No. COA11-298 FOURTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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WILLIAM DAVID CARDEN Plaintiff-Appellant, v. OWLE CONSTRUCTION, LLC Defendant-Appellee.	)))))))))	From Durham County File No. 06 CVS 6720

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BRIEF OF PLAINTIFF-APPELLANT

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WILLIAM DAVID CARDEN	)	
	)	
Plaintiff-Appellant,	)	
	)	From Durham County
v.	)	File No. 06 CVS 6720
	)	
OWLE CONSTRUCTION, LLC	)	
	)	
Defendant-Appellee.	)	

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

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I. DID THE SUPERIOR COURT CORRECTLY CONCLUDE THAT CASES STARTED IN THE SUPERIOR COURT CAN BE REMOVED OR TRANSFERRED FROM THE GENERAL COURT OF JUSTICE TO THE CHEROKEE TRIBAL COURT?

II. DID THE SUPERIOR COURT CORRECTLY CONCLUDE THAT THIS ACTION STARTED IN DURHAM SUPERIOR COURT WAS NO LONGER PENDING IN DURHAM SUPERIOR COURT SO THAT THE PREVIOUS ORDER STAYING THE CASE COULD NOT LATER BE LIFTED BY THE COURT?

STATEMENT OF THE CASE

This is an appeal from the Superior Court's order denying Plaintiff's Motion to Lift a Stay. On December 8, 2006, Mr. Carden filed a tort action in the Superior Court division of the General Court of Justice, Durham County, North Carolina, against Harrah's North Carolina Casino Company, LLC, Harrah's Operating Company, Inc. (hereinafter referred to as the casino defendants) and Owle Construction, LLC (hereinafter referred to as Owle), alleging that their negligence in the construction of a sidewalk along US 19 was a proximate cause of his injuries. R. p. 21. In their answer, the casino defendants denied liability and asserted a cross-claim against Owle. R. p. 36. In its answer, Owle denied liability and moved to change venue to the Superior Court division of the General Court of Justice, Swain County, North Carolina. R. p. 29. The Superior Court subsequently denied Owle's motion for change of venue. R. p. 41. The case was set for trial in Durham on February 11, 2008 and then re-calendared for trial on August 25, 2008. R. p. 42. Defendant Owle never contested jurisdiction in the General Court of Justice.

On March 12, 2008, the casino defendants moved to dismiss Plaintiff's case for lack of personal and subject matter jurisdiction in the General Court of Justice. R. p. 43. The casino defendants contended that the Tribal Casino Gaming

Enterprise (TCGE) was a necessary party, and that the TCGE could not be sued in a North Carolina state court due to sovereign immunity of the Eastern Band of Cherokee Indians. R. p. 43.

On April 17, 2008, the Superior Court entered a consent order staying the action to allow for an action to be pursued in the Cherokee Court and stating the action would be removed to the Cherokee court. In the order, the Superior Court determined that because of jurisdiction in the Tribal Court and because TCGE was a necessary defendant Plaintiff should pursue his options in Cherokee Court first. R. pp. 49-50.

The trial of the action in tribal court against the TCGE, Harrahs and Owle in November 2009 ended in a mistrial after the six person jury twice indicated they were deadlocked, one member of the jury became absent due to the death of his father during deliberations and when another juror told the court that other jurors were putting improper pressure on her. R. p. 57. Subsequently, the tribal court ordered mediation. R. p. 59. The mediation was held on April 1, 2010, resulting in the resolution of Plaintiff's claims against Defendants Harrah's and TCGE. R. p. 52. As a result, Harrahs and the TCGE were dismissed with prejudice from the tribal court action. R. p. 63. Harrah's and TCGE also dismissed their cross-claim against Owle in Tribal Court. R. p. 69.

