 61 (1987). "Extreme and outrageous conduct must be conduct that the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim, "'Outrageous!'" *Christian v. Tohmeh*, 191 Wn. App. 709, 735-36 (2015) (*quoting Reid v. Pierce County*, 136 Wn.2d 195, 201-02 (1998)).

Liability will exist "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as

atrocious, and utterly intolerable in a civilized community." *Grimsby v. Samson,* 85 Wash.2d 52, 59 (1975). The question of whether certain conduct is sufficiently outrageous is ordinarily a question for a jury. *Phillips v. Hardwick,* 29 Wn.App. 382, 387 (1981). However, the Court has the responsibility to make an initial determination whether reasonable minds could differ about whether the conduct was so extreme as to result in liability. *Jackson v. Peoples Fed. Credit Union*, 25 Wn. App. 81, 84 (1979) (trial court must make an initial determination as to whether the conduct may reasonably be regarded as extreme and outrageous, thus warranting a factual determination by the jury).

If reasonable minds could not differ on whether the conduct has been sufficiently extreme and outrageous to result in liability, summary judgment is proper. *Id.* at 387. In each of Defendant Tribal Employees cases, the Plaintiffs fail to plead any of the essential elements, rather, their Complaint alleges that the Defendants engaged in specific legal processes common to both the state of Washington and the Nooksack Indian Tribe. Plaintiffs' claims are not torts, they are frivolous claims that warrant sanctions.

Under Plaintiffs' alternative claim for negligent infliction of emotional distress, they may recover only if they prove the elements of negligence (duty, breach, proximate cause, damage), plus the additional element of objective symptomatology of their emotional distress. *Kumar v. Gate Gourmet*, 180 Wn.2d 481 (2014). Defendant Tribal Employees hereby join in Defendant Dodge's motion to dismiss for failure to plead the objective symptomology element required for a claim. As to Plaintiffs' claims against each of Defendant Tribal Employees, the Plaintiffs fail to plead any known or accepted duty.[3] Rather, Plaintiffs complain that each of the

[3] Pursuant to Washington law, the Plaintiff must also plead facts sufficient to demonstrate an exception to the "public duty doctrine" exists when attempting to hold a governmental entity liable for damages in negligence. *Vergeson v. Kitsap Cy.*, 145 Wn.App. 526 (Div. 2 2008).

Tribal Employee Defendants utilized specific legal processes common to both the state of Washington and the Tribe. Again, the Plaintiffs' claims are not torts, they are frivolous claims that warrant sanctions.

1. Plaintiffs' claims Against Andrew Garcia must Fail.

Here, Plaintiffs allege the Tribe's Building Inspector, Andrew Garcia, is liable for the simple act of walking up the driveway and meeting the Plaintiff Robert Rabang at the front entrance of the Tribal Rental Unit. *Compl.*, ¶ 32. Rental housing inspections are commonplace and specifically authorized by Tribal law, Tribal Housing Policies and Procedures, and the Housing Department rental agreements. Exh. 2, Decl. of C. Bernard; *see* also R.C.W. § 59.18.150. In this case, not only was the inspections authorized by policy, but the inspection was ordered by the Tribal Court Order and was to be conducted midday after nearly a week advanced notice. Compl., ¶¶ 30-31.

As a matter of law, this Court must dismiss the Plaintiffs' claims as it appears beyond doubt that the Plaintiffs cannot prove any set of facts which would justify recovery. Defendant Garcia's sole involvement in this matter was attempting to perform a rental housing inspection authorized by Tribal Housing Policies, Ms. Rabang's lease, and an order of the Tribal Court.

2. Plaintiffs' claim Against Defendants Ashby, Gilliland, and unnamed officers for Serving Legal Documents Must Fail.

The Plaintiffs' attempt to hold NPD officers liable for serving legal documents must fail. The Plaintiffs alleged that an unnamed law enforcement officer, acting pursuant to Defendant Gilliland's order, served the Plaintiff Margretty Rabang with a Notice of Eviction and a Notice to Vacate. *Compl.*, ¶ 18-19. As a matter of law, the service of legal documents does not establish "extreme and outrageous conduct" required for outrage, nor does the effecting of service violate any duty owed by NPD.

