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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NO. 96316-9

***AJI P.**,et al.,*

Plaintiff-Appellant,
v.

STATE OF WASHINGTON, et al.

Appeal from a Decision of the Superior Court of the State of Washington
For King County

Civil Action No. 18-2-04448-1 SEA

Honorable Michael R. Scott

AMICUS BRIEF OF SAUK-SUIATTLE INDIAN TRIBE SEEKING REVERSAL IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS

The Sauk-Suiattle Indian Tribe has inhabited what is now the State of Washington since Time Immemorial. In the Treaty of Point Elliott it reserved the right to fish, hunt, gather, and harvest vegetative resources in the former Territory of Washington potentially impacted by respondents' failure to act to avoid degradation of resources by addressing climate changes.

Counsel for amicus is a non-profit tribal corporation which provides legal advice and assistance to low-income members of Indian tribes in the State of Washington with experience in preservation of natural resources. Appellants and Respondents consented to the filing of this *amicus* brief.

To supplement their diet and carry on subsistence practices they have relied upon since Time Immemorial, *amicus* harvests animal, aquatic and vegetative resources, all of which exist only within the parameters of very specific ecosystems. Erna Gunther, *Ethnobotany of Western Washington; the Knowledge and Use of Indigenous Plants by Native Americans* (1945). *See generally*, United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *affirmed* 520 F. 2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). Failure to address climate change which effects one species of plant, fish or animal

life relied upon by this population has devastating ripple effect on the entire life cycle of the precious species of the Pacific Northwest region. Not less than 15 tribal reservations in the State of Washington are situated adjacent to marine waters. According to the National Congress of American Indians, 31 villages inhabited by nearby Native Alaskans are eligible for relocation due to the rise in oceanic water levels.[1] The Environmental Protection Agency has predicted that the next 40 to 80 years will see the loss of more than half of the salmon and trout habitats throughout the United States. According to the University of Maryland School of Public Policy, Native Americans in the United States are disproportionately affected by climate change. C. Cotterell, *Indigenous Populations in the U.S. Disproportionately Affected by Climate Change* (November 29, 2018).[2] *See also*, Fourth National Climate Assessment (U.S. Govt. Printing Office, 2018), Ch. 7 [Indigenous Peoples] ("adverse impacts on subsistence activities have already been observed").[3] According to the most recent Indian Labor Force Statistics maintained by the United States Bureau of Indian

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[1] http://www.ncai.org/policy-issues/land-natural-resources/climate-change

[2]http://www.cgs.umd.edu/news/2018/11/29/indigenous-peoples-in-the-us-are-disproportionately-affected-by-climate-change-says-new-us-climate-reports

[3] https://nca2018.globalchange.gov/

Affairs, unemployment among Indian tribes in Washington State is as high as nearly fifty percent: Yakama 48.9%; Umatilla 43%; Shoalwater Bay Tribe 49.1%; Cowlitz 66%. U.S. Dept. of Interior, *American Indian Population and Labor Force Report* (Jan. 16, 2014).[4] Such factors make the availability of natural foods and medicines relied upon for the diet and subsistence of Native American communities especially important. As was stated in the landmark case of Sohappy v. Smith, 302 F. Supp. 899 (1969), native Americans in what was formerly Washington Territory were loath to sign treaties until assured that they continue their subsistence lifestyles. To date, consideration of the effects of failure to address climate change has focused primarily on such things as increasing temperatures, storm strength, wildfires and higher ocean levels necessitating relocation of communities. Very little attention has been given to the effect upon resources relied upon by the first inhabitants of this region for their very existence and culture. Since Time Immemorial, people of the First Nations in Washington State have relied upon the little-known plant resources in the State, many of which survive only under narrow ecological conditions—and many sensitive species of which are

[4] https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc1-024782.pdf

now either absent or are have been so reduced in availability due to climate change that the unwritten cultural laws prohibit their harvest.

The Sahkumehu, or Sauk-Suiattle Tribe, traditionally harvested ćabid (wild onions), šagʷək (Indian carrots), hačoʔ (a celery-like plant), ćagʷič (a root that tastes like garlic), and k'auxʷ (camas) at Sauk Prairie, a moist meadow near their homeland which is increasingly drying up.[5] In testimony before the United States Indian Claims Commission (Sauk-Suiattle Indian Tribe, docket no. 97), the son of Nels Bruseth (1851-1905), an immigrant from Norway who settled near Darrington, Washington, testified that:

> The first white men to visit Sauk Prairie were surprised at the number of Indians living there. The sloughs were full of canies, and houses, shacks and camps like a town stood on the banks. There were big racks of roots drying in the sun[.]