Plaintiff Carden then asked the tribal court to dismiss the tribal court action on grounds that with the dismissal of the tribal entities, jurisdiction no longer existed in the tribal court. R. p. 68. On September 2, 2010, the tribal court entered an order indicating that while it "likely" would not have had jurisdiction of the case between Owle Construction and Plaintiff as an original matter, the doctrine of pendent jurisdiction furnished sufficient jurisdiction to permit it to continue to exercise jurisdiction over Plaintiff Carden's claim against Owle. R. p. 69.

On October 21, 2010, Plaintiff Carden filed a motion in the Durham Superior Court action asking the Superior Court to lift the stay order dated April 17, 2008. R. p. 51. Plaintiff also filed a voluntary dismissal of his claims against the casino defendants in the Superior Court action. R. p. 64. On October 27, 2010, Plaintiff Carden filed a voluntary dismissal without prejudice of the tribal court action against Owle Construction. R. p. 73.

On December 15, 2010, Plaintiff's Motion to Lift Stay came on for hearing in Durham Superior Court before Hon. Shannon Joseph. Judge Joseph entered an order denying the motion to lift stay on the grounds that the Superior Court action was no longer pending in Durham County because it had been removed or transferred from Superior Court to tribal court. R. p. 75.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

N.C. Gen. Stat. § 7A-27 invests the Court of Appeals with appellate jurisdiction to hear appeals from the final orders of the Superior Court or where an order has affected the substantial rights of a party. This appeal is from a final order of the Superior Court and affects the substantial rights of the Plaintiff Carden.

STATEMENT OF THE FACTS

On the night of December 12, 2003, Plaintiff William David Carden, a Durham County resident, was struck by a Jeep Cherokee while he was crossing U.S. 19 at a crosswalk between Harrah's Cherokee Hotel and Casino to the Fairfield Inn on the Qualla Boundary. R. p. 21. On that part of the highway, the North Carolina Department of Transportation has a sixty-foot wide right-of-way that extends out thirty feet from each side of the highway center line.[1] At the time of the accident, Defendant Owle Construction, LLC (Owle) was renovating the curb and installing a sidewalk at that location within the right-of-way of Highway 19 under a contract with the casino. R. p. 22. Mr. Carden is not an Indian. Owle is a North Carolina limited liability company organized under a charter from the State

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[1] This mixed question of fact and law is important to whether the tribal court has jurisdiction of certain cases. The Cherokee tribal court addressed this issue in another case in which a pedestrian was injured in the same crosswalk as the one involved in the current case. See *Dorman v. Eastern Band of Cherokee Indians*, 7 Cher. Rep. 5, 10 n.4; 2008 N.C. Cherokee Sup. Ct. LEXIS 2, 6-8.

of North Carolina with a principal place of business in Swain County, North Carolina. R. p. 21.

Plaintiff Carden's complaint filed in Durham Superior Court alleged that at the time of the accident Owle Construction was operating within the N.C. DOT right of way without obtaining the necessary permits for the construction from the N.C. DOT and without complying with numerous safety rules required by the federal Manual on Uniform Traffic Control Devices that has been adopted in North Carolina and all 50 states. R. pp. 23-24. Plaintiff further alleged that Owle's negligence was a proximate cause of the accident in which he was severely injured. R. p. 27.

ARGUMENT

STANDARD OF APPELLATE REVIEW

The standard of review of an appeal from a ruling of the Superior Court on matters of law is *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 699 S.E.2d 572 (N.C. 2008).

I. THE SUPERIOR COURT ERRED IN DETERMINING THAT IT COULD NOT GRANT THE MOTION TO LIFT STAY BECAUSE IT ERRONEOUSLY CONCLUDED THAT THE ACTION WAS NO LONGER PENDING IN SUPERIOR COURT.

This is a case of first impression in the North Carolina Appellate Courts

concerning whether there exists a mechanism for the transfer or removal of cases from North Carolina state court to the Cherokee tribal court. In December 2006, William David Carden, a Durham County resident, brought a negligence action in Durham Superior Court arising out of an automobile-pedestrian collision that occurred in the right of way of U.S. 19 in Cherokee, North Carolina. Suit was brought against Owle Construction, LLC and Harrahs N.C. Casino alleging that Owle and the Harrahs defendants had been performing construction in the U.S. 19 right of way in front of Harrahs Cherokee Casino and that their negligence in doing this was a proximate cause of the accident in which Mr. Carden was seriously injured.