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Both the Tribe and the State of Washington officially authorize service of legal documents. Service of process is a routine service carried out by law enforcement officers, including officers employed by the Tribe. *See also* R.C.W. 36.28.010(3)[4]; *see also* Bellingham Municipal Code, § 2.24.055(c)[5]. Pursuant to Tribal law, service of a notice to vacate and notice of eviction are both prescribed by the Tribe's Housing Policies and Procedures. Exh. 2, Decl. of C. Bernard.

As a matter of law, this Court must dismiss the Plaintiffs' claims as it appears beyond doubt that the Plaintiffs cannot prove any set of facts which would justify recovery. Defendant Law Enforcement officers' sole involvement in this matter was attempting to perform routine tasks of service of legal documents authorized by Tribal Housing Policies and Tribal law.

3. Plaintiffs' claims Against Defendants for Enforcing Long- Standing Court Orders Must Fail.

The Plaintiffs' attempt to hold the NPD liable for outrage and negligent infliction of emotional distress as a result of the officers' enforcement of long-standing Tribal Court orders to provide a security perimeter around the Tribal Court must fail. The Plaintiffs alleged that Defendant Law Enforcement Officers denied Plaintiff Margretty Rabang counsel at her Tribal Court hearing. *Compl.*, ¶ 25. As a matter of law, complying with a series of Tribal Court orders mandating that a security perimeter be established around the Tribal Court does not establish "extreme and outrageous conduct" required for outrage, nor does it violate any duty owed by law enforcement officers.

Court attendance and obedience to court orders is a standard service, if not a duty, carried out by law enforcement officers, including those officers employed by the Nooksack Indian

[4] The County Sheriff "[s]hall execute the process and orders of the courts of justice or judicial officers, when delivered for that purpose, according to the law."
[5] A warrant officer shall have the authority to "serve civil and criminal court orders".

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Tribe. *See also* R.C.W. § 36.28.010[6]; *see also* Bellingham Municipal Code, § 2.24.055(c).[7] Further, maintenance of the peace, including crowd control and protection of public property are also services routinely carried out by, if not duties of, law enforcement officers, including those officers employed by the Nooksack Indian Tribe. *See* R.C.W. § 38.28.010(6)[8]; *see also* Bellingham Municipal Code §2.24.030.[9] Within the Tribe's jurisdiction, the NPD has the obligation to ensure compliance with Tribal law, including Tribal Council resolutions and Tribal Court orders.

This lawsuit is a continuation of the Plaintiffs', and their legal counsels', efforts to disrupt governmental activities of the Tribe and besmirch the NPD and other Tribal employees. This lawsuit is an extension of a lawsuit initially filed in 2013 in Tribal Court, wherein then-Chief Judge Montoya-Lewis issued no fewer than four (4) separate court orders directed towards Plaintiffs' counsel (and their clients), outlining suitable behavior inside and outside the Courtroom. Exhs. 4-7, Decl. of M. Ashby. Within the series of court orders, then-Chief Judge Montoya-Lewis instructed Plaintiffs' counsel of an all-too-obvious fact that Plaintiffs' counsel disregarded, that is, the Tribal Court has a very limited seating capacity. Exhs. 5-7, Decl. of M. Ashby. As a result of the Plaintiffs, and their counsels' unwillingness to act in accordance with the reality of the Court's limited size, the Court ordered (1) the NPD to maintain a perimeter around the court and (2) the parties to notify the NPD, in advance, of how each side would utilize the five seats allotted.[10] Exh. 7, Decl. of M. Ashby.

Several years later, following Judge Montoya's departure, Chief Judge Alexander issued

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[6] "The sheriff... shall attend the sessions of the courts of record..., and obey their lawful orders or directions."
[7] A "warrant officer shall provide security for the Bellingham municipal court."
[8] The Sheriff shall "keep and preserve the peace" and "quiet and suppress all affrays, riots, unlawful assemblies and insurrections."
[9] "The police department has all such authority...including, but not limited to, maintenance of the peace..."
[10] Unsurprisingly, neither Mr. Galanda, nor his client Plaintiff Robert Rabang, appealed Judge Montoya's orders regarding security.

a Standing Administrative Order Re: Security[11]. Exh. 8, Decl. of M. Ashby. In the 2016 rendition, the Court again ordered (1) the Police Department to establish a perimeter in order to assure safety of all concerned and (2) the parties to notify the Police Department, in advance, of how each side would utilize the five seats allotted. *Id.* The mandates of the previously-identified security orders continued under the direction of Defendant Chief Judge Dodge in late-2016.

