No. COA 12-493 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. 11 CVS 5119

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BRIEF OF PLAINTIFF-APPELLANT

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No. COA12-493 FOURTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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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 ERR IN CONCLUDING THAT THE GENERAL COURT OF JUSTICE HAS NO SUBJECT MATTER JURISDICTION TO HEAR A CASE ALLEGING THAT THE NEGLIGENCE OF A NORTH CAROLINA CORPORATION INJURED A NORTH CAROLINA CITIZEN IN AN ACCIDENT ON A HIGHWAY OWNED BY THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION?

II. DID THE SUPERIOR COURT ERR IN CONCLUDING THAT PLAINTIFF'S CLAIMS FOR INJURIES FROM DEFENDANT'S NEGLIGENCE FOR FAILING TO FOLLOW SAFETY RULES WHILE DOING WORK IN A HIGHWAY RIGHT-OF-WAY FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED?

STATEMENT OF THE CASE

This is an appeal from the Superior Court's order on March 5, 2012 granting Defendant's Motion to Dismiss this action for lack of subject matter jurisdiction and for failure to state a claim.

On December 8, 2006, Plaintiff William David 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. 10. The case was set for trial in Durham on February 11, 2008 and then re-calendared for trial on August 25, 2008. Defendant Owle did not contest jurisdiction in the General Court of Justice in that action.

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. 10. The casino defendants contended that the Tribal Casino Gaming Enterprise (TCGE) was a necessary party, and that the TCGE, as a Cherokee tribal agency, could not be sued in a North Carolina state court due to sovereign immunity of the Eastern Band of Cherokee Indians. R. p. 10.

On April 17, 2008, the Superior Court entered a consent order directing that the action be stayed and that the action be "removed" to the Cherokee Court . The Court expressly did not rule on any jurisdictional issues. R. p. 10.

A multi-week trial of the action in tribal court against the casino defendants and Owle in November 2009 ended in a mistrial. R. p. 29. Subsequently, the tribal court ordered mediation resulting in the resolution of Plaintiff's claims against the casino defendants. R. p. 29. As a result, the casino defendants were dismissed from the tribal court action. R. p. 29. 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. 28. On September 2, 2010, the tribal court entered an order indicating that while it "likely" would not have had subject matter jurisdiction of the case solely between Owle Construction and Plaintiff, the doctrine of pendent jurisdiction furnished sufficient jurisdiction to permit it to continue to exercise jurisdiction over Plaintiff Carden's claim against Owle, after dismissal of the tribal entities. R. p. 29. On October 27, 2010, Plaintiff Carden filed a voluntary dismissal without prejudice of the tribal court action against Owle Construction under Rule 41 of the N.C. Rules of Civil Procedure as adopted by the Tribal Court. R. p. 16.

On October 21, 2010, Plaintiff Carden filed a motion in the earlier Durham

Superior Court action asserting that the action had been stayed by the April 2008 order and asking the Superior Court to lift the stay order dated April 17, 2008. R. p. 11. 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 ground 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. 11.

Plaintiff Carden appealed Judge Joseph's order to the North Carolina Court of Appeals. On January 17, 2012, the Court of Appeals affirmed Judge Joseph's order that the case was no longer pending in Durham. In its decision, the Court of Appeals held that the April 2008 Superior Court consent order had removed the action entirely from the Superior Court and transferred the action to the Tribal Court. The Court concluded that the voluntary dismissal without prejudice taken in October 2010 had terminated the action that had been started in Durham Superior Court. See *Carden v. Owle Construction, LLC*, ____ N.C. App. ____, 720 S.E. 2d 825 (2012).

On September 29, 2011, within a year of the voluntary dismissal in the Tribal Court, Mr. Carden filed the current action in the Superior Court for Durham County. R.A. p. 8. On December 16, 2011, Defendant Owle filed a Motion to

Dismiss the action for lack of subject matter jurisdiction and for failure to state a claim.[1] R. P. 22. Superior Court Judge Orlando Hudson granted the Motion to Dismiss on March 5, 2012 for lack of subject matter jurisdiction and for failure to state a claim. R. A. p. 25. This appeal followed.