After the case had been pending in Durham Superior Court for more than an year and after the case had been calendared for trial, the Harrahs defendants filed a motion to dismiss on the ground that the Tribal Casino Gaming Enterprise, an agency of the Eastern Band of the Cherokee Indians, was a real party in interest and that the tribe enjoyed sovereign immunity from suit in the Superior Court. R. p. 43. On April 19, 2008, the Superior Court entered an order to permit the claims to be pursued in the tribal court. R. p. 48.

In its conclusions of law made in the April 2008 order, the Superior Court stated:

1. The issues in this matter present difficult issues of subject matter jurisdiction that have not been resolved by controlling decisions of the United States Supreme Court and the North Carolina Supreme Court.
2. This court makes no decision at present over whether it has subject matter jurisdiction in this matter.
3. As a matter of comity, the Plaintiff should exhaust his remedies before the Cherokee Court before this court decides the difficult issue of subject matter jurisdiction. The Tribal Casino Gaming Enterprise should be added as party Defendant.
4. **Further proceedings in this matter will be stayed in this Court pending the outcome of proceedings in the Tribal Court.**
5. This matter is properly brought before the Cherokee Court.

R. P. 49. [Emphasis added.] The Court went on to state that the action would be "removed" to the Cherokee Court. R. p. 50. The order did not state that the Superior Court action was being dismissed in state court.

Thereafter, Plaintiff pursued his claims in the Cherokee court against Owle Construction, the Tribal Casino Gaming Enterprise and Harrahs. A lengthy jury trial ended in tribal court in November 2009 with a mistrial.[2] R. p. 54. The tribal court then ordered the case to mediation. R. p. 59. At a mediation held in Durham in April 2010, Mr. Carden settled his claims with Harrahs and the Tribal Casino Gaming Enterprise. He took a voluntary dismissal of these claims with prejudice in May 2010 in the tribal court. After the Cherokee Court indicated it had "pendent"

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[2]The trial was the longest civil trial in the history of the tribal court. See Order of Cherokee Court. R. p. 58.

jurisdiction of the claims of Plaintiff against Owle, Mr. Carden took a voluntary dismissal without prejudice of his claims against Owle Construction in the tribal court in October 2010 and he moved in the Superior Court to lift the stay that had been imposed in April 2008 in order to permit him to proceed against Owle in state court. R. p. 51.

The Superior Court in its order in December 2010 denying Mr. Carden's motion expressed the view that the Superior Court action had been "removed" from Superior Court to the tribal court and that there was no action pending in Superior Court. Accordingly the Court denied Mr. Carden's motion to lift the stay given its view that there was no pending action.

A. THE SUPERIOR COURT ERRED IN ITS ORDER BECAUSE THERE IS NO MECHANISM IN EITHER FEDERAL OR NORTH CAROLINA LAW TO "REMOVE" OR TRANSFER A CASE FROM A NORTH CAROLINA COURT TO TRIBAL COURT.

The premise that the Superior Court judge based her decision on – that Mr. Carden's action pending in Durham Superior Court had been transferred to tribal court – was fundamentally flawed because there is no mechanism to transfer a case from a North Carolina court to an Indian tribal court.[3] Judge Joseph based this on

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[3] The Durham Superior Court clearly had jurisdiction over Plaintiff's claims against Owle since the General Court of Justice has jurisdiction of tort actions filed by non-Indians in cases arising on the Qualla Boundary. See *Sasser v. Beck*, 40 N.C. App. 668, 253 S.E.2d 577 (N.C. Ct. App. 1979).

the language of the April 2008 Order which indicated that the Durham Superior Court action should be stayed and "removed" to the Cherokee Court for further proceedings. R. p. 77.