In the underlying eviction case, pursuant to the Tribal Court's long-standing security orders, the NPD established a security perimeter and ensured that only five (5) individuals would be permitted into the Courthouse. Decl. of M. Ashby at 5. The Plaintiff Margretty Rabang informed the Court of her five (5) attendees, which did not include Mr. Galanda and/or Mr. Dreveskratch. *Id.* The Court then notified the NPD of the identity of the Plaintiff's selected attendees, and the NPD permitted entry of those identified. *Id.* The NPD ensured faithful execution of Tribal law, including the security orders issued by the Tribal Court. The Plaintiffs' attempt to characterize the enforcement of long-standing Tribal Court orders as torts must be stopped, and the Plaintiffs' case dismissed.

As a matter of law, this Court must dismiss the Plaintiffs' claims as it appears beyond doubt that the Plaintiffs cannot prove any set of facts which would justify recovery. Defendant Law Enforcement officers execution of Tribal Court orders was a routine tasks of Tribal Law Enforcement, and a statutory duty in many jurisdictions including Whatcom County[12].

[11] Again, neither Mr. Galanda, nor his clients Robert Rabang, appealed Judge Montoya's orders regarding security.
[12] The Sheriff "[s]hall execute the process and orders of the courts of justice or judicial officers, when delivered for that purpose, according to the law"). R.C.W. 36.28.010(3).

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V. CONCLUSION

The Defendants respectfully request dismissal with prejudice.

Respectfully submitted this 24th day of March, 2017.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

MARGRETTY RABANG, and ROBERT RABANG,

Plaintiffs,

v.

RORY GILLIAND, et al.,

Defendants.

Case No.: 17-2-00163-1

DEFENDANTS' MOTION TO LIFT STAY AND FOR ORDER OF DISMISSAL

Without Oral Argument

I. RELIEF REQUESTED

Defendants, by and through their respective counsels of record hereby move the Court to lift the stay following the Ninth Circuit Court of Appeals decision affirming the District Court's dismissal of Plaintiffs' Complaint without prejudice in *Rabang, et al. v. Kelly Jr., et al.*, Case Nos. 18-35711; 17-cv-00088-JCC, and for dismissal of Plaintiffs' Complaint for Intentional and Negligent Infliction of Emotional Distress in light of the same decision.

II. RELEVANT FACTS

On January 31, 2017, Plaintiffs filed a Complaint for intentional and negligent infliction of emotional distress against multiple defendants, including Judge Dodge. At the same time, Plaintiffs filed a lawsuit in federal district court alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). *See Rabang, et al. v. Kelly, Jr., et al.*, United States

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District Court for the Western District of Washington (Case No. 17-CV-00088-JCC). In March 2017, Defendants separately moved to dismiss Plaintiffs' claims in this case 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. On April 21, 2017, this Court issued an order in response to Judge Dodge's and other Defendants' motion 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.

Court's Order on Defendants' Motions to Dismiss at 1–2 (emphasis added). On May 25, 2018, Judge Dodge and other Defendants each moved to stay discovery pending resolution of Judge Dodge's motion to dismiss. On June 15, 2017, the Court granted Defendants' motion until further order of the Court.

In the companion federal case, the parties continued to litigate until the federal district court ordered a stay of proceedings on October 25, 2017, 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. Declaration of Rachel Saimons ("Saimons Decl."), Ex. A (filed herewith). On January 29, 2018, the court again stayed all proceedings until April 30, 2018, awaiting a recognition decision from Interior. Saimons Decl., Ex. B. On March 9, 2018, the Department of Interior issued an interim recognition of the Nooksack Indian Tribal Council. Saimons Decl., Ex. C. In light of that decision, on June 7, 2018, the Court ordered Plaintiffs to show cause as to why their claims should not be dismissed for lack of subject matter jurisdiction. 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. Saimons Decl., Ex. D. On August 24, 2018, the Plaintiffs filed an appeal of the district court's decision to the Ninth Circuit

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Court of Appeals. In light of that appeal, on September 5, 2018, the parties to this case filed a stipulated motion to stay proceedings in this Court pending resolution of Plaintiffs' appeal to the Ninth Circuit.

