

FOURTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

WILLIAM DAVID CARDEN,)
Plaintiff-Appellant,)

v.)

From Durham County
No. 06 CVS 06720

OWLE CONSTRUCTION, LLC,)
Defendant-Appellee.)

PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31

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OWLE CONSTRUCTION, LLC,)	
Defendant-Appellee.)	

Plaintiff William David Carden respectfully petitions the Supreme Court of North Carolina pursuant to Rule 15 of the North Carolina Rules of Appellate Procedure and N.C. Gen. Stat. §7A-31 to certify for discretionary review the decision of the Court of Appeals filed March 19, 2013. The subject matter of this appeal involves legal principles of major significance to the jurisprudence of the State of North Carolina because the Court of Appeals decision holds that the North Carolina Courts are automatically divested of subject matter jurisdiction if the Cherokee Court has determined it had subject matter jurisdiction in an earlier action that is no longer pending. The Court of Appeals' decision also deprives litigants of the long settled benefits of Rule 41 voluntary dismissals without prejudice. The decision of the Court of Appeals conflicts with prior decisions of the Supreme Court construing the subject matter jurisdiction of the North Carolina

courts and it conflicts with prior rulings on the effect of voluntary dismissals under N.C. Civ. Proc. Rule 41(a). The case is also important to the jurisprudence of North Carolina because it is the first appellate decision interpreting the full faith and credit provisions of N.C. Gen. Stat. § 1E-1 passed in 2001 and the Court of Appeals misapplied the provision to an interlocutory order.

In support of this petition, Plaintiff respectfully shows the following:

FACTS

On September 29, 2011, Plaintiff William David Carden filed this tort action (*Carden II*) in the Superior Court division of the General Court of Justice, Durham County, North Carolina, against Owle Construction, LLC, alleging that its negligence in constructing a sidewalk along U.S. Highway 19 in Jackson County was a proximate cause of his injuries. R. p. 10. 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. 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. The Court of Appeals affirmed the decision of the Superior Court in its decision dated March 19, 2013 solely on the grounds that the Superior Court lacked subject matter jurisdiction of the case.

The claims in this action arise out of a pedestrian-car collision on U.S. 19 in Cherokee, North Carolina. On the night of December 12, 2003, Plaintiff 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 adjacent to the Qualla Indian Boundary in Swain County, North Carolina. R. pp. 9-10. At the time of the accident, Defendant Owle Construction, LLC (hereinafter referred to as "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 its principal place of business in Swain County. R. p. 8.

Plaintiff Carden's complaint alleged that Owle was negligent because it was operating within the N.C. DOT right of way without obtaining the necessary permits for the construction from the N.C. DOT and because its operation violated numerous safety rules that apply to roadway construction. 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.

Plaintiff Carden initially filed his claims (*Carden I*) on December 8, 2006 in the Superior Court for Durham County against Owle. Defendant Owle did not

contest jurisdiction in the General Court of Justice in that action. Mr. Carden also sued Harrah's North Carolina Casino Company, LLC and Harrah's Operating Company, Inc. (hereinafter referred to as the casino defendants). R. p. 10. *Carden I* was set for trial in Durham on February 11, 2008 and then re-calendared for trial on August 25, 2008. On March 12, 2008, the casino defendants moved to dismiss *Carden I* 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 (hereinafter "EBCI"). 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 Superior Court, in its order, expressly stated it was not ruling on any jurisdictional issue. R. p. 10. The action was transferred to the tribal court as a result of the Superior Court's order.¹

After a mediation in 2010, Plaintiff Carden settled with the casino defendants and dismissed his action in the Cherokee Court against the casino

¹The Court of Appeals in an earlier decision held that the Superior Court's consent order acted to transfer or remove *Carden I* from the state courts to the tribal court, *Carden v. Owle Construction, LLC*, ____ N.C. App. ____, 720 S.E. 2d 825 (2012).

defendants. R. p. 29. Plaintiff Carden then asked the tribal court to return the action to Superior Court on the ground that, with the dismissal of the tribal entities, subject matter jurisdiction no longer existed in the tribal court for the claim against Owle. R. p. 28. On September 2, 2010, the Cherokee Court determined that while, as an original matter, it would not have had subject matter jurisdiction of a case against Owle Construction without the casino defendants, the doctrine of pendent jurisdiction allowed 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 EBCI. R. p. 16.