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 that affected 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 sport utility vehicle while he was crossing U.S. 19 at a marked crosswalk between Harrah's Cherokee Hotel and Casino and the Fairfield Inn in Swain County, North Carolina. R. pp. 9-10. 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

[1] Owle also moved to dismiss for lack of personal jurisdiction but did not pursue this in the Superior Court at hearing.

highway center line.[2] At the time of the accident, Defendant Owle Construction, LLC (Owle) was renovating the curb and installing a sidewalk within the right-of-way of U.S. 19 under a contract with the casino. R. p. 8. Owle is a North Carolina limited liability company organized under a charter from the State of North Carolina with a principal place of business in Swain County, North Carolina. R. p. 8.

Plaintiff Carden's new complaint filed in Durham Superior Court on September 29, 2011 alleged that at the time of the accident Owle Construction was negligent in 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 including the federal Manual on Uniform Traffic Control Devices that has been adopted in North Carolina and all 50 states. R. p. 9. Plaintiff further alleged that Owle's negligence was a proximate cause of the accident in which he was severely injured. R. p. 14.

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[2] The question of whether a highway is state owned is important to whether the tribal court has jurisdiction in certain cases. The Cherokee tribal court addressed this issue in another case in which a pedestrian was injured at the same crosswalk as the one involved in the current case. It concluded that U.S. 19 in this area is owned by the North Carolina Department of Transportation. 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 (2008).

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). This standard of review applies to dismissals for lack of subject matter jurisdiction, *Keith v. Wallerich*, 201 N.C. App. 550, 554, 687 S.E.2d 299, 302 (2009) (citing *Country Club of Johnston Cty., Inc. v. U. S. Fidelity & Guar. Co.,* 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002), and for failure to state a claim, *Leary v. N.C. Forest Prods., Inc.,* 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003) .

I. THE COURT OF APPEALS SHOULD REVERSE THE ORDER FOR DISMISSAL BECAUSE THE GENERAL COURT OF JUSTICE HAS PLENARY SUBJECT MATTER JURISDICTION OVER THIS CASE.

Defendant Owle moved for dismissal under Rule 12(b)(1) claiming that the General Court of Justice lacked subject matter jurisdiction over this case. The order of the Superior Court dismissed the action for lack of subject matter jurisdiction. The ruling of the Superior Court on subject matter jurisdiction is directly contrary to well established North Carolina law that the General Court of Justice has subject matter jurisdiction of the claim in this case.

Mr. Carden brought a tort claim against Owle, a North Carolina corporation,

arising out of an incident in a U.S. Highway right-of-way owned by the N.C. Department of Transportation that runs through the Qualla Boundary, the territory of the Eastern Band of the Cherokee Indians. The North Carolina courts have repeatedly held that they have subject matter jurisdiction of injury claims even though they occur on the Qualla Boundary. For example, in *Sasser v. Beck*, 40 N.C. App. 668, 253 S.E.2d 577, *disc. rev. denied* 298 N.C. 300, 259 S.E.2d 915 (1979), this Court addressed the question of whether the North Carolina General Court of Justice has subject matter jurisdiction over tort claims arising on the Qualla Boundary. In *Sasser*, a non-Indian Plaintiff brought a premises liability claim against two individual members of the Eastern Band of Cherokee Indians (EBCI) arising out of an incident that occurred at the defendants' motel on the Qualla Boundary. After reviewing the history of the state's civil jurisdiction over the tribe, the *Sasser* court concluded that North Carolina courts gained civil jurisdiction over the EBCI following the Treaty of New Echota in 1835, and that subject matter jurisdiction of the North Carolina courts remains unchanged regardless of subsequent federal recognition of the EBCI. The Court of Appeals specifically held in *Sasser* that North Carolina courts *do* have subject matter jurisdiction to adjudicate tort claims arising on the Qualla Boundary between EBCI members and

non-Indians.[3]

If anything, the argument for subject matter jurisdiction in this case is stronger than it was in *Sasser*. While the tort claim in *Sasser* arose in Indian country (EBCI owned-land within the Qualla Boundary), Mr. Carden's claim arose within the right-of-way of a U.S. Highway that is owned by the N.C. Department of Transportation. The Cherokee Tribal Court itself has declared that the portion of U.S. 19 where this accident occurred is not Indian country, but is property owned by the State of North Carolina.[4] While the defendants who fought the North

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[3] The North Carolina court have acknowledged that the jurisdiction of the state courts are more circumscribed in cases involving the paternity or child support of Indian children living on the Qualla Boundary with their parents, or in cases directly affecting casino operations at the casino owned by the EBCI.

