No. 12-493 FOURTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

WILLIAM DAVID CARDEN	)	
	)	
Plaintiff-Appellant,	)	
	)	From Durham County
v.	)	File No. 11 CVS 5119
	)	
OWLE CONSTRUCTION, LLC	)	
	)	
Defendant-Appellee.	)	

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PLAINTIFF-APPELLANT'S REPLY BRIEF

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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?

REPLY ARGUMENT

I. SUBJECT MATTER JURISDICTION EXISTED IN THE SUPERIOR COURT REGARDLESS OF THE JURISDICTION OF THE CHEROKEE COURT.

The thrust of Defendant's argument on the first issue concerning subject matter jurisdiction is that there cannot be subject matter jurisdiction in the Superior Court because there would have been jurisdiction in the Cherokee Court if the case had been re-filed there. The arguments Defendant makes in support of this proposition do not stand up to scrutiny.

First, Defendant Owle offers no argument to counter the settled authority that there is subject matter jurisdiction in the General Court of Justice of tort actions that occur in North Carolina, even those that occur within the Qualla Indian Boundary "QIB". See *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). Instead, Defendant Owle advances the notion that if there is jurisdiction in the Cherokee Court, there is no jurisdiction in the Superior Court. Owle Brief p. 6. Defendant Owle, however, offers no persuasive authority for the proposition of why Cherokee Court jurisdiction, if it exists, would exclude Superior Court subject matter jurisdiction.

Moreover, the arguments Defendant Owle offers in support of its position would require this Court to determine whether there would be Cherokee court jurisdiction of the re-filed action. This is the very type of question that this Court

declined to determine in *Carden v. Owle Construction, LLC*, ____ N.C. App. ____, 720 S.E. 2d 825, 829 (2012) when it indicated that it would not address the jurisdiction of the Cherokee Court. The resolution of this appeal depends on the subject matter jurisdiction of the Superior Court, which is plenary in this case, not upon the jurisdiction of the Cherokee Court.

If, however, this Court wished to wade into the question of the Cherokee Court jurisdiction, Plaintiff Carden offers the following rebuttal to Defendant Owle's arguments. First, Defendant Owle argues that the Cherokee Court would have jurisdiction of the second action against Owle because the accident occurred on Indian trust lands. Owle Brief, p. 6. Defendant Owle cites Cherokee Civil Code Section 1-2(c) as providing "jurisdiction over tortious conduct of all persons where the conduct occurs on Indian trust land." This section of the Cherokee Code does not apply because the accident that injured Plaintiff Carden did not occur on Indian trust land. The Cherokee Court has itself determined that the pedestrian crosswalk involved in this case is not Indian trust land. See *Dorman v. Eastern Band of Cherokee Indians*, 7 Cher. Rep. 5, 8, 2008 N.C. Cherokee Sup. Ct. LEXIS 2, 8 (2008). In *Dorman,* plaintiff was injured "when she was struck by an automobile while crossing Highway 19 in the crosswalk between the Fairfield Inn and Harrah's Cherokee Hotel and Casino (the Casino) on the Qualla Indian Boundary (QIB)."

Id. at 6, 2008 N.C. Cherokee Sup. Ct. LEXIS 2 at 4. In *Dorman*, the Cherokee Court applied existing federal precedent to hold the crosswalk is "non-Indian fee land" for purposes of determining the Cherokee Court's subject matter jurisdiction. *Id.* at 8, 2008 N.C. Cherokee Sup. Ct. LEXIS 2 at 8. See also *Crow v. Parker*, 6 Cher. Rep. 33, 2007 N.C. Cherokee Sup. Ct. LEXIS 21 (2007) (dismissing a personal injury claim in Cherokee Court against non-Indian defendants for lack of subject matter jurisdiction where the accident occurred within the N.C. DOT right of way). Plaintiff Carden was injured in same crosswalk of U.S. 19 where the accident occurred in *Dorman*. Thus Plaintiff Carden was not injured on Indian trust land.