Despite the language in the April 2008 Order, there is no provision in the North Carolina General Statutes that authorizes the transfer or "removal" of a case from the General Court of Justice to the court of any other jurisdiction, be it federal, state or a tribal court. A search of the General Statutes comes up empty in this regard. There is simply no statute that permits such a transfer to the Cherokee tribal court. For example, Chapter 71A of the General Statutes, dealing generally with Indian tribes in North Carolina, contains no provision for the transfer of cases from state to tribal court. Even Chapter 50A of the General Statutes that deals with Uniform Child-Custody Jurisdiction and Enforcement does not provide for the transfer of a case from a North Carolina court to the court of another state or Indian Tribe. N.C. Gen. Stat. § 50A-104 instead provides that an Indian tribe will be considered as if it were a State of the United States for purposes of that statute.

Indeed, the only statutory provisions that allow for the transfer or removal of a civil action from the General Court of Justice of North Carolina to a court in another jurisdiction are contained in federal statutes that have no application to this case. For example, the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., contains

a provision that permits a case to be moved or transferred from a state court in certain circumstances not present here. 25 U.S.C. § 1911(b) provides:

> (b) Transfer of proceedings; declination by tribal court. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, that such transfer shall be subject to declination by the tribal court of such tribe.

The Indian Child Welfare Act, of course, has no application in the present case.

Nor do any of the other federal statutes that permit removal of actions from state court to a federal district court apply in this case. Generally, cases may be removed to federal court only where original jurisdiction exists in the federal district court. See 28 U.S.C. § 1441. Actions subject to removal are generally actions brought between citizens of different states[4], actions raising federal questions[5], admiralty cases,[6] actions against federal officers[7], civil right cases[8], or

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[4] 28 U.S.C. § 1332.

[5] 28 U.S.C. § 1331.

[6] 28 U.S.C. § 1333.

[7] 28 U.S.C. § 1442.

[8] 28 U.S.C. § 1443

actions against foreign states[9]. None of these situations for federal removal exist in the present case which involves a negligence case brought by a North Carolina citizen against a North Carolina corporation. Moreover, the federal removal statutes – when they apply – provide for removal to federal district courts, not tribal courts.

In sum, there is simply no statutory mechanism to transfer or remove cases from a state court in North Carolina to the Cherokee tribal court or any other tribal court.

The only statutory mechanism in the General Statutes that deals with how a case pending in the General Court of Justice is to be handled when a claim should first be pursued in the courts of another jurisdiction is contained in N.C. Gen. Stat. § 1-75.12. That provision permits an action to be stayed while the action is pursued in the courts of another jurisdiction. It is clear under N.C. Gen. Stat. § 1-75.12, however, that the action is merely stayed and not transferred, to the courts of the other jurisdiction. Indeed, the statute specifically states:

> (b) Subsequent Modification of Order to Stay Proceedings. -- In a proceeding in which a stay has been ordered under this section, jurisdiction of the court continues for a period of five years from the entry of the last order affecting the stay; and the court may, on motion and notice to the parties, modify the stay order and take such action as the interests of justice

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[9] 28 U.S.C. § 1441 (d).

> require. When jurisdiction of the court terminates by reason of the lapse of five years following the entry of the last order affecting the stay, the clerk shall without notice enter an order dismissing the action.

In the present action, the order stopping the action in Superior Court was entered on April 17, 2008. Under the provisions of N.C. Gen. Stat. § 1-75.12, jurisdiction over the case would continue in Durham Superior Court until April 2013. Thus, in December 2010, the stayed action was pending in Durham Superior Court and the Superior Court's conclusion that there was no action pending was wrong as a matter of law. As a result the Order of the Superior Court denying the Motion to Lift Stay should be vacated and this case returned to the Superior Court for further proceedings.

