

NORTH CAROLINA COURT OF APPEALS

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MEHERRIN TRIBE OF NORTH )  
 CAROLINA, a/k/a MEHERRIN )  
 INDIAN TRIBE, )  
 )  
 Plaintiff/Petitioner, )  
 v. )  
 )  
 NORTH CAROLINA STATE )  
 COMMISSION OF INDIAN AFFAIRS, )  
 )  
 Defendant/Respondent. )

From Wake County  
No. 09 CVS 23196

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DEFENDANT-APPELLANT'S BRIEF

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CLERK COURT OF APPEALS  
OF NORTH CAROLINA

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QUESTIONS PRESENTED

- I. Whether the trial court erred in adopting the decision of the Office of Administrative Hearings, including that tribunal's erroneous assertion of subject matter jurisdiction,, thereby exceeding the trial court's jurisdiction in this matter.
- II. Whether the trial court erred in reversing the Final Agency Decision based upon the findings and conclusions contained in the order reversing the Agency's Final Decision.
- III. Whether the trial court erred in making Conclusion of Law No. 3 in which it concluded that the issues of material fact identified by Defendant/Respondent in this Decision and Order where not of such material fact as to constitute grounds for remand to an administrative Law Judge for presentation of evidence.
- IV. Whether the trial court erred in making Conclusion of Law No. 4 in which it concluded that there were no genuine issued of material fact in the administrative contested case proceeding.

- V. Whether the trial court erred in making Conclusion of law No. 5 in which it concluded that the Administrative Law Judge properly found that there were no genuine issues as to any material fact.
- VI. Whether the trial court erred in making Conclusion of Law No. 6 in which it concluded that the Administrative law Judge properly found that the Plaintiff/Petitioner was entitled to judgment as a matter of law.
- VII. Whether the trial court erred in making Conclusion of Law No. 7 in which it concluded that the Administrative law Judge properly granted Plaintiff/Petitioner's motion for summary judgment.
- VIII. Whether the trial court erred in making Conclusion of Law No. 8 in which it adopted the Administrative Law Judge's decision allowing summary judgment for Plaintiff/Petitioner, thereupon reversing the defendant/respondent's Decision and Order.

**STANDARD OF REVIEW**

"The standard of review for lack of subject matter jurisdiction is de novo". Keith v. Wallerich, 201 N.C. App. 550, 554, 687 S.E.2d 299, 302 (N.C. Ct. App. 2009). "The standard of review for summary judgment is de novo." Forbis v. Neal, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). Since all the issues here relate to either subject matter jurisdiction or summary judgment, the standard of review for all issues on this appeal is de novo.

**STATEMENT OF THE CASE**

On September 5, 2008 the North Carolina State Commission of Indian Affairs (the Commission) voted to seat Douglas Patterson as the representative of the Meherrin Tribe (the Tribe) on the Commission. Plaintiff filed a Petition for Contested Case Hearing on September 8, 2008, questioning the Commission's

decision to seat Douglas Patterson instead of Chassidy Hall. (R p. 124) On June 15, 2009, Fred G. Morrison Jr., Senior Administrative Law Judge at the Office of Administrative Hearings (OAH), issued a Decision Granting Summary Judgment for Petitioner. (R pp. 8-10) The Commission considered the Administrative Law Judge's ruling and made a decision on this issue at its February 2, 2010 meeting. (R p. 119) The Commission denied Plaintiff's motion for summary judgment, finding that there are genuine issues of material fact and that therefore, Plaintiff was not entitled to judgment as a matter of law. (R p. 120) The Commission also remanded the case to the Administrative Law Judge for hearing. (R p. 120) On November 17, 2009, Plaintiff filed Plaintiff/Petitioner's Complaint and Petition for Judicial Review in Wake County Superior Court. (R pp. 5-7) By order entered June 9, 2010, Judge Michael R. Morgan determined that there were no genuine issues of material fact and adopted the Administrative Law Judge's decision, granting summary judgment for Plaintiff. (R pp. 339-42) The Commission appeals from this order. By an Order entered May 23, 2011, this Court allowed a Petition for Writ of Certiorari, which provided that Defendant/Respondent's appeal was deemed to have been taken as of the date of that Order. The record on appeal was filed in the Court of Appeals on July 20, 2011 and was docketed on July, 21 2011.

**STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW**

When the trial court grants summary judgment for one party, the other party has the right to appellate review. See, Carr v. Great Lakes Carbon Corp., 49 N.C. App. 631, 634, 272 S.E.2d 374, 376 (1980), cert. denied, 302 N.C. 217, 276 S.E.2d 914 (1981). Since the trial court issued an order adopting the Administrative Law Judge's decision granting summary judgment, a final order, and the Commission has the right to appeal from this order. In addition, as set forth herein, the Office of Administrative Hearings and the Trial Court acted without subject matter jurisdiction.

**STATEMENT OF THE FACTS**

**BACKGROUND FACTS**

This case arises out of an ongoing internal dispute over the leadership and membership of the Meherrin Indian Tribe. See, Meherrin Indian Tribe v. Lewis, 197 N.C. App. 380 (2009). On August 24, 1990, some alleged members of the Tribe adopted a resolution in which they disavowed their membership and purportedly established a new tribe called "The Upper Meherrin Tribe of Eastern North Carolina." (R. pp. 183-98) Over 100 people signed this resolution. (R. pp. 184-98) A letter dated August 25, 1995 further details the controversy over the membership of the Tribe, suggesting that the leaders of the Tribe at that time were improperly adopting people into the tribe. (R. p. 199) Two letters from the alleged Chief and Tribal Council



members to the Bureau of Indian Affairs provide additional evidence of the ambiguity of the Tribe's membership. (R. pp. 203, 207) The authors of the first letter suggested that they represent the "Meherrin Tribe." (R. p. 203) In contrast, the authors of the second letter suggested that they represent the "Cherokee Tribe." (R. p. 207) It appears that eight of the nine signatures are the same on both letters. (R. pp. 203, 207) In correspondence with Plaintiff's counsel, counsel for one of the tribe's competing factions summarized the ambiguity surrounding the Tribe's membership when he stated that certain members of the Tribe had "disavowed their membership in the Meherrin tribe in documentation to the NC Commission of Indian Affairs and the US Bureau of Indian Affairs in 1995 and 1998 as members of the 'Upper Meherrin', as well as, 'Cherokee.'" (R. p. 239)

In addition to the uncertainty surrounding the Tribe's membership, two factions currently claim that they alone represent the Tribe's actual and proper leadership. See, Meherrin Indian Tribe v. Lewis, 197 N.C. App. 380 (2009). The events that gave rise to this power struggle began at the November 10, 2007 Meherrin General Body Meeting where Thomas Lewis presided as Chief. (R p. 225) Members of the tribe allegedly removed him from office during this meeting. (R pp. 226-27) While they may have followed the proper procedure for removing a "member, officer or Tribal council member" under Article IX, Section 8 of the 1996 Meherrin Tribal Constitution and Bylaws, as amended (the Meherrin Constitution), they

apparently did not follow the proper procedure for removing the Chief under Article IX, Section 9. (R pp. 157, 226-27) Section 8 permits removal of a "member, officer or Tribal Council member . . . by a two-thirds (2/3) vote of the eligible voters in attendance voting at a General Body Meeting." (R. p. 157) Section 9 specifically addresses removal of the Tribal Chief, and it provides:

The Tribal Chief may be removed from office if at least (6) months prior to the expiration date of his term, a petition bearing the signatures of at least forty (40) percent of the eligible voting members in attendance voting at a General Body or Call Meeting is presented to the Tribal Council. Within sixty (60) days of such presentation, the Tribal Council shall call for a special election to be held on the question of recall. If the majority of these voting members vote for a recall, provisions of Article IX, Section 4, shall apply, provided that at least seventy-five (75) percent of the eligible voters voting at a General Body or Call Meeting shall have voted.

(R p. 157) (emphasis added) Since no one presented the requisite petition to the Tribal Council (R p. 299), the validity of the General Body's alleged removal of Thomas Lewis as Chief remains unclear.