This probable lack of subject matter jurisdiction in the Cherokee Court of an accident occurring in U.S. 19 was the very reason that the Cherokee Court in *Carden I* resorted to the doctrine of "pendent jurisdiction" in its September 2010 order after the settlement with the tribal entities. If Mr. Carden had re-filed the action in the Cherokee Court, Plaintiff Carden would have run a serious risk of having the re-filed action dismissed when Defendant Owle contested subject matter jurisdiction in the Cherokee Court.

Defendant Owle's next argument – the Superior Court does not have subject matter jurisdiction because it must give "full faith and credit" to the Cherokee

Court's September 2010 order – fails because it misrepresents what that order says. Defendant Owle argues that the Superior Court does not have subject matter jurisdiction over the case because North Carolina courts must "give full faith and credit" to the September 2, 2010 Order of the Cherokee Court. Owle Brief, p. 6. To rule for Plaintiff Carden, the North Carolina Court of Appeals does not need to "ignore" the September 2, 2010 Order of the Cherokee Court regarding its jurisdiction over *Carden I*. Nor does this Court need to deny the order the full faith and credit as Defendant Owle claims. The Cherokee Court's order simply has nothing to say about the issues of this appeal – the subject matter jurisdiction of the General Court of Justice over the re-filed action. The issue of the subject matter jurisdiction of the North Carolina courts over the Plaintiff's claims was never addressed by the Cherokee Court. The Cherokee Court never expressed an opinion over the North Carolina court's jurisdiction of Mr. Carden's claims against Owle.

If Defendant Owle had truly wanted to determine whether the Cherokee Court had jurisdiction over Plaintiff's claims by virtue of its September 2, 2010 Order, Defendant Owle should have sought a stay of this matter under N.C. Gen. Stat. § 1-75.12. To do this Owle would have had to stipulate to allowing the case to be re-filed in the Cherokee Court and to jurisdiction in that court. Defendant Owle chose not to do this.

None of Defendant Owle's remaining arguments defeat the subject matter jurisdiction of the North Carolina courts. Defendant Owle cites *Williams v. Lee*, 358 U.S. 217 (1987). Owle Brief p. 10. *Williams* is a commercial case involving a debt collection action brought by a non-Indian merchant against Navajo tribe members over purchases made at a store on a reservation in Arizona. The tribal interest at issue in *Williams* was, according to a later U.S. Supreme Court analysis, an interest in self-governance of economic activities "on the reservation that had a discernible effect on the tribe or its members." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332 (U.S. 2008). In contrast, in the case at hand, Plaintiff Carden does not make any claims or seek any remedies that implicate the Eastern Band of Cherokee Indians' ("ECBI") interest in governing the tribe's economic activities. It is a simple negligence claim by a North Carolina citizen against a North Carolina corporation for personal injury suffered in a state-owned highway right-of-way.

Defendant Owle also cites *Jackson Co. v. Swayney*, 310 N.C. 52, 35 S.E.2d 413 (1987). That case is also irrelevant to the issue at hand. In *Swayney*, a county brought a paternity action in state court against a member of the EBCI involving an ex-wife and children who were also EBCI members, all of whom resided on the QIB. The Supreme Court of North Carolina held that the Cherokee Court had

exclusive jurisdiction over the adjudication of paternity on those facts because the question of paternity of a tribe member was one of special interest to tribal self-governance. 310 N.C. at 63, 35 S.E.2d at 419. Adjudicating Mr. Carden's claims for Owle's negligence on a state-owned highway right-of-way does not implicate tribal self-governance.

Finally, Defendant Owle cites *Jackson Co. v. Smoker*, 341 N.C. 182, 459 S.E. 2d 789 (1995). *Smoker*, a companion case to *Swayney*, is similarly irrelevant to the issues before this Court. In *Smoker*, a county filed an action in state court against an EBCI member for reimbursement of child support funds and entry of a child support order. 341 N.C. at 182, 459 S.E. 2d at 789. The defendant's ex-wife, also an EBCI member, had earlier won a judgment in Cherokee Court against her ex-husband for support. *Id.* The Supreme Court of North Carolina found that both the state court and the tribal court had concurrent jurisdiction over child support claims. *Id.* at 183, 459 S.E.2d at 790. It held, however, that the county must bring its claim in the Cherokee Court, however, because the Cherokee Court had "retained" jurisdiction over claims based on the ex-husband's duty to support the children. *Id.* A family court typically retains jurisdiction over enforcement and modification of the obligations that a child support adjudication creates.