On September 29, 2011, within a year of the voluntary dismissal, Mr. Carden filed a new action (*Carden II*) against Owle Construction in the Superior Court for Durham County. Defendant Owle then filed a motion to dismiss the new action alleging the Superior Court lacked subject matter jurisdiction of the new action and alleging a failure to state a claim. The Superior Court granted the motion to dismiss on both grounds.

On appeal, the Court of Appeals affirmed the Superior Court's holding that subject matter jurisdiction did not exist for Plaintiff's action in Superior Court.

The Court of Appeals acknowledged an earlier North Carolina decision in *Sasser v. Beck*, 40 N.C.App. 668, 253 S.E.2d 577 (1977). *Sasser* held that the North Carolina courts have plenary subject matter jurisdiction over tort claims arising on the Qualla Indian Boundary. The Court of Appeals, however, held that even though *Carden I* had been voluntarily dismissed, the Cherokee Court's ruling in *Carden I* that it had pendent jurisdiction of *Carden I* divested the Superior Court of subject matter jurisdiction in *Carden II*. The Court of Appeals' only rationale for this holding was that the North Carolina courts must give full faith and credit to the decisions of the tribal courts under N.C. Gen. Stat. § 1E-1(a)(2011). The tribal court in *Carden I*, however, never determined that the North Carolina Courts lacked subject matter jurisdiction over the claims against Owle Construction. Instead, Cherokee Court's order suggests that the tribal court would lack subject matter jurisdiction of Mr. Carden's claims if the only defendant in the complaint was Owle, the situation in *Carden II*.

REASONS WHY CERTIFICATION SHOULD BE GRANTED

THE SUPREME COURT SHOULD REVIEW THE COURT OF APPEALS' DECISION BECAUSE THIS CASE INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF NORTH CAROLINA.

The Court of Appeals' decision below has great significance for the

jurisprudence of the State of North Carolina for several reasons. First, its ruling that North Carolina Courts are automatically divested of subject matter jurisdiction because of a ruling by the tribal court in a prior case severely restricts the right of North Carolina citizens. Second, the Court of Appeals' decision on this point ignores the main decision of the North Carolina Supreme Court that outlines how the North Carolina courts should determine whether they have subject matter jurisdiction over civil actions over matters that may arise on the Qualla Indian Boundary. In addition, the Court of Appeals' decision is a major departure from prior North Carolina case law that interprets the effect of voluntary dismissals taken without prejudice under Rule 41(a) of the North Carolina Rules of Civil Procedure. Finally, the Court of Appeals is the first appellate decision to apply the full faith and credit provision of N.C. Gen. Stat. § 1E-1 enacted in 2011, and the Court of Appeals misapplied the provision to an interlocutory order.

A. THE COURT OF APPEALS' DECISION ON THE SUBJECT MATTER JURISDICTION OF THE NORTH CAROLINA COURTS AND ON VOLUNTARY DISMISSALS IGNORES PRIOR PRECEDENT AND RESTRICTS THE RIGHTS OF NORTH CAROLINA CITIZENS TO ACCESS THEIR COURTS.

In holding that the tribal court's ruling in *Carden I* that it had subject matter jurisdiction automatically deprived the state court of its subject matter jurisdiction