On November 10, 2007, the Meherrin General Body also unanimously voted to hold its next meeting on January 12, 2008 at the Meherrin Native American Church. (R. p. 226) The Meherrin Constitution does not specifically provide the procedure for scheduling meetings of the General Body. (R. pp. 144-74) It explicitly provides that the Tribal Council Chairman shall

schedule all meetings of the Tribal Council. (R. p. 148) It further provides that the "Tribal Chief shall preside over all General Body Meetings." (R. p. 153) It also grants the Tribal Chief the "power to call special meetings of the General Body or Tribal Council." (R. p. 158)

Before the January 12, 2008 meeting, Thomas Lewis, whose status as Chief remained in question, posted notice on the Tribe's website changing the location for the meeting to the Elks Shrine Building. (R. p. 260) The conflicting information about the location of the meeting resulted in two meetings at two different locations on January 12, 2008. (R. p. 260-61)

#### Facts From This Action

Pursuant to N.C. Gen. Stat. § 143B-407(a), the Tribe is entitled to select one member to serve as its representative on the Commission. Article XIV, Section 1 of the Meherrin Constitution provides that the "General Body shall appoint the required number of representatives to the Commission of Indian Affairs Board." (R. p. 160) In 2005, the Meherrin General Body selected Douglas Patterson as its representative to serve a three-year term ending in June 2008. (R p. 94)

Further attempts to change the Tribe's leadership occurred at the meeting taking place at the Meherrin Native American Church on January 12, 2008. See, Meherrin Indian Tribe v. Lewis, 197 N.C. App. 380, 382, 677 S.E.2d 203, 205 (2009). Most

importantly for the purposes of this case, those attending this meeting voted to remove Douglas Patterson as the Tribe's representative to the Commission. (R p. 229) In his place, they allegedly elected Chassidy Hall. (R p. 229) The part of the Tribe that supports Thomas Lewis (the Lewis Group) and that attended the meeting at the Elks Shrine Building claims that Douglas Patterson is the rightful representative to the Commission. See, Record on Appeal at 18-27, Meherrin Indian Tribe, 197 N.C. App. 380, 677 S.E.2d 203 (2009).

On March 13, 2008, allegedly to settle the dispute surrounding the leadership of the Tribe, Plaintiff filed a complaint in Hertford County Superior Court under docket number 08 CVS 159, alleging that it represented the actual and proper governing body of the Tribe and naming Thomas Lewis and other removed officers of the Tribe as defendants. See, Meherrin Indian Tribe, 197 N.C. App. 380, 677 S.E.2d 203 (2009) and that case's Record on Appeal at pp. 18-27. The complaint seeks a declaratory judgment regarding the disputed positions of Chief, members of the Tribal Council, and representative to the Commission. Id. The litigation to determine the proper leadership of the tribe is still pending in Hertford County Superior Court with the Honorable Gary Trawick now presiding. Meherrin Indian Tribe v. Lewis, No. 08-CVS-159 (Hertford County Superior Court filed March 13, 2008).

Despite this separate litigation to resolve the leadership dispute, Plaintiff filed the instant case against the Commission in an attempt to prematurely exercise its power as the governing body of the Tribe. Prior to the expiration of Douglas Patterson's term, Plaintiff advised the Commission that the Tribe had selected Chassidy Hall as its representative for the term beginning July 1, 2008. (R. p. 125) The Lewis Group, however, advised the Commission that the Tribe had selected Douglas Patterson as its representative for the same term. (R. p. 136) At the regularly scheduled quarterly meeting of the Commission held on September 5, 2008, the Commission voted to seat Douglas Patterson as the Meherrin representative. (R. p. 6) On September 30, 2008, however, the Commission declared the seat vacant in light of the Tribe's internal dispute. (R. p. 6)

Notably, neither prior to Plaintiff's filing a Petition for Contested Case Hearing with OAH, nor at any other time, does the record reflect that Plaintiff either applied for leave from the Attorney General to bring an action in the nature of quo warranto or tendered security to indemnify the State for such an action.

#### ARGUMENT

I. THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION REGARDING THE SUBSTANCE OF THE PLAINTIFF'S ADMINISTRATIVE CLAIMS FOR TWO INDEPENDENTLY DISPOSITIVE REASONS:

A. THE ADMINISTRATIVE TRIBUNAL WHOSE WORK THE TRIAL COURT WAS REVIEWING UTTERLY LACKS SUBJECT MATTER JURISDICTION TO TRY THE TITLE TO PUBLIC OFFICES, STATUTORILY GIVEN SOLELY TO THE SUPERIOR COURTS, AND ADMINISTRATIVE REVIEW BY THE TRIAL COURT COULD NOT CONFER THAT JURISDICTION UPON AN ADMINISTRATIVE TRIBUNAL NOR UPON ITSELF; AND

If a court lacks subject matter jurisdiction, then the proceedings in that court are a nullity. In re T.R.P., 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006). A party cannot waive subject matter jurisdiction, and thus, it can raise this issue for the first time on appeal. Id. at 595, 636 S.E.2d at 793. N.C. Gen. Stat. 7A-247 gives sole jurisdiction to try the title to a public office, a suit in the nature of quo warranto, to the Superior Courts:

The superior court division is the proper division, without regard to the amount in controversy, for the trial of all civil actions seeking as principal relief the remedy of quo warranto, according to the practice and procedure provided for obtaining that remedy.

