IN THE COURT OF APPEALS

OF THE

QUINAULT INDIAN NATION

RYAN HENDRICKS, Plaintiff/Appellant, v. QUINAULT CONSTRUCTION COMPANY, THE QUINAULT NATION ENTERPRISE BOARD and the QUINAULT INDIAN NATION, Defendants/Respondents.	Case Nos. CV-10-054 (AP) CV-10-057 (AP) OPINION

These matters come before the Quinault Indian Nation Court of Appeals pursuant to Notices of Appeal filed on June 7, 2012 by Appellant Ryan Hendricks. At issue in these appeals is one order below which dismissed both cases.[1] For this reason, and because the cases are factually interconnected, this Court combines its review of the appeals in these two cases.

For the reasons that follow, we affirm the Trial Court's dismissal of both CV 10-054 and CV 10-057.

I. FACTS AND PRCODEDURAL HISTORY

Plaintiff/Appellant Ryan Hendricks ("Appellant") filed two personal injury complaints against Respondents. The first Complaint

[1] The record does not contain an order consolidating the cases. However, the trial court has authority to order a joint hearing "of any or all matters at issue" when separate actions are pending before the court that involve "a common question of fact or law." QTC 30B.18.010.

was filed on April 26, 2010, as Case No. CV10-054, and sought damages for on-the-job injuries suffered on April 28, 2009 while Appellant was in the employ of Respondent Quinault Construction Company. On May 3, 2010, Appellant filed a second Complaint as Case No. CV10-057. The two Complaints contain identical allegations.[2]

On February 26, 2012, prior to filing his first Complaint, Appellant mailed written notice of his claim to the Chairman of the Quinault Business Committee and the Office of the Reservation Attorney. The same notices were sent again by registered mail on March 30, 2010.

On September 13, 2011, the Trial Court dismissed both Complaints on its own motions. The September 13, 2011 Orders are identically worded, and find that the Court improperly accepted the Complaints for filing because Appellant did not provide proof of compliance with "Title 99 of the Quinault Tribal Code as it relates to Sovereign Immunity." On December 6, 2011, both dismissal orders were vacated.[3]

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[2] Appellant filed two complaints out of concern that the first Complaint had been filed before the expiration of the 30-day notice requirement set out in QTC 99.02.040(3).

[3] The September 13, 2011 Orders dismissing the cases are entitled "Sua Sponte Order of Dismissal" and were entered by J. Leona Colegrove. By Orders dated December 6, 2011, Judge Colegrove recused herself in each case. In the December 6, 2011 recusal orders, Judge Colegrove assigned the matters to another judge "for trial." These orders appear to have been intended to vacate the prior orders dismissing the cases, and were so understood by the parties and the Trial Court thereafter.

On February 17, 2012, Respondents filed a combined motion to dismiss both complaints.[4] On March 6, 2012, Appellant moved for default judgment against all Respondents in both cases. On March 27, 2012, Respondents filed a second combined motion to dismiss both Complaints.[5] It appears that Respondent Quinault Nation Enterprise Board also filed separate motions to dismiss in each case, alleging that Quinault Nation Enterprise Board had never been served with summons.[6]

A combined hearing on the motions to dismiss in both cases was held on May 22, 2012. Record, Recording of May 22, hearing.[7] Thereafter, the Trial Court entered an Order dismissing both complaints. Order on Defendants' Motion to Dismiss (May 30, 2012) (filed May 31, 2012).

II. STANDARD OF REVIEW

This Court's review is governed by QTC 31.04.010, which provides, in relevant part: "The Court of Appeals shall limit its

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[4] On February 3, 2012, Appellant filed a motion seeking to consolidate the two cases. Respondents opposed the motion. There is nothing in the record to indicate that the Trial Court ever ruled on the consolidation motion. However, both the parties and the Trial Court appear to have treated the matters as if they had been consolidated in some manner, and pleadings and orders thereafter were filed listing both case numbers.