For example, the North Carolina Supreme Court dealt with this in *Jackson County by and Through its Child Support Enforcement Agency, ex Rel. Annette Jackson v. John Wesley Swayney*, 319 N.C. 52, 352 S.E.2d 413 (1987). The Supreme Court there held that the State court lacked subject matter jurisdiction to determine paternity of an Indian child where the child, mother and father were all Indians living on the reservation; the State Court had jurisdiction to determine and enforce child support obligations once paternity was established.

In *Hatcher v. Harrahs N.C. Casino Company, LLC*, 169 N.C. App. 151, 610 S.E.2d 210 (2005), the Court of Appeals concluded that the state courts did not have subject matter jurisdiction to adjudicate a dispute over gambling winnings between a casino patron and the casino operated by the EBCI.

The present case, of course, is markedly different from these cases since neither party is an Indian living on the reservation and the defendant is not a tribal entity and the case does not seek to question the casino operations directly.

[4] The EBCI's Tribal Court has declared the stretch of highway upon which the accident occurred as subject to the operation of "a kind of 'judicial alchemy,'

Carolina Court's jurisdiction in *Sasser* were natural persons with tribal membership, the Defendant corporation in this matter is not a natural person but is a corporation chartered by the State of North Carolina. Owle, as a corporation, is not a member of the EBCI.[5] Instead, Owle is a corporation chartered by the State of

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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" a federal test that determines whether a tribe maintains sovereignty to exercise some forms of civil jurisdiction over non-Indians on their reservations. *Dorman v. Eastern Band of Cherokee Indians*, 7 Cher. Rep. 5, 8, 2008 N.C. Cherokee Sup. Ct. LEXIS 2, 7-8 (Cherokee Supreme Court of North Carolina, March 5, 2008) (citing *Crow v. Parker*, 6 Cher. Rep. 33, 36, 2007 N.C. Cherokee Sup. Ct. LEXIS 21, 7-8 (The Cherokee Supreme Court of North Carolina, Oct. 17, 2007)).

[5] The Cherokee Code of Ordinances § 49-2 makes this clear:

The membership of the Eastern Band of Cherokee Indians shall consist of the following:

(a) All persons whose names appear on the roll of the Eastern Band of Cherokee Indians of North Carolina, prepared and approved pursuant to the Act of June 4, 1924 (43 Stat. 376), and the Act of March 4, 1931 (46 Stat. 1518);

(b) All direct lineal descendants of persons identified in *section 49-2*(a) who were living on August 14, 1963; who possess at least 1/32 degree of Eastern Cherokee blood, who applied for membership prior to August 14, 1963, and have themselves or have parents who have maintained and dwelt in a home at sometime during the period from June 4, 1924, through August 14, 1963, on lands of the Eastern Band of Cherokee Indians in the Counties of Swain, Jackson, Graham, Cherokee and Haywood in North Carolina;

(c) All direct lineal descendants of persons identified in section 49-2(a) who apply for membership after August 14, 1963, and who possess at least 1/16

North Carolina.

Given that *Sasser* holds there is subject matter jurisdiction over a suit by a non-Indian against individual EBCI members in tort actions arising on EBCI land, then surely the General Court of Justice has jurisdiction of a suit by a non-Indian North Carolina citizen against a North Carolina corporation for a claim of negligence occurring in a right-of-way owned by the State of North Carolina.

While Defendant Owle did not file a brief in the Superior Court, in the Superior Court Owle primarily argued that the current action should be dismissed because the Tribal Court had subject matter jurisdiction of this action. Although the question of whether the Tribal Court currently would have jurisdiction of a re-filed action by Mr. Carden against Owle is potentially a difficult question, that issue really has no bearing on the issues in the present appeal which concern the subject matter jurisdiction of the North Carolina courts rather than the tribal court.[6] Even if

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degree of Eastern Cherokee blood.

Cherokee Code § 49-2. Corporate entities are not tribe members. Thus, the Defendant Owle is not an EBCI tribe member. The cited Cherokee provision can be found at http://www.narf.org/nill/Codes/ebcicode/49enrollment.pdf.