In the face of such a statute, it cannot be contemplated that subject matter jurisdiction in such matters resides in an administrative tribunal, which is not a court, but is rather an organ existing within the executive branch and organized under a statute that expressly only "confers procedural rights." N.C. Gen. Stat. 150B-1(b).

B. EVEN IF THE TRIAL COURT WERE SOMEHOW DEEMED TO HAVE BEEN SEEKING TO EXERCISE ITS OWN JURISDICTION IN THE MATTER, THE RECORD DOES NOT REVEAL EVEN AN ATTEMPT BY THE PLAINTIFF TO FULFILL THE STATUTORY PRE-CONDITIONS TO SUCH AN ACTION, THE LACK OF WHICH IS AN INSURPERABLE BAR TO THE EXERCISE OF JURISDICTION BY THE TRIAL COURT.

It is therefore manifest that to settle a controversy between rival claimants to a public office, a party must bring a civil action in the nature of quo warranto. State ex rel. Freeman v. Ponder, 234 N.C. 294, 301, 67 S.E.2d 292, 298 (1951). Only the Attorney General may bring such an action on behalf of the State. N.C. Gen. Stat. § 1-515. If a private party seeks to bring a civil action in the nature of quo warranto, it must comply with certain statutory requirements. N.C. Gen. Stat. § 1-516 (allowing private parties the right to bring a quo warranto action under stated conditions). First, the private party must obtain leave from the Attorney General before bringing the action; second, the party must tender sufficient security. Id.; See also, Cooper v. Crisco, 201 N.C. 739, 161 S.E. 310, 311 (1931) ("[W]hen a private citizen desires to bring such action in the name of the state he must apply to the Attorney General for leave and tender satisfactory security to indemnify the state against all costs and expenses which may accrue in consequence of the action."). The North Carolina General Assembly has made it clear that failure to comply with the surety requirement alone justifies dismissal of the action. N.C. Gen. Stat. § 1-518.

These requirements apply to public offices, and the Supreme Court of North Carolina has articulated the following tests to determine whether a position qualifies as a public office:

"The three tests to be applied in determining whether an information will lie," are in the words of the same author; "first, the source of the office; second, its tenure; and third, its duties. The source of the office should be from

the crown or sovereign authority, either by charter or legislative enactment; its tenure should be fixed and permanent, and its duties should be of a public nature."

Eliason v. Coleman, 86 N.C. 235, 240 (1882) (considering whether a position qualifies as a public office in a quo warranto action).

The position of Meherrin representative to the Commission qualifies as a public office under each of the three tests that the Supreme Court of North Carolina articulated in Eliason. Id. First, the North Carolina General Assembly constitutes the source of the office here because it created the Commission. N.C. Gen. Stat. § 143B-404. Second, tenure on the Commission is fixed and permanent because each representative serves a three-year term. N.C. Gen. Stat. § 143B-407(b). Third, the duties of the Commission are of a public nature because the Commission serves as the agency which oversees Indian affairs for the people of North Carolina. See, N.C. Gen. Stat. § 143B-405 (articulating the purposes of the Commission); N.C. Gen. Stat. § 143B-406 (providing the duties of the Commission). Therefore, under each test, the position as the Meherrin representative to the Commission qualifies as a public office.

Here, both Chassidy Hall and Douglas Patterson claim to be the rightful Meherrin representative to the Commission. When Plaintiff claims that Chassidy Hall, not Douglas Patterson, is the actual and proper Meherrin representative to the Commission, Plaintiff seeks to resolve a controversy between rival claimants



to a public office. Thus, a civil action in the nature of quo warranto is the appropriate and required method for trying title to this office. Note: prior to bringing the Hertford County action discussed herein, the Plaintiff here sought permission to proceed in quo warranto in seeking to have determined the true leadership of the Meherrin Tribe but the Attorney General denied that request since the leadership of that tribe is not a public office; no request has ever appeared seeking leave to proceed in quo warranto regarding the Tribe's representative to the Commission, manifestly a public office.