The procedural posture of the second action in *Swayney* was quite different

than the situation in the present case. In *Swayney*, the Cherokee Court issued a final adjudication on the parties' original claims regarding child support well before the county filed an action in state court. In Plaintiff Carden's case, the Cherokee Court made no final adjudication of the claims against Defendant Owle. After a mistrial, Plaintiff Carden settled with the tribal defendants. Moreover, the September 2, 2010 order of the Cherokee Court did not retain jurisdiction of claims in Carden I in the sense used in *Swayney*. The Order simply found that on September 2, 2010, under the doctrine of pendent jurisdiction[1], the Cherokee Court still had jurisdiction of the claim despite the dismissal of the tribal entities whose presence had necessitated the transfer of the case to the Cherokee Court in the first place. The wording of the September 2, 2010 order gives no indication that Judge Martin intended for the Cherokee Court to "retain" subject matter jurisdiction over Plaintiff Carden's claims against Owle for all time. Only after that Order was entered was the voluntary dismissal take. Thus, the Cherokee Court did not "retain" jurisdiction and there was no final adjudication was made of plaintiff's claims against Defendant Owle.

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[1] The pendent jurisdiction doctrine is the doctrine applied in federal court to prevent loss of jurisdiction where federal question jurisdiction has been lost as a result of a development in the case. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

II. RULE 41(a)(1) SAVINGS PROVISION APPLIES TO THIS ACTION BECAUSE PLAINTIFF'S PRIOR ACTION WAS VOLUNTARILY DISMISSED PURSUANT TO NORTH CAROLINA'S RULE 41(a)(1) AND INVOLVED NORTH CAROLINA SUBSTANTIVE LAW.

Defendant Owle also argues that the "savings" provision of N.C.R.Civ. P. 41(a)(1) does not apply to Plaintiff Carden's new action and that the statute of limitations thus bars his claim. Defendant Owle asserts that because *Carden I* was transferred from its original venue, Durham County Superior Court, to the Cherokee Court, "logically, the Plaintiff's original action is treated for dispositional purposes as if it had been originally filed in the Cherokee Court." Owle Brief p. 12. Similarly, Defendant Owle also argues that this Court should disregard case law applying the Rule 41(a) "savings" provision for diversity cases dismissed from federal court and re-filed in state court. Owle Brief p. 12-13. Defendant Owle reasons that such cases are inapplicable because "federal courts sitting in diversity jurisdiction and applying North Carolina law are treated 'like another court of the state'" (citations omitted), rather than as "foreign jurisdiction." Defendant cites no North Carolina case authority for these propositions.[2]

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[2]While the Eastern Band of Cherokee Indians is a sovereign entity, it operates far less like a "foreign jurisdiction" and more like a court sitting in diversity jurisdiction and applying North Carolina law. According to the Order of the Cherokee Court, entered on September 2, 2010 in Carden I, the Cherokee Court accepted as a matter of comity the transfer of the Carden I action, which asserted the same North Carolina common-law negligence claims. EBCI members, and thus, the court's jury pool, are eligible to vote as citizens of North Carolina and

The only authority cited by Defendant Owle is a "so-called" majority rule from other jurisdictions. Defendant Owle does not explain the reasoning of its so-called "majority rule" or to explain why the "majority rule," rather than some other, should apply to Plaintiff Carden's case. Without examining the rationale of either position, Defendant appears to argue that North Carolina's courts should follow the so-called "majority rule" merely because it is more popular.