Following briefing, the Ninth Circuit held oral argument on June 7, 2019. On May 4, 2021, the Ninth Circuit affirmed the District Court's July 31, 2018 determination that it lacked subject matter jurisdiction over the case and that dismissal was therefore proper. Saimons Decl., Ex. E. Accordingly, Defendants now move to lift the stay in this case and for an order of dismissal in light of the Ninth Circuit decision.

III. STATEMENT OF THE ISSUES

Whether the Court should enter an order dismissing Plaintiffs' claims for intentional infliction of emotional distress and negligent infliction of emotional distress in light of the Ninth Circuit Court of Appeals' recent decision affirming the District Court's dismissal for lack of subject matter jurisdiction.

IV. EVIDENCE RELIED UPON

Defendants rely upon the pleadings in this case, as well as the declaration of Rachel Saimons, and the exhibits attached thereto and filed herewith.

V. AUTHORITY AND ARGUMENT

A. The Court Should Lift the Stay and Dismiss Plaintiffs' Claims

This case has been stayed, either by the Court's initiation or by stipulation, for nearly four years. *See* June 15, 2017 Order Granting Defendants' Motion to Stay and October 24, 2019 Stipulated Motion for Stay. For the last eighteen months, Defendants have awaited the "resolution of Plaintiff Margretty Rabang's appeal of the U.S. District Court's Order in *Rabang v. Kelly* to the Ninth Circuit Court of Appeals," as required to lift the stipulated stay. Order Granting Stipulated Motion to Stay. That decision finally arrived on May 4, 2021, when the Ninth Circuit affirmed the District Court's July 31, 2018 Order, which clearly and unequivocally determined that the United States' recognition of the newly-elected Nooksack Tribal Council

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divested the Court of its subject matter jurisdiction and required that the Plaintiffs exhaust their tribal court remedies before suing in federal court. Saimons Decl., Ex. E.

Specifically, the Ninth Circuit found that:

> Resolution of Rabang's RICO claims requires consideration of the alleged predicate acts, which all center on the allegedly unlawful disenrollment of hundreds of members of the Nooksack Indian Tribe. But "[t]ribal enrollment decisions are generally beyond the power of federal courts to review." *Aguayo v. Jewell*, 827 F.3d 1213, 1222 (9th Cir. 2016); *see also Lewis v. Norton*, 424 F.3d 959, 960 (9th Cir. 2005) (noting a "lack of federal court jurisdiction to intervene in tribal membership disputes"). The district court therefore properly dismissed the case for lack of jurisdiction.
>
> Because the Nooksack Indian Tribe has a full tribal government that has been recognized by the DOI, *see Roberts v. U.S. Dep't of the Interior*, No. 19-35743, ECF 47 at 5 (March 10, 2021) (holding that DOI recognition of new Tribal Council was not arbitrary and capricious), Rabang's case no longer falls under the futility exception to the tribal exhaustion requirement, which "applies narrowly to only the most extreme cases." *See Grand Canyon Skywalk Dev.*, 715 F.3d at 1203.2

Id.

Thus, the Ninth Circuit decision affirms the District Court's Order which concluded, "it is for the Nooksack Tribe, not this court, to resolve Plaintiffs' claims." Saimons Decl., Ex. D.

This long-anticipated decision provides this Court with the guidance that it has awaited. Defendants respectfully request that their pending motions to dismiss be re-noted and that this Court follow the Ninth Circuit's findings to dismiss this action.

VI. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court lift the stay and dismiss Plaintiffs' Complaint.

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DATED this 21st day of June, 2021.

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CERTIFICATE OF SERVICE

I certify that on June 21, 2021, I caused to have served a true and correct copy of **DEFENDANTS MOTION TO LIFT STAY AND FOR ORDER OF DISMISSAL**, on the following by the method(s) indicated below:

Gabe Galanda gabe@galandabroadman.com Galanda Broadman, PLLC 8606 35th Ave NE, Suite L1 PO Box 15146 Seattle, WA 98115 *Attorneys for Plaintiffs*	_____ _____ X X _____	E-Service (via the Clerk) Hand-Delivery U.S. Mail, Postage Prepaid Email Facsimile

DATED this 21st day of June, 2021

Kilpatrick Townsend & Stockton LLP

By: _____

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NO. 834568

COURT OF APPEALS, DIVISION 1

OF THE STATE OF WASHINGTON

RABANG, *et. al.*, Plaintiffs/Appellants, vs. GILLILAND, *et. al.* Defendants/Respondents.	No. 834568 RESPONDENTS TRIBAL EMPLOYEES' MOTION TO PUBLISH

I. INTRODUCTION

Respondents Gilliland, Garcia, and Ashby (hereinafter "Respondents Tribal Employees") respectfully request that this Court publish its opinion dated August 15, 2022. This Court's Opinion concludes five years of meritless litigation targeting individual Tribal employees. The primary reason the litigation languished for five years was Plaintiffs' counsel's utilization of naming the employees as defendants in their individual

capacities in order to avoid the valid defense of sovereign immunity.