Crucially, in addition to not obtained leave from the Attorney General before bringing its action in the nature of quo warranto, Plaintiff has not complied with the statutory requirement that it "tender[s] . . . satisfactory security to indemnify the state against all costs and expenses which may accrue in consequence of the action." N.C. Gen. Stat. § 1-516. Accordingly, the trial court lacked subject matter jurisdiction of the case, and all proceedings prior to this appeal are a nullity. The Superior Court should have dismissed the action in accordance with the General Assembly's mandate in N.C. Gen. Stat. § 1-516.

In addition to failing to comply with the statutory requirements for trying title to a public office, Plaintiff did not file suit in Superior Court, as N.C. Gen. Stat. § 7A-247 requires, it filed in the Office of Administrative Hearings. As

discussed above, OAH lacked subject matter jurisdiction over this matter, and Plaintiff's subsequent Petition for Judicial Review before the Superior Court could confer no such jurisdiction, either upon OAH nor upon the Superior Court of Wake County. Neither could judicial review excuse the Plaintiff's failure to follow the statutory requirements otherwise.

All of the above leads to only one conclusion, the Plaintiff's action, filed in the wrong form, in the wrong forum, without authority and in complete non-compliance with statutory requirements should have been dismissed by the Office of Administrative Hearings and, failing that, should have been similarly disposed of by the reviewing Superior Court of Wake County.

**II. EVEN IF THE TRIAL COURT OTHERWISE WERE TO HAVE SUBJECT MATTER JURISDICTION, IT WAS WHOLLY IMPROPER FOR THE TRIAL COURT TO EXERCISE THAT JURISDICTION OVER THE SUBSTANTIVE ISSUE IN THE CASE - THE REPRESENTATIVE OF THE MEHERRIN TRIBE TO THE NORTH CAROLINA COMMISSION OF INDIAN AFFAIRS - SINCE THE STATUTORY AUTHORITY TO NAME SUCH A REPRESENTATIVE BELONGS SOLELY TO THE TRIBAL LEADERSHIP AND THE IDENTITY OF THE TRIBAL LEADERSHIP WAS ALREADY PENDING IN ANOTHER SUPERIOR COURT AT THE SUIT OF THE SAME PLAINTIFF.**

The authority to name a representative from the Meherrin Tribe to the NCCIA is vested by statute in the tribal leadership. N.C. Gen. Stat. § 143B-407(a). Thus, the designation of representative to the NCCIA is necessarily contingent on the dispute concerning the governance of the Meherrin Tribe being resolved. The Superior Court in Hertford County attained subject matter jurisdiction over the dispositive issue of the disputed

leadership of the Meherrin Indian Tribe when plaintiffs in this case first filed suit in Hertford County Superior Court on March 13, 2008, against members of a rival faction also claiming governing control of the Tribe.

The plaintiffs' suit in Hertford County was initiated well before they filed the petition for contested case hearing against NCCIA in the Office of Administrative Hearings and the resulting complaint and petition for judicial review against NCCIA in Wake County Superior Court. As the contested leadership issue is still pending before the Superior Court of Hertford County, the exercise of jurisdiction by the trial court in Wake County was improper. This is so because by adopting the administrative law judge's decision, the Wake County Superior Court effectively supplanted the jurisdiction of the Hertford County Superior Court in determining which of the competing factions possessed the authority to name the representative to the NCCIA.

By filing suit in Hertford County, the plaintiffs chose that forum to adjudicate their claim to be the rightful leaders of the Meherrin Indian Tribe. The subsequent action brought by the plaintiffs in Wake County and that court's acceptance of jurisdiction over the matter created an "unseemly conflict . . . between judges of concurrent jurisdiction." State v. Reed, 357 N.C. 544, 550, 592 S.E.2d 191, 194 (2003). Our Supreme Court has held that "[t]he reason one superior court judge is prohibited from reconsidering the decision of another has remained

consistent for over one-hundred years. When one party 'waits for another judge to come around and [takes its] chances with him," and the second judge overrules the first, an 'unseemly conflict' is created." Id. (quoting Henry V. Hilliard, 120 N.C. 479, 487-88, 27 S.E. 130, 132 (1897) (quoting Roulhac v. Brown, 87 N.C. 1, 4 (1882))

The Hertford County Superior Court may rule against the plaintiffs' in the case before it, which would be in direct opposition to the decision of the Wake County Superior Court to seat the plaintiff's representative on the NCCIA. If the trial court in Wake County had jurisdiction in this case, it should have stayed any decision as to the proper representative to the NCCIA pending a final decision in plaintiff's action before the Hertford County Superior Court.