B. THE SUPERIOR COURT SHOULD HAVE LIFTED THE ORDER STAYING THE PROCEEDINGS BECAUSE IN DECEMBER 2010 NO FURTHER JURISDICTION EXISTED IN THE TRIBAL COURT FOR THE DISPUTE BETWEEN PLAINTIFF AND OWLE CONSTRUCTION.

While a number of appellate decisions have addressed the question of whether an order to stay proceeding under N.C. Gen. Stat. § 1-75.12 was properly granted or denied, there are no reported decisions dealing with motions to modify or lift the stay. Likewise there are no cases which set forth standards for motions to lift or modify the stay.

Despite this lack of prior authority, it is clear on the present facts that the

Superior Court should have lifted the stay to permit the case to proceed in Durham Superior Court because the General Court of Justice in December 2010 was the only proper forum for resolving the dispute between plaintiff and Owle Construction. First of all, the question of whether there was primary jurisdiction of the case in Superior Court had been resolved with the settlement of the case in tribal court with the defendants Tribal Casino Gaming Enterprise and Harrahs. It was the allegation by these defendants in their Motion to Dismiss filed in April 2008 that raised the difficult questions of jurisdiction in the Superior Court. These difficulties lead to the entry of the Order stopping the Superior Court action in April 2008. Without the casino defendants, the case was simply a common tort action brought by a North Carolina resident against a North Carolina corporation for which jurisdiction clearly existed in Superior Court. See *Sasser v. Beck*, 40 N.C. App. 668, 253 S.E. 2d 577 (1979) (jurisdiction exists in Superior Court for tort actions occurring on Qualla Boundary).

Moreover, the Motion to Lift the Stay should have been granted in December 2010, because jurisdiction no longer existed in the tribal court for Mr. Carden to pursue the action against Owle Construction, LLC. Several decisions of the Supreme Court of the United States set forth the rules for analysis of tribal courts' subject matter jurisdiction in cases involving non-Indians, such as Mr. Carden. In

Montana v. United States, 450 U.S. 544 (1981), the Supreme Court held that "[a tribe's inherent power does not reach] beyond what is necessary to protect tribal self government or to control internal relations. … [T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id*. at 564-565. Two exceptions to this rule allow the exercise of civil jurisdiction over non-Indians on reservations, even when they are on non-Indian fee lands, in limited circumstances. *Id*. First, the *Montana* court held, "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements. *Id*. Second, a tribe may also have jurisdiction "over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 566.

The Supreme Court of the United States has since applied the *Montana* rule in the context of a tort action over an accident that occurred on a state-maintained highway running through an Indian reservation. In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) the Court found that a tribal court lacked jurisdiction where a non-Indian plaintiff sued a non-Indian defendant for injuries suffered in a traffic accident which occurred on non-Indian, alienated land, even though the accident

took place within the boundaries of a reservation. Several circuit courts have since applied *Strate* to find that tribal courts had no subject matter jurisdiction over non-Indian defendants for tort actions arising within state or federal highway rights-of-way within reservation boundaries. See, e.g., *Nord v. Kelly*, 520 F.3d 848 (8th Cir. 2008)(applying *Strate* to affirm that a tribal court lacked jurisdiction over a suit against a non-Indian, nonmember of the tribe arising from a car accident on a state highway within a reservation); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997)(same).

Less certain has been whether a tribal court has jurisdiction over such tort claims when the plaintiff is a non-Indian and the defendant is a tribe member. The United States District Court for the Western District of North Carolina has examined the issue of the Cherokee Court's subject matter jurisdiction in a case in which a non-Indian plaintiff brought an action against an enrolled member of the Eastern Band of Cherokee Indians over a car accident that occurred on a federal highway within the Qualla Boundary. In *Tejesova v. Bone*, 2007 WL 1160059, 2007 U.S. Dist. LEXIS 29087 (W.D.N.C. Apr. 18, 2007) (W.D.N.C. April 18, 2007), Judge Lacy Thornburg found that the Cherokee Court lacked subject matter jurisdiction under *Strate* and *Montana*. The non-Indian's party status does not appear to have been material to this opinion. Rather, following *Strate* and its

progeny, Judge Thornburg in *Tejesova* emphasized that tribes lack the "right of absolute and exclusive use and occupation" over highway rights-of-way that they have granted, and that they therefore "may not exercise jurisdiction over the nonmember[s]" regarding claims that arise within such rights-of-way. *Tejesova* at 4 (citations omitted).