Contrary to Defendant's Owle's assertions, Defendant Owle's rule violates both prior North Carolina precedent and the public policy of the State of North Carolina. In *Bockweg v. Anderson*, this Court and later the North Carolina Supreme Court rejected the approach suggested by Defendant Owle. In *Bockweg v. Anderson*, 96 N.C. App. 660, 387 S.E.2d 59 (1990), the North Carolina Court of Appeals considered whether the savings provision of N.C. R. Civ. P. 41(a)(1) applied to an action that was filed and voluntarily dismissed in a North Carolina federal court under diversity jurisdiction, then re-filed in a North Carolina state court. The *Bockweg* defendants relied on *High v. Broadnax*, 271 N.C. 313, 316,

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serve on N.C. juries. In Cherokee Court, attorneys must have North Carolina law licenses. Cherokee Court L.R. 83.1(b). Judges and justices of the Cherokee Courts must be attorneys licensed by the North Carolina State Bar. Cherokee Code § 7-8. Virtually the only procedural difference between the litigation of a negligence claim in Cherokee Court and in a North Carolina State Court is that the Cherokee Court follows the comparative negligence scheme and uses six person juries.

156 S.E.2d 282, 284 (1967). In *High*, the Supreme Court of North Carolina had considered the situation where an action was filed and voluntarily dismissed in a federal court in West Virginia, and then re-filed in North Carolina state court. The *High* court held that the savings provision was not tolled when the original suit had been brought in "another jurisdiction." 96 N.C. App. at 661, 387 S.E.2d at 59. The Court of Appeals in *Bockweg*, however, distinguished *High v. Broadnax*, holding that Rule 41(a)(1)'s savings provision was rewritten in 1969 and superseded the version of the Rule the *High* Court had applied. "The statute will [now] be tolled when voluntary dismissal is granted *pursuant to the North Carolina Rules of Civil Procedure*, regardless of whether or not the dismissal is granted in a State court." *Id.* at 661, 387 S.E.2d at 60 (emphasis added).[3]

When *Bockweg* was reviewed by the Supreme Court of North Carolina, the Supreme Court explicitly overruled *High* which had followed the so-called "majority" rule suggested by Owle in this case. See *Bockweg v. Anderson*, 328 N.C. 436, 449; 402 S.E.2d 627 (1991). It also rejected the notion that the savings

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[3] *Bockweg* has been followed in a number of cases where suits were brought in other states and dismissed to allow re-filing in courts sitting in North Carolina. See *Simpson v. Air Liquide Am., LP*,2009 U.S. Dist. LEXIS 68984 (W.D.N.C. July 20, 2009) (citing *Bockweg* and *Clark v. Velsicol Chemical Corp*., 110 N.C. App. 803, 431 S.E.2d 227, 229 (N.C. App. 1993)) (holding that plaintiff who had previously filed and voluntarily dismissed his claims in both South Carolina and Texas could re-file them in court in North Carolina under *Bockweg*.

clause of Rule 41 was limited only to cases filed in North Carolina courts. Specifically the Supreme Court stated:

> **The rule itself does not expressly extend or limit the application of the savings provision to dismissals or refilings in any particular court**.

328 N.C. at 449.

The *Bockweg* Supreme Court decision makes clear that what is important for purposes of applying North Carolina's savings provision is not *where* an action was originally brought, but rather that North Carolina's law applied to the original action. In other words, when a case originally filed in another forum or jurisdiction – *any* other forum or jurisdiction – relies on North Carolina substantive law and is voluntarily dismissed, the savings provision of N.C. R. Civ. P. 41(a)(1) applies, and the statute of limitations is tolled during the one-year period for re-filing. That is exactly what happened in the present case. Plaintiff's case involving North Carolina law was started in the North Carolina courts, transferred to Cherokee Court and voluntarily dismissed using N.C. Civ. Proc. Rule 41.[4] Plaintiff Carden's voluntary dismissal of *Carden I*, thus falls squarely within the holding of *Bockweg*.