**III. THE TRIAL COURT ERRED ADOPTING THE ADMINISTRATIVE TRIBUNAL'S CONCLUSION THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT AND ADOPTING THAT TRIBUNAL'S ENTRY OF SUMMARY JUDGMENT.**

Assuming for the sake of argument that this Court finds that the lower courts did have subject matter jurisdiction of the proceedings in this case, the trial court should not have granted Plaintiff's motion for summary judgment. "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.' " Smith v. Harris, 181 N.C. App. 585, 587, 640

S.E.2d 436, 438 (2007). When there is any evidence of a genuine issue of material fact, a court should deny a motion for summary judgment. Id. "[Courts] review the record in a light most favorable to the party against whom the order has been entered to determine whether there exists a genuine issue as to any material fact." Id. Here, substantial ambiguities surrounding the Tribe's membership and leadership led to several genuine issues of material fact: (1) whether the votes of non-eligible voters were counted at either the November 10, 2007 meeting or the January 12, 2007 meeting; (2) whether Thomas Lewis was removed from his position as Chief in accordance with the Meherrin Constitution; and (3) whether either of the meetings taking place on January 12, 2007 constituted a meeting of the Meherrin General Body. If this Court finds that even one of these genuine issues of material fact exists, then the trial court erred when adopting the administrative tribunal's entry of summary judgment.

A. THE AMBIGUITY SURROUNDING TRIBAL MEMBERSHIP PRESENTS A GENUINE ISSUE OF MATERIAL FACT

While Plaintiff claims that everyone voting at the relevant meetings qualified as a member of the Tribe, the ongoing controversy over membership prevents the Commission from accepting Plaintiff's uncorroborated assertions. Conclusory allegations of the vote's validity and the voter's membership will not suffice. To establish the validity of the votes at these meetings, Plaintiff should present evidence of the membership of each person who voted. Plaintiff could attempt to meet this burden by presenting evidence

of members' tribal enrollment cards or the tribal rolls. Without such evidence, the Commission cannot make an informed decision about whether the votes were valid and therefore, it cannot determine whether Chassidy Hall is the proper Meherrin representative to the Commission. Since these votes reflect the gravamen of this case, there can be no doubt that they are material. Thus, the tribal membership of those voting at both meetings presents a genuine issue of material fact, and summary judgment was not appropriate.

**B. AMBIGUITY SURROUNDING CHIEF THOMAS LEWIS' REMOVAL PRESENTS A GENUINE ISSUE OF MATERIAL FACT**

Although Plaintiff contends that the Meherrin General Body removed Thomas Lewis as Chief, the Commission cannot rely on this assertion for at least two reasons. First, apparently no one presented Thomas Lewis with the petition, as the Meherrin Constitution requires. Second, as discussed above, the validity of the membership and thus the votes of those present at the November 12, 2007 meeting remains unclear. In light of these two ambiguities, a genuine issue exists as to whether the Meherrin General Body actually removed Thomas Lewis as Chief.

This fact is material because it relates to Thomas Lewis' authority to change the location of the January 12, 2007 meeting and his authority to call a special meeting, as discussed in more detail below. If he did have authority to take these actions, then the votes taken at the January 12, 2007 meeting at the Meherrin Native American Church may not have constituted official votes of

the Meherrin General Body. The potential invalidity of these votes seriously undermines Chassidy Hall's purported status as Meherrin representative to the Commission, which represents the most crucial fact in this case. Therefore, the ambiguity surrounding Chief Thomas Lewis' removal presents a genuine issue of material fact, and the trial court should not have granted summary judgment.