[6] The Record reflects that the Tribal Court viewed that it had jurisdiction over Plaintiff's claims against Owle only by operation of the doctrine of pendent jurisdiction. Because it initially had jurisdiction of the claims brought against the tribal entities such as the Tribal Casino Gaming Enterprise, pendent jurisdiction provided jurisdiction of the claims against Owle. Because no tribal entities are

the Tribal Court has jurisdiction, its jurisdiction would, at most, be concurrent with the subject matter jurisdiction of the North Carolina Courts over this action. The Tribal Courts do not have exclusive jurisdiction.

If Owle's argument is that it would be more appropriate to try the case in the Cherokee Tribal Court than in the North Carolina Courts, it picked the wrong procedural mechanism to present its argument. Rather than attacking the subject matter jurisdiction of the North Carolina court and seeking a dismissal, Owle should have filed a motion to stay of the current action in favor of proceeding in the Tribal Court.

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parties to the re-filed action, pendent jurisdiction would not exist in the Tribal Court to provide subject matter jurisdiction of the current action.

In its September 2, 2010 order, the Tribal Court stated:

> First, the Plaintiff argues that, by virtue of the absence of the Tribal entities, this matter bas become converted into a garden variety case governed by *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) and therefore the case should be dismissed. The testimony in the case discloses that the Plaintiff was injured within the right-of-way of the State of North Carolina. 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. But that is not what happened. At the time of the transfer Order, Tribal entities were party Defendants and all parties agreed that the Court properly possessed subject matter jurisdiction over the action and personal jurisdiction over them.

R. P. 29.

The General Statutes provides a statutory mechanism to deal with how a case pending in the General Court of Justice is to be handled when a claim is made that the action should first be pursued in the courts of another jurisdiction. N.C. Gen. Stat. § 1-75.12 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 to be dismissed. Indeed, the statute specifically states:

> § 1-75.12. Stay of proceeding to permit trial in a foreign jurisdiction
>
> > (a) When Stay May be Granted. -- If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial.
> >
> > (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 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.
> >
> > (c) Review of Rulings on Motion. -- Whenever a motion for a stay made pursuant to subsection (a) above is granted, any nonmoving party shall have the right of immediate appeal. Whenever such a

> motion is denied, the movant may seek review by means of a writ of certiorari and failure to do so shall constitute a waiver of any error the judge may have committed in denying the motion.

Defendant Owle declined to use this provision and instead chose to argue that the General Court of Justice lacked subject matter jurisdiction of the present action. Manifestly, the General Court of Justice has plenary subject matter jurisdiction of this action against Owle.[7] In sum, the prior decisions of the North Carolina courts make clear that the General Court of Justice would have subject matter jurisdiction over claims of negligence in this case even if the claims had arisen on the Qualla Boundary rather than in the U.S. 19 right of way. The Court of Appeals should reverse the decision of the Superior Court which concluded to the contrary.

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[7] Finally, Owle cannot be heard to argue that the consent order entered in the first action between Owle, Mr. Carden and the casino defendants affects the determination of subject matter jurisdiction of the General Court of Justice in the present action. That consent order specifically stated that it was not deciding any question of the subject matter jurisdiction of the North Carolina Courts. In its order of April 2008, the Superior Court provided:

> This court makes no decision at present over whether it has subject matter jurisdiction in this matter.

Thus the consent order entered between the parties in the first action has no effect on the issues concerning subject matter jurisdiction in the second action.

The Consent Order is set out in the Record on Appeal in the first appeal between the parties at p. 49, Court of Appeals case number 11-289.

II. THE COURT OF APPEALS SHOULD REVERSE THE ORDER OF DISMISSAL BECAUSE THE COMPLAINT STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Under N.C. R. Civ. P. 12(b)(6)**,** a defendant may move to dismiss a claim for "[f]ailure to state a claim upon which relief can be granted." In considering a Rule 12(b)(6) motion, a court must accept as true all of the allegations contained in a complaint and view them in the light most favorable to the plaintiff to determine whether they are sufficient to state a claim upon which relief may be granted under some legal theory. *Isenhour v. Hutto*, 350 N.C. 601, 517 S.E.2d 121 (1999).