The reliance upon such delicate plants native to Washington is not unique among Washington tribes. The Yakama, for example, "derived their subsistence primarily from the gathering of wild plant foods, fishing and hunting, approximately in that order of importance." H. Schuster*,*

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[5] S. Snyder, *Field Notes for Swinomish, Upper Skagit and Sauk-Suiattle* (1952-55), Univ. Wn. Special Collections, *cited* in A. Onat and J. Hollenbeck, *Inventory of Native American Religious Use, Practices, Localities, and Resources on the Mt. Baker-Snoqualmie National Forest*, U.S. Forest Service (1979).

Yakama Indian Traditionalism; a Study in Continuity and Change (Univ. Wa. Doctoral Dissertation, 1977). According to ethnologist and photographer Edward Sheriff Curtis in 1911, the Yakama harvested "no fewer than twenty-three kinds of roots and eighteen kinds of berries",[6] including sawitk, piyəx̠ʷay (bitterroot), pənq'u (little potato), wapato, and k'unč—each of which have experienced loss due to climate change.

Although Appellants' claims relate mainly to the climatic impacts of Appellees' encouragement of the use of fossil fuels and its resultant increase in CO_2 emissions, appellants have failed in their duties to plan for avoidance of exacerbated climate conditions in other ways. Appellant Commissioner of Public Lands' failure to address the effects of managing the State's timber harvesting lands owned by the State of Washington Department of Natural Resources and managing timber harvests by private timberland owners to limit the practice of "clear-cutting" timber in important mountain watersheds, for example, causes removal of important shade canopies which reduce flooding and preserve water flows.

Although the dangers of climate change have only recently arisen to national attention, the Tribal citizens of the State of Washington have for decades enunciated their concern

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[6] E. Curtis, *The North American Indians,* Vol. 7 (1911).

over the diminishment of their tribal resources and received little attention. As was eloquently stated in by the Blackstone of American Indian law, Felix Cohen, to the rest of our citizenry the Indian often serves as the canary in the coalmine, providing an advance warning "mark[ing] the shifts from fresh air to poison gas in our political atmosphere."[7]

The students who filed the litigation under appeal have similarly enunciated their concerns and have presented a complaint alleging a statement of facts—presumed to be true—demonstrating their belief that they can prove them. As a matter of substantive due process, they should be allowed the opportunity to do so. At least 4 of the plaintiffs are members of tribal nations. As was noted by the United States Congress, when enacting the Indian Child Welfare Act, among tribal nations children are considered to be our greatest natural resource and they are deserving of greater legal protection than other citizens. 25 U.S.C. § 1901 (3). For such reasons, *amicus* supports the appellants, ages eight to eighteen, in their petition seeking review.

[7] F. Cohen, *The Erosion of Indian Rights, 1950-53; a Case Study in Bureaucracy*, 62 Yale L. J. 349, 390 (1953).

STATEMENT OF THE CASE

Amicus incorporates by reference the allegations contained in appellants complaint filed in the Superior Court and in appellant's opening brief.

ISSUES PRESENTED

Did the superior court err in ruling that appellant's civil complaint presented questions which were quintessentially political in nature?

Did the superior court err in ruling that consideration of plaintiffs' complaint would violate separation of powers?

Did the superior court err in determining that plaintiffs' complaint raised no cognizable claims arising under the Washington State Constitution?

Did the superior court err in ruling that only personal or claims for injury to a single individual were cognizable under the Equal Protection clause and that claims for communal harm to large numbers of persons were not cognizable?

STANDARD OF REVIEW

The standard for reviewing a CR 12 (c) motion is the same as review of a CR 12 (b) (6) motion to dismiss for failure to state a cognizable claim. Hodgson v. Bicknell, 49 Wn. 2d 130 (1956); Bailey v. Forks, 108 Wn. 2d 262 (1987). The court must accept

as true all well-pleaded allegations of a plaintiff's complaint and construe it most strongly in favor of the non-moving party. A superior court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of law that appellate courts review *de novo*. The same standard should apply to review of the grant of a CR 12 (c) motion for judgment on the pleadings.