C. AMBIGUITY SURROUNDING THE VALIDITY OF THE JANUARY 12, 2007 MEETINGS PRESENTS A GENUINE ISSUE OF MATERIAL FACT

As discussed above, since it is not clear whether the Meherrin General Body actually removed Thomas Lewis as Chief, his subsequent attempts to change the location of the meeting and/or to call a special meeting may or may not have been valid. The Meherrin Constitution provides that the Chief "shall preside over all General Body Meetings." It also grants the Chief the power to call special meetings. These provisions raise additional issues of fact. Can the Chief unilaterally change the location of the meeting? If so, what procedures are sufficient? Does a posting on the Tribe's website suffice? What are the effects of the Chief calling a special meeting of the General Body at a different location but at the same time as a scheduled General Body meeting?

The Commission had these and other questions in mind when it denied Plaintiff's motion for summary judgment and remanded the case to OAH. Without the presentation of evidence, these many crucial questions will remain unanswered.

All of these facts are material because they directly affect the validity of the votes that allegedly removed Douglas Patterson

and elected Chassidy Hall. Since these votes reflect the main issue in this case, there can be no doubt that they are material. Moreover, they present genuinely disputed and ambiguous issues of fact. Thus, the validity of the meetings held on January 12, 2007 presents a genuine issue of material fact.

Overall, the ambiguities surrounding the Tribe's membership and leadership have put the Commission between two competing factions of the Tribe, forcing it to speculate about matters of tribal governance and about the results of litigation in a separate case. Additionally, the proceedings thus far in this case has put the commission in peril of contradictory and decisions by two different courts.

#### CONCLUSION

For all the reason set forth above, the defendant, by and through the Attorney General, prays this Honorable Court to:

1. Reverse and vacate the decision of the Honorable Superior Court of Wake County;
2. Vacate any and all orders made heretofore in this matter by the North Carolina Office of Administrative Hearings;
3. Order that the position on the North Carolina State Commission of Indian Affairs to be filled by the Meherrin Tribe be declared vacant pending the resolution of that certain action pending in Hertford County Superior Court, identified above, to determine the true leadership of the Meherrin Tribe, and remain

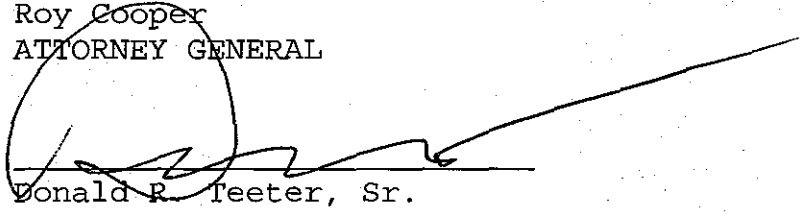


vacant until such time as the leadership thus determined appoints its representative to the North Carolina Commission on Indian Affairs as by law provided; and,

4. Such other and further orders as to this Honorable Court may seem just.

This the 24<sup>th</sup> day of August, 2011.

Roy Cooper  
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read 'Donald R. Teeter, Sr.', is written over a horizontal line. The signature is stylized and extends to the right, crossing the line.

Donald R. Teeter, Sr.  
Special Deputy Attorney General

North Carolina Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602  
(919) 716-6500  
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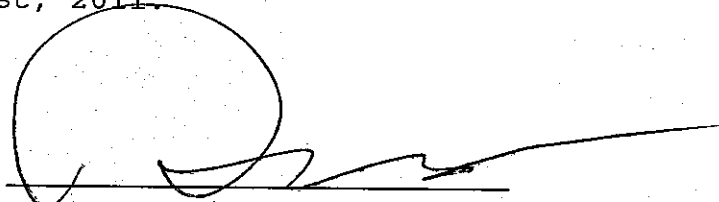
CERTIFICATE OF SERVICE

The undersigned certifies that copies of the foregoing Appellant's Brief were mailed for filing in the office of the Clerk of the North Carolina Court of Appeals, and served upon opposing counsel, both on the date last written below, by depositing the same in postpaid, properly addressed wrappers, in a post office or depository under the exclusive care and control of the United States Postal Service, addressed to:

John H. Connell, Clerk  
Court of Appeals Building  
One West Morgan Street  
Raleigh, NC 27601

Barry Nakell  
Counsel for Plaintiff/Appellee  
149 Dixie Drive  
Chapel Hill, North Carolina 27614

This the 24<sup>th</sup> day of August, 2011.

A handwritten signature in black ink, appearing to read 'Donald R. Teeter, Sr.', is written over a horizontal line. The signature is stylized and extends to the right.

Donald R. Teeter, Sr.  
Special Deputy Attorney General