[5] Motions to dismiss were filed by two different attorneys on behalf of Respondents, each claiming to represent all Respondents.

[6] The record contains these motions, but the motions are not date stamped as filed. The Clerk's handwritten notes indicate that the motions were filed on March 27, 2012. Although each motion is titled as a motion to dismiss, the motions argue that summary judgment in favor of Respondent Quinault Nation Enterprise Board was appropriate.

[7] The record does not contain a notice for the May 22, 2012 hearing. However, the Court held a combined hearing on that date on various motions, including Respondents' motions to dismiss.

consideration, so far as interests of justice permit, to matters of law and interpretation." QTC 31.04.010.

III. RESPONDENTS' MOTION TO STRIKE BRIEF OF APPELLANT

As a preliminary matter, the Court addresses Respondents' assertion that this Court should strike all or a portion of Appellant's brief. Respondent argues that at page 5 of Appellant's brief, Appellant refers to documents in the record that Appellant's attorney avers to "have personally seen." From this statement, Respondent infers that Appellant is introducing new evidence to the Court.

The Court finds no merit in Respondents' argument. The language Respondents point out is a reference to a specific portion of the record before this Court. Appellant's reference to the existing record is not an attempt to enter new evidence into the record. Respondent's motion to strike is therefore **DENIED**.[8]

IV. DISCUSSION

Appellant's Assignments of Error raise three issues for our determination:

1) Did the Trial Court err in dismissing CV 10-057 on the basis that suit was barred by the statute of limitations?

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[8] Respondents also include a "motion" in their brief asking this Court to strike certain evidence presented to the Trial Court. Respondents own argument indicates that the Trial Court did not reach the issue of the evidence at issue. This "motion" is interpreted by this Court as part of Respondents' argument on appeal, rather than as an evidentiary motion, which would be inappropriate before this Court. The Court does not reach this issue, for the reasons set out herein.

2) Did the Trial Court err in dismissing both CV 10-054 and CV 10-057 for failure to comply with QTC 99-02-040(a)(3)?

3) Did the Trial Court err in dismissing CV 10-054 and CV 10-057 as to Respondent Quinault Nation Enterprise Board on the grounds that Quinault Nation Enterprise Board had not been served with Summons and Complaint?

Because it is dispositive, the Court begins its analysis with Appellant's second assignment of error. The Trial Court dismissed Appellant's first and second Complaints because Appellant failed to file the "proof of compliance" required by QTC 99.02.040(3) at the time the Complaint was filed. The Trial Court found that "[w]hile [Appellant] may have complied with the statutory pre-filing notice requirements of QTC 99.02.040(a), he failed to provide proof of such compliance at the time of filing the two lawsuits." Record, Order on Defendants' Motion to Dismiss (May 30, 2012).

The Quinault Indian Nation has partially waived its immunity from suit, but only for certain enumerated types of suits, and then only if certain procedures are followed. QTC 99.02.020; QTC 99.02.040. At issue in these appeals is whether Appellant properly complied with the procedures set out in QTC 99.02.040(a)(3), which govern whether a suit against the Nation may be accepted for filing.[9]

QTC 99.02.040(a) provides as follows:

> Procedure with Respect to Actions Authorized by This Title
>
> (a) Any person desiring to institute suit against the Quinault Indian Nation as authorized

[9] The Trial Court did not determine whether the underlying actions fit within one of the exceptions to the Nation's sovereign immunity as set out in QTC 99.02.020, and this Opinion does not address that issue. We note, however, that even if the underlying actions were to constitute an exception under QTC 99.02.020, the filing requirements of QTC 99.02.040(a)(3) remain applicable as a condition precedent to jurisdiction.