in *Carden II*, the Court of Appeals ignored the seminal case of *Jackson County v. Swayney*, 319 N.C. 52, 352 S.E.2d 413, *reh'g denied*, 319 N.C. 412, 354 S.E.2d 713, *cert. denied*, 484 U.S. 826, 98 L. Ed. 2d 54 (1987). In *Swayney*, the Supreme Court of North Carolina addressed how the state courts determine when they have subject matter jurisdiction over matters that may arise on the Qualla Indian Boundary. The Court in *Swayney* established a three-prong test for determining whether exercise of state court jurisdiction unduly infringes on the self-governance of the Eastern Band of Cherokee Indians. *Id.* at 59-60, 352 S.E.2d at 418. The *Swayney* test required reviewing three criteria: “(1) whether the parties are Indians or non-Indians, (2) whether the cause of action arose within the Indian reservation, and (3) the nature of the interests to be protected.” *Id.* at 59, 352 S.E.2d at 418 (citing *New Mexico ex rel. Dept. of Human Services v. Jojola*, 99 N.M. 500, 502-3, 660 P. 2d 590, 592, *cert. denied*, 464 U.S. 803, 78 L.Ed. 2d 69 (1984)). Applying the three-part test, the *Swayney* court held that the General Court of Justice had jurisdiction to hear some of the claims presented in *Swayney* but not others. Specifically, *Swayney* held that the General Court of Justice had *concurrent* jurisdiction with the Cherokee Court to hear actions by Jackson County to recovery AFDC payments, because such concurrent jurisdiction did not significantly affect the tribe's interest in self-government. *Id.* at 63, 352 S.E.2d at

419. *Swayney*, however, also concluded that the state court had no jurisdiction over the issue of paternity because the issue of tribe member paternity is one of special interest to tribal governance. *Id.* at 63, 352 S.E.2d at 419.²

The Court of Appeals' decision below entirely ignores *Swayney* and the important principles set out in *Swayney* to delineate the boundaries of jurisdiction between the state and the tribal courts in North Carolina. Had the Court of Appeals heeded *Swayney*, the Court of Appeals would have found compelling reasons for subject matter jurisdiction in the state courts in the current case. The first prong of *Swayney* - whether the parties are Indian or non-Indian - favors jurisdiction in the state courts. Plaintiff William Carden, a Durham resident is not an Indian. Owle Construction, LLC is a North Carolina limited liability corporation.

The second prong of *Swayney* - whether the action arose on the Qualla Indian Boundary - also favors state court jurisdiction. Mr. Carden's accident occurred on U.S. 19, a right of way owned by the State of North Carolina.

Although the site of the accident is adjacent to the Harrahs Casino property, the

² In *Jackson County by & Through Child Support Enforcement Agency v. Smoker*, 341 N.C. 182 (N.C. 1995) the Supreme Court held the General Court of Justice had no subject matter jurisdiction over collection of AFDC payments where there was pending child support enforcement action in the Cherokee Courts. This case differs from *Smoker* in that in *Carden II* there was no pending case in tribal court when *Carden II* was filed. The Court of Appeals below discussed neither *Smoker* nor *Swayney*.

accident site is not on the Qualla Indian Boundary. The Cherokee Court has itself ruled that the pedestrian crosswalk on U.S. 19 involved in this case is not Indian trust land. In the earlier case of *Dorman v. Eastern Band of Cherokee Indians*, 7 Cher. Rep. 5, 8, 2008 N.C. Cherokee Sup. Ct. LEXIS 2, 8 (2008), plaintiff Dorman 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” in the process of determining the Cherokee Court lacked 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*. Plaintiff Carden was not injured on Indian trust land. The second prong of the *Swayney* test thus favors subject matter jurisdiction in the North Carolina courts.

The third and final prong of the *Swayney* test – the interests to be protected

– also favors subject matter jurisdiction in the North Carolina courts. The plaintiff was injured as a pedestrian crossing U.S. 19 because of the negligence of Owle Construction in failing to obtain the necessary permits from the State of North Carolina to work in the right of way owned by the State of North Carolina and because of Owle’s failure to comply with the safety regulations imposed by the State of North Carolina on contractors working in the highway right of way. In *Carden I*, witnesses from the casino and both N.C. DOT and the tribal DOT testified that it was Owle’s responsibility to obtain the necessary permits from the N.C. DOT and to comply with the N.C. DOT’s safety regulations for working in US 19.³ Mr. Carden’s negligence claim in this case thus raises questions of North Carolina law, not tribal law. Mr. Carden’s claims against Owle affect no interests of the EBCI. Instead they concern the important public interest of the State of North Carolina in maintaining public safety in its rights of way and highways.