The Cherokee Court has itself applied *Strate* in connection with an accident occurring in the same crosswalk involved in the Carden case. In *Dorman v. Eastern Band of Cherokee Indians*, 7 Cher. Rep. 5, 7-8, 2008 N.C. Cherokee Sup. Ct. LEXIS 2, 6-8 (Cherokee Supreme Court of North Carolina, March 5, 2008), the Cherokee Court held that it is "undisputed" that Eastern Band of Cherokee Indians has granted a right-of-way to the State of North Carolina that includes a portion of Highway 19. This section of U.S. 19 runs in front of Harrah's Cherokee Hotel and Casino and contains the crosswalk over the highway between the casino complex and the Fairfield Inn. *Id*. at 6; 2008 N.C. Cherokee Sup. Ct. LEXIS 2 at 4. This is the exact location where Defendant's construction site was located in December 2003 and where Plaintiff suffered his injuries. At this location, according to the tribal court, the *Strate* opinion "[operates] a kind of 'judicial alchemy,' which works to convert portions of Indian Country onto which a highway easement has been granted to a State into non-Indian fee land for purposes of the two part

Montana test." *Id*. at 8, 2008 N.C. Cherokee Sup. Ct. LEXIS 2 at 7-8 (citing Crow at 36, 2007 Cherokee Sup. Ct. LEXIS 21 at 7-8). The incident that gave rise to this action, then, like the incident that gave rise to the *Tejasova* plaintiff's action, occurred on non-Indian fee land within the Qualla Boundary. The Cherokee Court in *Dorman* held that jurisdiction did not exist because of *Strate.*

Because this case concerns a tort action on non-Indian fee land the tribal court would have no subject matter jurisdiction over Mr. Carden's action against Owle under either prong of *Montana* if Mr. Carden now attempted to sue Owle in tribal court. Looking to the first *Montana* exception, Plaintiff has not subjected himself to tribal jurisdiction through any "consensual relationships" with the Defendant Owle. See *Montana*, 450 U.S. at 566. Moreover, the *Strate* court found that the consensual relationships that are relevant to this analysis are those of a business nature:

> *Montana 's* list of cases fitting within the first exception, see 450 U.S., at 565-566, 101 S.Ct. 1245, indicates the type of activities the Court had in mind: *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants); *Morris v. Hitchcock*, 194 U.S. 384, 24 S.Ct. 712, 48 L.Ed. 1030 (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation); *Buster v. Wright*, 135 F. 947, 950 (C.A.8 1905)

> (upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as "inherent" the Tribe's "authority to prescribe the terms upon which noncitizens may transact business within its borders"); [*Washington v. Confederated Tribes of the] Colville [Indian Reservation]*, 447 U.S. [134], 152154, 100 S.Ct. 2069, 65 L.Ed.2d 10 [(1980)] (tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status").

Taking this into account, it is clear that Mr. Carden had not entered into any consensual relationship of the type envisioned by the *Montana* Court. Rather, Plaintiff was a mere visitor to the reservation in the role of a tourist when this accident occurred.

Similarly, there is nothing about the parties' conduct in this case that would place this case within the second *Montana* exception. As the *Strate* court noted, negligent conduct in a public area of a reservation does have a negative impact on the safety of tribe members. 520 U.S. at 457-458. Nevertheless, the court held, "if *Montana's* second exception requires no more [than negligent conduct endangering the public safety], the exception would severely shrink the rule." Id. The *Strate* court went on to categorize the second *Montana* prong as one concerned primarily with the protection of tribal self-government, and to find that "[n]either regulatory

nor adjudicatory authority over the [federal] highway accident at issue is needed to preserve the right of reservation Indians to make their own laws and be ruled by them."