Not only does the case law of North Carolina support Plaintiff Carden's

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[4] Plaintiff Carden's original case, Carden I, was originally filed in North Carolina state court and voluntarily dismissed from the Cherokee Court pursuant to N.C. R. Civ. P. 41(a), as the Cherokee Court uses the North Carolina Rules of Civil Procedure. R. p. 16.

position with respect to the statute of limitations, but public policy calls for the same result. Similar cases from another jurisdictions explain the public policy underpinning the North Carolina Court of Appeals' interpretation of its savings provision in *Bockweg*. In *Templer v. Zele*, 166 Ariz. 390, 391 (Ariz. Ct. App. 1990), an Arizona appellate court considered the filing in Arizona of an action originally filed and voluntarily dismissed in another jurisdiction. The *Templer* cited Justice Cardozo's observation that a "savings" provision

> is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction. The important consideration is that, by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts.

Id. (citing *Gaines v. City of New York*, 215 N.Y. 533, 539, 109 N.E. 594, 596 (App. 1915). Noting that the purpose of a statute of limitation is to give a defendant "reasonable and timely notice" of a claim against it, the *Templer* court reasoned that application of the Arizona savings provision to a case previously timely filed in a different state would not negate that purpose; the filing of the first action gave the defendant fair notice of the claim. 166 Ariz. at 391. The plaintiff's use of the savings statute to file the case in the new forum did not, therefore, harm the defendant. *Id.* Meanwhile, the important public policy for access to the courts

would be served, as the plaintiff would have the chance to have the case judged on its merits. *Id.*[5]

In the present case, Plaintiff Carden timely filed his original case, *Carden I,* based on North Carolina substantive law in the state court of North Carolina, within the North Carolina statute of limitations. *Carden I* was then transferred to the Cherokee Court. Plaintiff dismissed his claim voluntarily in Cherokee Court pursuant to North Carolina's Rule 41(a)(1). Plaintiff re-filed his action as *Carden II* within one year in state court in North Carolina. Defendant cannot argue that use of of Rule 41's savings provision to this case harms it. Nor has any forum-shopping occurred. Plaintiff filed his original action in the state court in Durham, North Carolina, which is exactly where he has re-filed it.

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[5] For similar holdings, see also, e.g., *Technical Consultant Services, Inc. v. Lakewood Pipe of Texas*, *Inc.*, 861 F.2d 1357 (5th Cir.1989) (Texas law); *Long Island Trust Co. v. Dicker*, 659 F.2d 641, 645-647 (5th Cir. 1981) (Texas law) (same); *Prince v. Leesona Corp., Inc.*, 720 F.2d 1166 (10th Cir.1983) (Kansas law); *Allen v. Greyhound Lines, Inc.*, 656 F.2d 418 (9th Cir.1981) (Montana law) (holding that Montana's savings statute should be liberally construed to allow re-filing in Montana of actions previously filed in other states within the Montana statute of limitations); *Stare v. Pearcy*, 617 F.2d 43 (4th Cir.1980) (West Virginia law); *Leavy v. Saunders*, 319 A.2d 44 (Del.Super.Ct. 1974); *McCrary v. United States Fidelity & Guar. Co.*, 110 F. Supp. 545 (D.S.C.1953) (Arkansas law); *Nichols v. Canoga Industries*, 83 Cal. App. 3d 956, 148 Cal. Rptr. 459, 463 (Cal.App. 1978) (California law); *Cook v. Britt*, 8 Ill. App. 3d 674, 290 N.E.2d 908, 909 (Ill.App. 1972) (Illinois law).

CONCLUSION

For the reasons given in Plaintiff Appellant Carden's original brief, and the reasons above, the Court should reverse the Superior Court's order and reinstate Plaintiff Carden's action.

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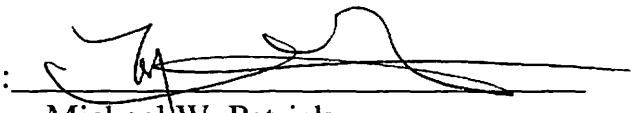
CERTIFICATION AS TO LENGTH OF BRIEF

Undersigned Counsel hereby certifies, pursuant to Rule 28 (j), that this brief was prepared in Times Roman 14 point type and contains fewer than 3750 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 Reply Brief of Plaintiff-Appellant was filed with of the Clerk of the Court of Appeals by use of the electronic filing system and was served on Defendants-Appellant by mailing a copy to:

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