In sum, the Court of Appeals’ decision below ignored the important principles enunciated in *Swayney* that govern the determination of subject matter

³In *Carden I*, both Jonathan Woodard, N.C. DOT District Engineer, and Robert Willcox, EBCI traffic engineer testified that Defendant Owle had to obtain permits from N.C. DOT and comply with N.C. DOT safety regulations to work in the US 19 right of way. Woodard Dep. p. 4-5; Willcox Dep. p. 5. Casino representative David Sneed testified that the casino entrusted Owle with obtaining a permit and complying with regulations for its work. Sneed Dep. p. 44.

jurisdiction in this case. In doing so, a North Carolina citizen was denied the right to seek redress in the state courts. It is important for the Supreme Court of North Carolina to reiterate its guidance to the lower court on how to determine the subject matter jurisdiction of the General Court of Justice.

This case is also important to the jurisprudence of North Carolina because the Court of Appeals' opinion ignored the important principles that apply to the dismissal and the re-filing of claims under Rule 41. Both the federal and North Carolina courts have repeatedly indicated that a voluntary dismissal of a case under Rule 41 wipes the slate clean and that the subsequent lawsuit is an entirely new lawsuit. 9 Wright & Miller, Federal Practice & Procedure Civil 2d §2367. Our courts have indicated that we should look to the federal decisions in interpreting the core of Rule 41. *See, e.g., Whedon v. Whedon*, 313 N.C. 200, 328 S.E. 2d 437 (1965).

The federal courts in interpreting the effect of a Rule 41 dismissal without prejudice have held that it is error to give a preclusive effect in the re-filed litigation to an order entered in an action prior to the voluntary dismissal. For example, in *Harvey Specialty & Supply, Inc. v. Anson Flowline Equip., Inc.*, 434 F.3d 320, 326 (5th Cir. 2005), plaintiff Harvey Specialty initially filed suit in Louisiana state court. Upon removal on grounds of diversity jurisdiction, the

federal district court entered an order that venue was improper in Louisiana and ordered the case transferred to a federal district in another state. The Plaintiff then took a voluntary dismissal of the federal action. When Harvey Specialty re-filed in Louisiana state court, it added a non-diverse defendant to defeat diversity jurisdiction in the federal courts. Defendant Anson Flowline then obtained an injunction in federal court against the state court proceeding arguing that the transfer order should be given preclusive effect even after the voluntary dismissal. On appeal, the Fifth Circuit held that the plaintiff's actions were a proper exercise of the right of voluntary dismissal under Rule 41(a) and that the venue rulings of the district court in the first action should not be given preclusive effect because the voluntary dismissal put the case in the same position as if the case had never been filed. The Fifth Circuit stated:

First and foremost, in none of the cases on which Anson relies were the dismissals voluntary dismissals under Rule 41(a)(1). As we have explained, **to apply preclusive effect to anything that precedes a Rule 41(a)(1) dismissal would deny the plaintiff's absolute right under the rule to a dismissal that puts him in the same legal position he would have been in had he never filed the suit.**

434 F.3d at 326. (Emphasis added.)

Similarly, in litigation over possession of North Carolina's copy of the Bill of Rights, the United States Court of Appeals for the Fourth Circuit reiterated that

a voluntary dismissal without prejudice ordinarily sweeps away the prior proceeding as if it had never been filed:

The United States dismissed its forfeiture action without prejudice by filing a notice of voluntary dismissal before Matthews, the only remaining adverse party, answered the forfeiture complaint. See Fed. R. Civ. P. 41(a)(1)(i). A voluntary dismissal under Rule 41(a)(1)(i) "is available as a matter of unconditional right and is self-executing, i.e., it is effective at the moment the notice is filed with the clerk and no judicial approval is required." *Marex Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 2 F.3d 544, 546 (4th Cir. 1993) (citations omitted). **Moreover, a dismissal without prejudice "operates to leave the parties as if no action had been brought at all." *Dove v. CODESCO*, 569 F.2d 807, 809 n. 3 (4th Cir. 1978). A voluntary dismissal thus "carries down with it previous proceedings and orders in the action, and all pleadings, both of plaintiff and defendant, and all issues, with respect to plaintiff's claim." *Van-S-Aviation Corp. v. Piper Aircraft Corp. (In re Piper Aircraft Distrib. Sys. Antitrust Litig.)*, 551 F.2d 213, 219 (8th Cir. 1977) (internal quotation marks omitted)**

United States v. Matthews (In re Matthews), 395 F.3d 477, 480-481 (4th Cir. 2005). (Emphasis added).