The same can be said of the case at hand. Indeed, Plaintiff's allegations of negligence against Defendant Owle hinge, not on any statutory or common law peculiar to the Eastern Band of Cherokee Indians, but rather, on Defendant's failure to follow the uniform highway construction zone standards established by the federal government in the Manual of Uniform Traffic Control Devices (MUTCD). These regulations are mandated on the states by the federal government and have been adopted by the North Carolina Department of Transportation in whose right-of-way the accident occurred. See N.C. Gen. Stat. § 136-30. No section of the Cherokee Code, case law, or ordinance instructs contractors on the Qualla Boundary not to follow MUTCD guidelines. Therefore, this case does not raise any question of the regulatory or adjudicatory authority of the tribe in order to protect the self-government of the Eastern Band of Cherokee Indians.

Finally, the tribal court in its September 2, 2010 order itself has recognized that as an original matter, subject matter jurisdiction would not exist for plaintiff's action against Owle Construction, LLC. In its decision on September 2, 2010 the Cherokee Court stated:

> Pursuant to *Strate*, the Court would likely have had no jurisdiction to entertain the case had it been in the procedural posture it is in now at the time of Judge Manning's transfer Order.

R. p. 69.

In sum, at the time of the December 2010 Order being appealed, the proper jurisdiction of the dispute between Mr. Carden and Owle Construction, LLC was the General Court of Justice. No jurisdiction over the case remained in the tribal court. This change of circumstances justified the lifting of the order granted in April 2008. The Superior Court in December 2010 should have therefore entered an order allowing the case to proceed in Durham County.

REQUEST FOR ORAL ARGUMENT

Because this is a case of first impression Plaintiff respectfully requests the Court to hold oral argument in this matter. Although this case is relatively unusual because of its procedural posture and history, it raises issues likely to re-occur in the North Carolina courts. Harrahs Cherokee Casino receives approximately 3.6 million visits a year.[10] These visits generate a number of accidents involving these visitors to the Qualla Boundary from which tort actions arise with similar procedural and jurisdictional issues.

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[10] http://nc-cherokee.com/economicdevelopment/files/2011/02/OPD-Brochure.pdf

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court to reverse the Superior Court's order that denied the Motion to Lift Stay and to remand the case to the Superior Court with directions to enter an order lifting the stay of the proceedings.

Respectfully submitted this the 16th day of May, 2011.

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CERTIFICATE OF SERVICE

I, Michael W. Patrick, do hereby certify that a true and correct copy of the foregoing Brief of Plaintiff-Appellant was filed with of the Clerk of the Court of Appeals and was served on Defendants-Appellant by use of the court's electronic filing system.

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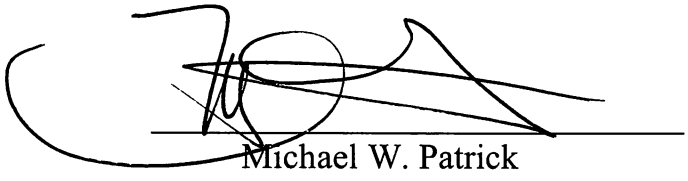

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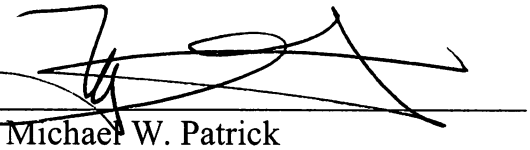
CERTIFICATION AS TO LENGTH OF BRIEF

Undersigned Counsel hereby certifies, pursuant to Rule 28 (j), that this brief was prepared in Times Roman 14 point type and contains fewer than 5000 words in the brief, exclusive of the Covers, Table of Authorities and Cases and Certificates

BY: 

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