Despite Plaintiffs' efforts to stack a lower court's record with mounds of irrelevant and/or false (but scintillating) information; this Court opined, "the activities complained of—issuing and enforcing eviction orders—are squarely official in their scope" yet were allowed to unnecessarily proceed for years. All litigants, including Tribal employees, are entitled to due process, including prompt dismissal of frivolous complaints.

II. STATEMENT OF RELIEF SOUGHT

Respondents Tribal Employees move for publication of the attached opinion as publication is in the general public interest.

III. ARGUMENT

Publication is necessary in order to clarify that Washington Courts must: (1) promptly dismiss individual capacity lawsuits against Tribal officials pled for an improper purpose and (2)

defer to Tribal forums for determinations of Tribal law, including the scope of Tribal employees' authority. Here, the current litigation languished these two primary reasons. Publication of this opinion should aid lower courts' efforts to quickly dispose of anti-tribal advocates' attempts to improperly capture a court's attention via this pleading device. Further, publication is in the general public interest given the size and scope of Washington Tribes' workforce and their impact on the Washington economy.

A. PUBLICATION OF THIS DECISION IS NECESSARY TO CLARIFY ARTFULLY PLEAD CASES AGAINST INDIVIDUAL TRIBAL EMPLOYEES MUST DEMONSTRATE THE EMPLOYEE ACTED OUTSIDE OF THEIR TRIBALLY-DEFINED AUTHORITIES.

This Court's opinion clarifies that Washington Courts promptly cut through a plaintiff counsel's fraud of improperly designating a Tribal employee defendant as in his or her "individual capacity" in order to avoid the defense of sovereign immunity. The concept of tribal sovereign immunity comprehensively protects recognized American Indian tribes

(and their employees) from suit absent an explicit and unequivocal waiver or abrogation by congress is not new. *Young v. Duenas*, 164 Wn.App. 343 (Div. 1 2011); *Scott v. Doe*, 199 Wn.App. 1039 (Div. 1 2017). This immunity extends to tribal officers and tribal employees, so long as their alleged misconduct arises while they are acting in their official capacity and within the scope of their authority. *Wright v. Colville Tribal Enterprise Corp.*, 159 Wn.2d 108, 116 (2006); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 726–27 (9th Cir. 2008), *cert. denied,* 129 S.Ct. 2159 (2009). Over-zealous advocates frequently utilize the simple expedient of naming tribal employees as defendants in their individual capacities in order to avoid the valid defense of sovereign immunity.

> 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.... Plaintiffs ... cannot circumvent tribal immunity through "a mere pleading device." *Young*, 164 Wn.App. at 350 (internal citations omitted).

Notwithstanding this tired, old practice, lower courts increasingly permit frivolous actions to linger when a Tribal employee is named in his or her individual capacity. Here, the underlying complaint was as clear – the Respondent Tribal Employees were simply doing their jobs as assigned by the Tribe. Yet, the lower court declined prompt dismissal, denying justice to the employees. Plaintiffs did not allege, nor could they argue that the Respondents Tribal Employees acted outside the scope of their employ. Plaintiffs' counsel grasped onto anti-Tribal biases and tarnished the names of individual Tribal employees (and the Tribe) in order to gain further delay from the inevitable dismissal of Plaintiffs' complaint.

Next, publication of the opinion would better ensure that would-be plaintiffs do not improperly obtain delay (side-stepping prompt dismissal) by begging a lower court to defer to improper opinions regarding Tribal law, including the scope of employees' authorities. Here, plaintiffs' counsel prayed on "the long and shameful history of [state and federal courts] ignoring

tribal sovereignty" by besmirching the Tribe's name to undermine the Tribe's lawful appointment of employees. Plaintiffs pinned their individual capacity complaint to a federal agency's opinion letter identifying concerns regarding a Tribal election to conclude that the Respondents Tribal Employees acted outside the scope of their employ. While the allegations were salacious, and the claimed harm could cause an outsider concern, the opinion was irrelevant to the issue then, and now. This court's opinion clarifies Washington law – Washington Court must defer to Tribal forums for interpretations and determinations of Tribal law, not external federal or state opinions.