SUMMARY OF ARGUMENT

For each of the above issues presented *post* for review, the answer as to whether the superior court committed reversible error is "yes". Washington is a notice pleading state. This means a simple concise statement of the claim and of the relief sought in a pleading is sufficient to allow a case to proceed. Pacific Northwest Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 352, 144 P.3d 276 (2006). Pleadings are to be liberally construed; their purpose is to facilitate a proper decision on the merits, not to erect formal and burdensome impediments to the litigation process. State v. Adams, 107 Wn.2d 611, 619–20 (1987). A complaint need merely contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which the pleader deems the pleader is entitled.

Relief in the alternative or of several different types may be demanded. CR 8 (a). In Washington, no technical form of pleading is required. CR 8 (e) (1). All pleadings are to be construed to do substantial justice. CR 8 (f). In a notice pleading state, it is contemplated that more specific detail is to be obtained in Discovery. CR 26.

As set for the below, appellants' complaint in the Superior Court satisfied the pleading requirements of CR 8 (a).

ARGUMENT

Construing appellants' pleadings as a whole, it is apparent what plaintiffs' claims are based upon. It is alleged that appellees violated duties imposed upon them by the common law Public Trust Doctrine to preserve the public resources of the State for the benefit of all state citizens. Complaint, ¶ 183, p. 64. *See generally*, <u>Caminiti v. Boyle</u>, 107 Wn. 2d 662 (1987). Each named plaintiff appears to be a citizen of the State of Washington. Complaint, ¶ 1, p. 1 and ¶¶ 12-24, pp. 9-14. *See also*, ¶25 ("all Plaintiffs are residents of the State of Washington and beneficiaries of the essential Public Trust Resources managed by Defendants"). They further allege that the conduct of the defendants violates rights conferred upon them by statute. ¶ 169, p. 61 (citing RCW 43.21A.010).

Appellant's further base their claims upon their substantive due process rights to a clean and healthful environment and their disparate treatment as children subjected to a degraded environment. Complaint., ¶¶ 149-173, 196-207, p. 70. Construing the allegations of their complaint as a whole, taking them as true, and resolving all doubts in their favor, there is little doubt as to the basis of their claims for relief.

The second prong of CR 8 (a) is that of a demonstration and demand for the relief to which they deem they are entitled.

As to such relief, the appellants seek a declaratory judgment that they possess certain rights to a healthful environment. They further seek a declaration affirming that the defendant state officials are subject to a trust or duty imposed by the Public Trust Doctrine and that they have through act or omission violated such duty. They seek a declaration that acts or omissions of the defendants impair their constitutional and other enumerated rights and that RCW 70.235 is invalid. Appellee's complaint seeks injunctive relief requiring them to take action to address the foregoing alleged violations, subject to continuing jurisdiction by the superior court. The relief to which they deem themselves entitled as citizens of the State of Washington is clearly demonstrated in their complaint.

Notwithstanding the foregoing liberal rules of pleading applicable to civil actions in this state, the superior court applied a far higher, and more technical, standard for the validity of the youth's complaint. Their complaint seeking declarations that the defendants had certain duties imposed by constitution, statutes and common law doctrines owed to them as a matter of right as state citizens, that the defendants breached or violated such duties, and enjoining them to fulfill such duties under ongoing court order or supervision is essentially in nature an action in *mandamus*. Such civil actions to compel governmental officials to fulfill their legal duties is by no means unprecedented. The Superior Court below ruled that "Plaintiffs' claims are non-judiciable" (Order Granting Defendants' Motion for Judgment on the Pleadings, pg. 6) because:

> The relief sought by Plaintiffs would require the Court to usurp the roles of the legislative and executive branches of our state government.

Id. Issuing a writ or order requiring state officials to perform duties imposed as a matter of law by constitutional or statutory authority is the very nature of what a superior court does in a *mandamus* action, in which a writ:

> [M]ay be issued by any court, except a district or municipal court, to any inferior tribunal,

> corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or
> station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board or person.