The North Carolina Supreme Court has not addressed whether the preliminary rulings in a dismissed case can be given preclusive effect in an action filed after a voluntary dismissal without prejudice. The Court of Appeals – until its decision below – had previously reached the same conclusion as the federal courts that the dismissal of the first action without prejudice wipes the slate clean. For example, in *Fieldcrest Cannon v. Fireman's Fund Ins. Co.*, 124 N.C. App. 232,

241, 477 S.E. 2d 59 (N.C. App. 1996), the Court of Appeals ruled that requests for admissions admitted in the first dismissed action were not binding when the case was re-filed. Similarly, in *Tompkins v. Log Systems, Inc.*, 96 N.C. App. 333, 335, 385 S.E.2d 545 (N.C. App. 1989), the Court of Appeals held that a trial court's denial of summary judgment in an earlier lawsuit that had been voluntarily dismissed did not prevent the trial judge in the refiled lawsuit from considering a summary judgment motion in the second suit.

In this case plaintiff was granted a voluntary dismissal without prejudice of his original action. **At that point it was as if the suit had never been filed.** *Webb v. Nolan*, 361 F. Supp. 418 (M.D.N.C. 1972), affirmed, 484 F.2d 1049 (4th Cir. 1973), appeal dismissed, 415 U.S. 903, 94 S.Ct. 1397, 39 L.Ed.2d 461 (1974). Plaintiff then refiled his claim within the one-year time limit established by the statute. **Such refileing began this case anew for all purposes. Once refiled the case must be considered on its merits without reference to the disposition of the prior action.** Therefore, Judge Kirby's ruling in the prior action did not foreclose Judge Lewis from considering defendant's summary judgment motion in this new action.

96 N.C. App. at 335 (emphasis added).

In the present case, however, the Court of Appeals markedly departed from these earlier state and federal decisions that held that rulings in the earlier dismissed action would not be given preclusive effect when the action was re-filed because the act of dismissal and re-filing began "the case a new for all purposes." Because of the important limitations that the Court of Appeals decision places on

the benefits of voluntary dismissals under Rule 41, the Court should grant the Plaintiff's petition for discretionary review in order to review this case.

B. THE SUPREME COURT SHOULD ALSO REVIEW THE COURT OF APPEALS' DECISION BECAUSE THIS CASE IS THE FIRST TIME A NORTH CAROLINA APPELLATE COURT HAS INTERPRETED THE FULL FAITH AND CREDIT PROVISION OF N.C. GEN. STAT. § 1E-1, AND THE COURT OF APPEALS MISAPPLIED THE PROVISION TO AN INTERLOCUTORY ORDER

The only rationale provided in the Court of Appeals' decision below for the result reached in the case below was the statutory provision in N.C. Gen. Stat. § 1E-1 which directs state courts to give full faith and credit to the decisions of the Cherokee Court. The Court of Appeals' decision is the first time the appellate courts of North Carolina have applied this provision. In doing so, the Court of Appeals misapplied N.C. Gen. Stat. § 1-E in two fundamental ways. First, the Court of Appeals misread the tribal court's court ruling. Second, the Court of Appeals erred in giving full faith effect to an interlocutory ruling under N.C. Gen. Stat. § 1E-1 when the North Carolina courts would not have given full faith and credit to a similar ruling from the court of another state.