Dismissal under N.C. R. Civ. P. 12(b)(6) is proper only "when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

To make out a prima facie case of negligence, a plaintiff must show that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) damages resulted from the injury. *Lamm v. Bissette Realty*, 327 N.C. 412, 416, 395 S.E.2d 112, 115 (1990) (modifying and affirming

reversal of summary judgment for defendant on negligence where plaintiff fell down stairs).

In the matter at hand, Plaintiff's complaint alleged (1) that Defendant Owle undertook work at a pedestrian crosswalk in a highway right-of-way, (2) that the work required that it obtain a permit and to comply with certain state and federal safety regulations, including regulations to ensure the safety of pedestrians, (3) that Defendant Owle failed to obtain the necessary permits to work in the right of way and its work in the right of way failed to comply with numerous safety regulations under the Manual on Uniform Traffic Control Devices applicable to those working in the right of way; (4) that Owle's failure to follow safety rules interfered with visibility for both pedestrians and motorists on U.S. 19; and (5) that Plaintiff was struck by a vehicle and injured as a proximate result of Defendant Owle's acts and omissions. R. pp. 9-14.

The North Carolina courts have long recognized that a contractor working in a highway right of way has a duty of care to the motorists and pedestrians using the highway and the contractor's negligence will subject the contractor to liability for injuries to motorists and pedestrians using the highway. For example, this Court stated in *Huss v. Thomas,* 12 N.C. App. 692, 693, 184 S.E.2d 381 (1971): "Contractors must exercise ordinary care in providing and maintaining reasonable

warnings and safeguards against conditions at the time and place." See also, *Gold v. Kiker*, 216 N.C. 511, 5 S.E.2d 548 (N.C. 1939); *C.C.T. Equipment Co. v. The Hertz Corp.*, 256 N.C. 277, 123 S.E.2d 802 (1962).

Plaintiff has therefore pleaded a prima facie case of negligence and stated a claim for relief.[8]

Defendant Owle did not file a brief in the Superior Court in support of its

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[8] The North Carolina Courts have also repeatedly indicated that failure to comply with the MUTCD is evidence of negligence in cases involving collisions in roadways. See *Jordan v. Jones*, 314 N.C. 106, 331 S.E.2d 662 (N.C. 1985); *Lonon v. Talbert*, 103 N.C.App. 686, 407 S.E.2d 276 (1991), and *Talian v. City of Charlotte*, 98 N.C.App. 281, 390 S.E.2d 737 (1990).

North Carolina appears to be in the majority of jurisdictions that hold that failure to comply with the MUTCD is evidence of negligence. A number of jurisdictions have held that failure to comply with the MUTCD is negligence per se while other jurisdictions have held that it is evidence of negligence rather than negligence per se. See, e.g., *Fraker v. C.W. Matthews Contracting Co., Inc*., 272 Ga.App. 807, 614 S.E.2d 94 (2005); *Burnett v. Lewis*, 852 So. 2d 519 (La. Ct. App. 4th Cir. 2003; *Schmidt v. Washington Contractors Group, Inc*., 290 Mont. 276, 964 P.2d 34, 38 (1998). See also *Faulconbridge v. State*, 333 Mont. 186, 142 P.3d 777 (2006) (stating that failure to comply with the MUTCD is not negligence per se). But see *Patton v. Cleveland*, 95 Ohio App.3d 21, 641 N.E.2d 1126 (1994) (holding that failure to meet requirements of MUTCD to post construction approach signs was negligence per se, not some evidence of negligence); see also *Fowler v. Henderson*, 2003 WL 23099686 (Tenn.Ct.App. 2003)(appellate court reversed summary judgment for tree company working in right of way where there was the tree trimming company was negligent for failing to properly warn motorists that its operations in compliance with the requirements set forth in the MUTCD.

motion to dismiss for failure to state a claim. As a result, it is difficult for the Plaintiff-Appellant to anticipate what arguments Owle may make in this court on appeal. Plaintiff, however, will address a possible argument that might be made concerning the statute of limitations.