RCW 7.16.160. The plaintiffs need not have entitled their complaint as such in order for that to be the essence of their civil action. In this state, pleadings are deemed amended to conform to the evidence presented to the court. CR 15 (b). The plaintiffs have pleaded much factual evidence in the complaint demonstrating that their goal is for the court to declare that the defendants have violated their rights by failing to perform official duties and compel them to perform them. As such, by virtue of allowing the appellants' litigation to proceed, the superior court would not have been engaging in "quintessentially political" matter, nor would doing so have violated separation of powers. Rather, the court would merely be determining the scope of the defendants constitutional, statutory, and common law duties, if any, and determining whether that duty was breached—necessitating judicial intervention compelling enforcement of such duties.

The trial court's determination that it could not entertain the case is contrary to the broad authority it possesses:

> The superior court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three hundred dollars, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce and for annulment of marriage, and for such special cases and proceedings as are not otherwise provided for; and shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court, and shall have the power of naturalization and to issue papers therefor. Said courts and their judges shall have power to issue writs of *mandamus*, *quo warranto*, review, *certiorari*, prohibition and writs of *habeas corpus* on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of *habeas corpus* may be issued on legal holidays and nonjudicial days.

RCW 2.08.010. *See also* Wash. State Const., Art IV, § 6. It is apparent from the technical details alleged in appellants' 72 page complaint that their case is complex and will require an extended period of time for completion. However, the *difficulty* of a case is not a basis for its declination or dismissal. The Superior Court Civil Rules provide procedures for the efficient

processing of complex cases. CR 16 (pretrial procedure and formulating issues). *See also* Manual for Complex Litigation 4th (2004). According to the Washington Code of Judicial Conduct:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

Rule 2.6 (Ensuring the Right to Be Heard).

There is no authority for the trial court to have concluded that rights enumerated in the Washington Constitution or imposed by statute or principles of common law protect only purely private "individuals". Order Granting Defendants' Motion, p. 8 (plaintiffs' claims "are not individual rights that can be enforced by a court of law"). This is a torpid reading of plaintiffs' complaint. Each individual plaintiff named in the complaint sets forth the right they claim has been harmed by defendants' failures to act. Complaint, ¶¶ 12-25.

The Superior Court further erred in its "blanket" decision regarding the plaintiffs' constitutional claims, treating the case as though the claims of all plaintiffs were identical rather than giving them the "individual" consideration that the trial court derided the plaintiffs for not asserting. For example, as a member of a federally recognized tribal nation with which the

first Governor of Washington Territory signed a treaty[8], the claims asserted by individual plaintiff Daniel M certainly raise a constitutional claim.

The Washington State Constitution expressly provides that "the *Constitution of the United States* is the supreme law of the land". Wash. State Const., Art. I, § 2 (emphasis added). According to that United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Art. VI, Cl. 2. Daniel M's claim that the defendants' acts and omissions infringed upon or damaged his ability to exercise his treaty rights is therefore a constitutional question. As stated in Seattle School District No. 1 of King County v. State, 90 Wn.2d 476 (1978), a Superior Court cannot abdicate its duty to interpret and construe questions arising under the Washington State Constitution. 90 Wn.2d at 506.

In the Quinault Treaty, Daniel M's tribe reserved an environmental right subjecting Washington state officials to

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[8] Treaty with the Quiniealt, etc., 12 Stat. 971 (1859).

protect the habitat of resources reserved by the Treaty. United States v. Washington, 864 F. 3d 1017 (9th Cir. 2017), *affirmed* (U.S. Supreme Ct. No. 17-269) (June 11, 2018). Daniel M, as an individual member of the Quinault Nation, is a beneficiary of this right. Although the treaties were negotiated with Washington tribes:

> They reserved rights, however, *to every individual Indian*, as though named therein.

United States v. Winans, 198 U.S. 371, 381 (1905) (emphasis added). Daniel M's claim is *inter alia* that his ability to harvest salmon has been impaired due to the disappearance of Anderson Glacier (Complaint, ¶ 23, p. 13) and that species of cultural importance to him have diminished (Id.) due to the defendant state officials' knowledge of the danger caused by climate change (Complaint, ¶ 115, p. 41) and their failure to fulfill their legal duties to prevent or mitigate it (Complaint, ¶¶ 156, 162). The superior court's dismissal prevents the parties to the case below from the opportunity, through Discovery, motions practice and litigation, to determine the merit of his claims. Additionally, as stated by the United States Supreme Court, the rights reserved to *Daniel* are not exclusive to the Indian signatories to the treaty. Because the right is "in common", citizens of the State of Washington like the other named plaintiffs are also

beneficiaries who share in it. Winans, *supra* ("as a mere right, it was not exclusive in the Indians, citizens might share it"). As such, they too are beneficiaries of this environmental right.