> by this Title shall, as a jurisdictional condition precedent to institution of such suit, provide notice to the Chairman, Quinault Business Committee and the Office of Reservation Attorney of the Quinault Indian Nation.
>
> (1) Such notice shall be sent by registered mail, return receipt requested.
>
> (2) Such notice shall state the name of the prospective plaintiff; the name(s) of the Defendant(s); the nature of the claim; the relief which will be sought and the name of the prospective plaintiff's attorney or counselor (if any).
>
> (3) No action shall be accepted for filing against the Quinault Indian Nation or any other officer, employee or agent of the Quinault Indian Nation unless the plaintiff provides proof of compliance with this paragraph (a) by delivery of the notice required by this paragraph at least 30 days prior to the date on which the complaint is proposed to be filed.

QTC 99.02.040(a).

With respect to the dismissal of his first Complaint, Appellant argues that the Complaint satisfied the requirements of QTC 99.02.040(a)(3) because the Complaint contained an allegation that he complied with the notice requirements in QTC 99.02.040 (a)(1)-(2). Appellant contends that the allegation of compliance is sufficient "proof" to satisfy the requirements of QTC 99.02.040(a)(3), and that dismissal of his Complaint was therefore in error. Our analysis is therefore one of statutory construction. We begin our analysis with the language of the ordinance itself, and

the plain meaning of the words of the ordinance. *Watt v. Alaska*, 451 U.S. 259, 265 (1981). Our goal in this analysis is to give full effect to all provisions, and to the entire statutory context. *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999.) We will not look beyond the plain language of the ordinance to determine the intent of the Tribal Council intent unless: 1) the language of the ordinance is ambiguous; 2) applying the plain meaning would lead to an absurd interpretation; or 3) there is otherwise clear evidence of intent different from the plain language. *Id.*

Applying these principles, we need proceed no further than the plain language of the ordinance itself. The requirements of QTC 99.02.040(a)(3) could not be more clear. In order to file a suit against the Quinault Indian Nation, Appellant was required provide proof of compliance with the notice requirements of QTC 99.02.040(a) at the time his Complaint was filed. In the absence of such proof, Quinault law prohibited the filing of the Complaint. QTC 9.02.040(a)(3).

Appellant's first Complaint, filed on April 26, 2010, was not accompanied by proof that Appellant had complied with the notice requirements in QTC 99.02.040(a). Appellant acknowledges this fact, but argues that a paragraph contained in his Complaint **alleging** compliance is sufficient to satisfy the requirements of QTC 99.020.040(a)(3). This argument has no merit. An allegation is, by

definition, only an allegation. An allegation is not proof.

Appellant filed a second identical Complaint on May 3, 2010. The record reflects that the second Complaint was accepted for filing at 9:08 a.m. on that date. Appellant argues that the second Complaint and the proof of compliance required by QTC 9.02.040(a)(3) were filed at the same time, in both actions. The record, however, does not support this argument. Rather, the record reflects that Appellant filed copies of registered mail return receipts on the day his second Complaint was filed, but at 1:51 p.m. on that day, more than four hours after the second Complaint was filed. With respect to the first Complaint, Appellant filed copies of his notice of claim and copies of the registered mail receipts on May 3, 2010, seven days after the filing of the Complaint.[10] Thus, even assuming that the documents filed in either action were sufficient to provide proof of compliance, none of the documents were filed at the time either Complaint was filed.

The Quinault Indian Nation Code sets forth in detail the circumstances under which the Nation has agreed to a limited waiver of its sovereign immunity. Appellant failed to comply with these requirements by failing to provide proof of compliance with the pre-filing notice of claim provisions contained QTC 9.02.040(a)(3) at

[10] With respect to the second Complaint, only copies of the certified mail receipts are contained in the record. Because the Court determines that the requirement to file proof was not satisfied when the Complaint was filed, the Court does not address whether filing of the registered mail receipts without the notice of claim would have been sufficient to satisfy QTC 99.02.040(3) if they had been timely filed.

the time of filing of both Complaints. The Quinault Tribal Court therefore was prohibited from accepting either Complaint for filing.