Anti-tribal advocates have long sought for federal and state courts to ignore or otherwise disregard Tribal law. The Supreme Court has repeatedly recognized Congress's commitment to a "policy of supporting tribal self-government and self-determination." *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845, 856 (1985). Consistent with this policy, the Supreme Court has determined that "tribal courts are

best qualified to interpret and apply tribal law." *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 16 (1986). Several federal circuits embrace the rule that the federal court "defer to the tribal courts' interpretation" of tribal law. *City of Timber Lake v. Cheyenne River Sioux Tribe,* 10 F.3d 554, 559 (8th Cir. 1993) (deferring to tribal court's decision that the tribal constitution gave the tribal court personal jurisdiction over non-Indians). This Court's opinion brought law within other federal circuits to Washington. That is, the determination of whether a tribal official "had general authority to act on behalf of the tribe in a governmental capacity [is a] pure question[] of tribal law, beyond the purview of the [state and] federal agencies and the [state and] federal courts." *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa,* 609 F.3d 927, 943 (8th Cir. 2010).

B. THE GENERAL PUBLIC INTERESTS IS SERVED BY PUBLICATION.

Publication of this decision is in the general public interests because of the number of Tribes in Washington, the expanding nature of Tribal commercial and governmental operations, and the frequency of nontribal contact with Tribal operations, and their employees.

Tribes and their members inhabited the lands presently known as Washington State long before settlers made "first contact." The Economic Community Benefits of Tribes in Washington, WIGA (May 2022) at 23. (Also found at https://www.washingtontribes.org/). Washington agencies estimate that Tribes ceded no less than seventy-five percent of the state's current land mass to the federal government prior to statehood.

https://goia.wa.gov/sites/default/files/public/WATribalReservationTreatyCeded2010.pdf. In return, the twenty-nine Washington tribes, and another six tribes maintaining a presence in Washington State, retain a fraction of land holdings

today. https://goia.wa.gov/tribal-directory/federally-recognized-indian-tribes. In addition to the Tribes' Reservations, Trust lands, and fee simple landholdings, Tribes retained many off-reservation rights, which members exercise throughout modern day Washington state. https://wdfw.wa.gov/hunting/management/tribal/history. Most, if not all, of the members of the general public have had some contact with Tribes, Tribal members, or their aboriginal lands.

Washington Tribes' commercial enterprises have exploded in size during the past thirty years. Washington Indian Gaming Association, The Economic Community Benefits of Tribes in Washington (May 2022) at 6. A recent report indicates that Tribal enterprises add over $6.5 billion dollars to the Washington economy each year, account for $2.8 billion in goods and services purchased annually, and contribute over $1 billion annually in state and local taxes. *Id.* at 2. Further, Washington tribes employ over 37,000 employees[1], far

[1] A vast majority of Tribal governmental and enterprise employees are non-Indian. *Id.* at 2.

exceeding the number of persons employed by King County. *Id.* at 12.

Tribal operations have become 'big business' and touch all Washingtonians' lives. Tribal economic and governmental operations are in the general public interest. Tribal workforces are substantial, and new opinions that affect that workforce are worthy of publication.

Respectfully submitted on this 23rd day of August, 2022.

NOOKSACK INDIAN TRIBE
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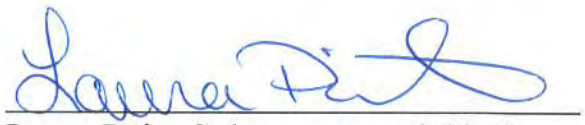
CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August, 2022, I electronically filed the foregoing RESPONDENT TRIBAL EMPLOYEES MOTION TO PUBLISH using the court's e-filing system, which will send notice of the filing to all parties registered in the court's system for this matter.



Laura Point Solomon, Legal Clerk,
Nooksack Indian Tribe

NOOKSACK INDIAN TRIBE, OFFICE OF TRIBAL ATTORNEY

August 23, 2022 - 11:24 AM

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