It is apparent that the Superior Court failed to exercise the judicial curiosity and diligence necessary to thoroughly assess the merit of appellants' complaint, simply stating that:

> Plaintiffs attempt to frame a constitutional claim. They assert a constitutional right to "a healthful and pleasant environment, which includes a stable climate system that sustains human life and liberty." *There is no such right to be found within our State Constitution.*

Order, p. 7 (emphasis added). Certainly, there may be no such *textual* right to be found in the Washington State Constitution but, read in its entirety, there is sufficient likelihood that the plaintiffs can prove that their state constitution embodies such a right to allow their case to proceed. For example, in Griswold v. Connecticut, 381 U.S. 479 (1965), the United States Supreme Court held that, although there was no *express* provision of the U.S. Constitution creating a "right to privacy", various separate provisions of the constitution, read *in pari materia,* established a "penumbra of privacy" sufficient to support plaintiff's claim that Connecticut state officials violated plaintiffs' right to privacy. The youthful appellants in this appeal should similarly be afforded the opportunity to demonstrate, as a matter of law, that

the Washington State Constitution read in its entirety reserved to them a right to a healthy environment. The dismissal of their cause at such a preliminary stage denied them this opportunity.

At a minimum, a superior court ruling upon a motion which is dispositive of whether a civil action will proceed should enunciate the *reasons* for its decision. In the absence of stated reasons, a reviewing court is left in the position of having to guess at the basis for the dismissal of an action. According to CR 54:

> A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies.

The civil rules generally contemplate that a court issuing a judgment or order from which an appeal can be taken set forth written findings or conclusions from which the reasons for the ruling can be discerned. In this case, as to many of the claims asserted in the plaintiffs' complaint, the superior court—rather than undertake to state its own basis for the ruling—merely stated that "for the reasons stated in Defendants' motion and reply memorandum"… "all of plaintiffs' other claims must be dismissed." Order, p. 10. Which *particular* reasons, or even what particular page, of Defendants' pleadings the superior court relied upon is not specified, leaving appellants to wonder,

for purposes of this appeal, what law, rule or precedent the court relied upon. At a minimum, the case should be remanded for clarification of just what authority the superior court was relying upon to dismiss all of plaintiffs' unspecified "other claims."

Finally, the superior court's "conclusion" (Order, pp. 10-11) reads like a class lecture from a member of a former generation to the current one, congratulating the plaintiffs for their passion while urging them as "young people" to trust "the legislature and the executive to enact and implement policies that will promote decarbonization and decrease greenhouse gas emissions"—the very officials they allege have failed in their duty to protect plaintiffs' rights. It is reminiscent of the decisions of previous courts best relegated to a bygone era where the wisdom of governments of higher authorities was deemed superior[9] to that of those in a "state of pupilage". Elk v. Wilkins, 112 U.S. 94, 108 (1884). It is apparent from the careful and technically accurate drafting of their complaint that the plaintiffs' complaint was not based upon mere youthful enthusiasm.

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[9] Johnson v. McIntosh, 21 U.S. 543, 574 (1823) ("while the different nations of Europe respected the right of the natives as occupants, they asserted the ultimate dominion to be in themselves").

CONCLUSION

For the foregoing reasons, the decision of the District Court should be *reversed* and the cause remanded for further proceedings.

DATED this 11th day of April, 2019.

Respectfully submitted,

S/ *Jack W. Fiander*

Counsel for Amicus Curiae
Sauk-Suiattle Indian Tribe

CERTIFICATE OF COMPLIANCE

Pursuant to, I certify that:

1. This brief complies with the type-volume limitation of because it contains 4,096 words, excluding the parts of the brief exempted by rule

2. This brief complies with the typeface requirements of and the type style requirements because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 12-point Century Schoolbook.

Date: April 11, 2019 S/Jack W. Fiander

CERTIFICATE OF COMPLIANCE

I certify that:

No counsel for any party authored this brief in whole or in part and no person or entity other than amicus or its counsel made a monetary contribution for the preparation or submission of this brief.

Date: April 11, 2019 S/Jack W. Fiander

CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing with the Clerk of the Court Participants in the case who are registered users will be served by the appellate system.

Date: April 11, 2019 S/Jack W. Fiander

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