The Clerk of the Court erred in accepting both Complaints for filing. An error on the part of the Clerk of the Court however, does not change the law of the Quinault Nation and does not allow the Trial Court to take jurisdiction under circumstances specifically prohibited by Quinault Nation law. Under these circumstances, the only appropriate action on the part of the Trial Court was to dismiss the Complaints. Any other action would ignore the clearly stated requirements under which the Quinault Nation agreed to waive its sovereign immunity.

Because this Court determines that both actions on appeal in this matter were properly dismissed for failure to comply with the provisions of QTC 99.02.040(a)(3), the remaining assignments of error are moot, and therefore are not addressed.

V. CONCLUSION

For the reasons discussed above, the order of the Trial Court dismissing CV 10-054 and CV-10-057 is **AFFIRMED**.

DATED THIS 14th day of May, 2013.

Suzanne Ojibway Townsend
Presiding Judge

Hunter Abell,
Judge

CONCURRENCE

Galanda, J.:

I write separately to state that I would affirm the order of the Trial Court dismissing CV 10-054 and CV-10-057, but on different grounds.

Quinault Tribal Code section 99.02.040(a)(3) states that "[n]o action shall be accepted . . . unless the plaintiff provides proof of compliance . . . ." Does this mean that, as Appellant contends, that "[t]he Nation, by accepting the complaint for filing, waived its claim filing defense"? Or does it mean, as Appellees and the majority asserts, that QTC 99.02.040(a), as a "jurisdictional condition precedent," cannot be waived, any more than a court can waive lack of subject matter jurisdiction?

By the clear terms of the statue, the penalty for failing to provide the required "proof" is that the Clerk shall not accept the filing. The onus, then, is on the clerk. In my opinion, the majority's conclusion that QTC § 99.02.040(a) makes filing proof of compliance a "jurisdictional condition precedent" is not entirely correct. Section 99.02.040(a) states, in relevant part, that "[a]ny person desiring to institute suit against the Quinault Indian Nation as authorized by this Title shall, as a jurisdictional condition precedent to institution of such suit, provide notice. . . ." Section 99.02.040(a), then, makes "notice" a jurisdictional condition precedent, not the filing of "proof." The filing of

"proof" is found only in subsection (a)(3), and that subsection, again, puts the onus on the clerk.

Practically speaking, though, this only partially solves the problem. When a clerk makes an error by accepting a complaint without making sure that the required evidence is submitted with the filing, what is the remedy? Some courts address the issue by ordering the filings stricken, without prejudice and while tolling the statute of limitations, to allow the prompt filing of corrected petitions. *United States v. Buckles*, 647 F.3d 883, 891 (9th Cir. 2011); *Shaffer v. Shaffer*, No. 20133, 2001 WL 34034513 (Neb. Dist. Ct. 2001). Other courts have "conclude[d] that the initial omission of [a] certification . . . may be excused" and that a "late certification may be accepted *nunc pro tunc*." *Rosen v. Rosen*, 614 N.Y.S.2d 1018, 1021 (N.Y. Sup. Ct. 1994); *see also In re Cortes*, 125 B.R. 418, 420 (E.D. Pa. 1991) (courts should "allow[] untimely complaints when the [plaintiff] had relied on erroneous information from the clerk's office"); *Taylor v. Langley*, 112 P.2d 411, 416 (Okla. 1941) ("[T]he clerk should not have accepted the action for filing until he was furnished with the proper certificate . . . But the clerk did accept and file the action . . . . While that action of the clerk was not in accord with the [law], and should not be followed again[,] we cannot hold that such act of the clerk . . . operates to destroy or withdraw the jurisdiction of this court."). Other courts' decisions vary. *See also Smith v. Dell*, No. 06-2496,

2007 WL 3232037 (W.D. Tenn. Oct. 31, 2007) (striking a motion that was accepted by the clerk's office that should not have been); *Harley Davidson v. Workforce Appeals Bd.*, 116 P.3d 349 (Utah 2005) (accepting a petition that should not have been accepted by the clerk, holding that late filing without the required fee is not jurisdictional); *Lee v. Hutson*, 600 F.Supp. 957, 960 (D.C. Ga. 1984) ("[T]he Clerk should not have accepted this document for filing, and the court will not consider it.")