Plaintiff's filing of this new action was timely because it was filed within one year of the dismissal of the prior action. The recent Court of Appeals decision in *Carden v. Owle Construction*, ___ N.C. App. ___, 720 S.E. 2d 825 (2012) made it clear that the earlier case between these parties filed in Durham Superior Court was completely removed to Cherokee Court by the consent order entered in the case in April 2008. Prior case law is clear that where a case is started in the General Court of Justice and is later removed to another court and then voluntarily dismissed in the other court, the one-year rule of Rule 41(a) allows the re-filing the case in the North Carolina courts.

Removal from state courts to the courts of an Indian tribe is directly analogous to the situation in which a plaintiff files an action in state court and the action is removed to federal court. The North Carolina courts have repeatedly held that where the action is voluntary dismissed after removal to a federal court, a new action based on the same claims may be re-filed in state court within one year. *Fleming v. Southern R.R. Co.*, 128 N.C. 80, 81, 38 S.E. 253, 1-2 (1901) explicitly

approves of such re-filing of an action in state court within one year after dismissal of an action removed to federal court. In *Fleming*, the plaintiff passenger had filed a personal injury action in state court, and the defendant railroad had removed the case to federal court. The North Carolina Supreme Court affirmed judgment against the railroad company after the plaintiff re-filed in state court within one year of dismissing of the removed case in federal court. *Id. Accord, Brooks v. Suncrest Lumber Co.*, 194 N.C. 141, 143, 138 S.E.2d 532, 533 (1927) (same); *Marshall Motor Co. v. Universal Credit Co.*, 219 N.C. 199, 13 S.E.2d 230 (N.C. 1941) (same).

This result is also strengthened by the fact Plaintiff's dismissal of his first action against Defendant Owle was taken pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure which expressly provides for the one year re-filing period. R. p. 16. Under Cherokee Code § 7-14(a), the EBCI has adopted for use the North Carolina Rules of Civil Procedure, Evidence, and Appellate Procedure. The Cherokee Code states that "the Cherokee Tribal Council adopts these North Carolina rules as a matter of comity to promote respect for the Cherokee Courts and to facilitate the practice of law in the Cherokee Courts." *Id.*

The Cherokee courts, thus, use North Carolina Rule of Civil Procedure 41(a)(1).[9] That Rule provides that a party may file a new action based on a claim one year of such dismissal.

In sum, this action states a claim upon which relief can be granted and the complaint disclosed no bar to recovery in this case. As a result the action of the Superior Court in dismissing the case for failure to state a claim was erroneous and should be reversed.

REQUEST FOR ORAL ARGUMENT

Because of the unusual nature of the issues in this case involving removal of a case from State to Tribal Court, Plaintiff respectfully requests the Court to hold oral argument in this matter.

CONCLUSION

Plaintiff William David Carden, a citizen and resident of Durham County, has sought since 2006 to have the General Court of Justice for Durham County adjudicate his negligence claim against a North Carolina corporation. Mr. Carden

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[9] This Cherokee Code provision can be found online at http://www.narf.org/nill/Codes/ebcicode/7judicial.pdf.

seeks assistance from the courts of his state and his home county. Subject matter jurisdiction clearly exists over the case in the Durham Court and the complaint plainly states a claim for relief. For the foregoing reasons, Plaintiff respectfully requests the Court to reverse the Superior Court's order that dismissed the action and to remand the case to the Superior Court for further proceedings.

Respectfully submitted this the 29th day of May, 2012.

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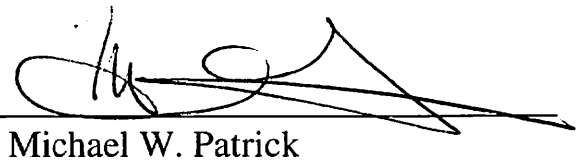
CERTIFICATION AS TO LENGTH OF BRIEF

Undersigned Counsel hereby certifies, pursuant to Rule 28 (j), that this brief was prepared in Times Roman 14 point type and contains fewer than 5500 words in the brief, exclusive of the Covers, Table of Authorities and Cases and Certificates

BY: 

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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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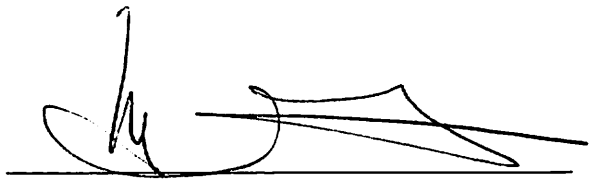

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