Given the state and federal case law discussed *infra*, as well as Quinault Court Rule 5(e)'s requirement that "all pleadings shall be construed so as to do substantial justice," I would hold that Appellant should have been able to cure the defect by filing proof of compliance with the notice requirement of QTC § 99.42.040(a) into the record at a later time.

That being said, I find that the error was harmless and join in the result of J. Townsend's opinion.

Appellant admits that his second complaint was filed past the one-year statute of limitations, but argues that QTC 99.01.030 tolled the limitations period. Section 99.01.030 states:

> If a person entitled to bring an action is, at the time the cause of action accrues, under disability of minority, mental incapacity, or imprisonment, the period of disability shall not be deemed a portion of the period limited for commencement of the action. Such person shall have the time after removal of the disability which is allowed to others to begin an action. If a person entitled to bring an action is, at the time the cause of action accrues, under more than one of the above-stated disabilities, the person shall have the time after removal of such disabilities to begin an action. The period of limitation shall not be extended by the tacking or connection of the initial disability or disabilities with another disability which occurs after the cause of action has accrued.

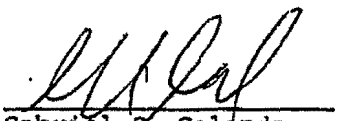
According to Appellant, and as confirmed by a declaration of his attending physician, Appellant "was incapable of making legal decisions until at least May 6, 2009." Appellant further apprises the Court that, at minimum, a question of fact exists as to his mental capacity, and that the Appellees have offered no evidence to counter this contention.

Appellees, on the other hand, argue that "QTC 99.01.030 does not say that someone using painkillers gets to toll the statute of limitations. . . . [Appellant] was not 'under a disability of mental incapacity' at the time the cause of action accrued. He was competent, so far as we know, to sign consent for surgery. No one ever brought a guardianship petition on his behalf." (emphasis in original). Further, according to Appellees, "QTC 99.01.010 requires that 'all civil action shall be started *and prosecuted* within 1 year after the cause of action accrues.'" (emphasis in original). And here, Appellant did nothing to prosecute the case until September

21, 2011. Thus, although the Appellant's first complaint was filed within the one-year statute of limitations period, it was not also prosecuted in that period. According to Appellees, "[t]he statue of limitations requires something more than just filing the case within a year. Otherwise the phrase 'and prosecuted' would be superfluous, meaningless."

This issue can be resolved without addressing whether Appellant's "disability" satisfies QTC § 99.01.030. "As most commonly used in legal language the word 'prosecute' means 'to seek to obtain, enforce, or the like, by legal process; as to prosecute a right or claim in a court of law.'" *Bohnen v. Harrison*, 232 F.2d 406, 409 (7th Cir. 1956) (WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d. 1953)). Here, the Quinault Business Committee determined that in order to prevent plaintiffs filing and then "sitting" on their claims, plaintiffs must "start[] and prosecute[]" their claims within the one year statute of limitations period. (emphasis added). In other words, plaintiffs must, by some method, seek to obtain relief within one year of their claim accruing - merely filing a complaint is not enough. Here, the cause of action arose on April 28, 2009, and Appellant did not seek to obtain any relief until September 21, 2011. This was well after one year had elapsed.

Although not for the reasons that the Trial Court held, dismissal of Appellant's action was correct nonetheless. It is for this reason that I join in the result reached by J. Townsend.



Gabriel S. Galanda,
Judge