The Cherokee Court's ruling in *Carden I* said two things: 1) that the Cherokee Court would not have jurisdiction over Mr. Carden's suit against Owle

if Owle was the only defendant sued in the complaint, and 2) that the Cherokee Court had jurisdiction of *Carden I* because the casino defendants were initially present and pendent jurisdiction allowed it to adjudicate claims against Owle after the casino defendants were dismissed.

Because the issues of subject matter jurisdiction were different in *Carden I* and *Carden II*, it does not deny full faith and credit to the Cherokee Court's order to determine that the state court has jurisdiction in *Carden II*. The issue in *Carden II* is whether the General Court of Justice has subject matter jurisdiction over the re-filed tort action alleging negligence of a North Carolina corporation injuring a North Carolina citizen in an accident on a highway owned by the North Carolina Department of Transportation. The Cherokee Court in its order in *Carden I* made no determination that the state courts of North Carolina lacked jurisdiction over this subject matter. The Cherokee Court simply stated it had pendent jurisdiction over the claims in *Carden I* against Owle because the casino defendants were originally sued alongside Owle. Therefore, a determination by a North Carolina court that it had jurisdiction over the subject matter in *Carden II* in which Owle was the only defendant sued in the complaint, would not deny full faith and credit to the ruling of the Cherokee Court because the tribal court never made a ruling on the issue of state court jurisdiction.

Even more importantly, the Court of Appeals misapplied N.C. Gen. Stat. § 1E-1, because the General Court of Justice would not afford full faith and credit of an order of another state that is interlocutory in nature. Section 1E-1 of the North Carolina General Statutes provides that

“[t]he courts of this State shall give full faith and credit to a judgment, decree, or order signed by a judicial officer of the Eastern Band of Cherokee Indians and filed in the Cherokee Tribal Court **to the same extent as is given a judgment, decree, or order of another state**, subject to the provisions of subsection (b) of this section; provided that the judgments, decrees, and orders of the courts of this State are given full faith and credit by the Tribal Court of the Eastern Band of Cherokee Indians.

N.C. Gen. Stat. § 1E-1(a) (2011) (Emphasis added). In other words, the State of North Carolina treats the orders of the Cherokee Court the same way it treats orders or judgments of a court of another state. In any situation in which the State of North Carolina would not give force to another state’s order or judgment, the State of North Carolina also does not give force to an order of the Cherokee Court.

If the order of another state is interlocutory, the State of North Carolina need not enforce it. *In re Craigo*, 266 N.C. 92, 145 S.E.2d 376 (1965). An interlocutory order is an order “made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. Durham*, 231 N.C.

357, 362, 57 S.E. 2d 377, 381 (1950). The Supreme Court of North Carolina held that a North Carolina court would not give full faith and credit to a temporary custody order from another state that was not a “final and conclusive” order. *In re Craigo* at 95, 145 S.E.2d at 78. *See also, e.g., Lynch v. Lynch*, 303 N.C. 367, 371, 279 S.E.2d 840, 843 (1981) (holding that temporary judgment in a custody matter was not entitled to full faith and credit and had no impact on a party’s ability to “seek full faith and credit of a final custody judgment subsequently rendered in another state”).

The Cherokee Court’s order was plainly an interlocutory order. The order was an order denying a motion to dismiss *Carden I* because the tribal entities were no longer parties to the action. The denial of a motion to dismiss is not a final judgment but an interlocutory order. *Carl v. State*, 192 N.C. App. 544, 550, 665 S.E.2d 787, 793 (2008). Because the Cherokee Court’s order was interlocutory, the courts of this state would not give it full faith and credit if it was the order of a court of another state. The Court of Appeals, in this first case interpreting N.C. Gen. Stat. § 1E-1, thus misapplied the provision.

The Court of Appeals’ application of N.C. Gen. Stat. § 1E-1 is particularly perverse because the Cherokee Court order concerning its continuing pendent jurisdiction in *Carden I* clearly suggests that it would not have subject matter

jurisdiction of *Carden II*. The Cherokee Court's order itself indicated that the tribal court would not have subject matter jurisdiction of Mr. Carden's claim if he had sued against Owle without the casino defendants. After Mr. Carden voluntarily dismissed *Carden I*, he had to decide where he could re-file his case in 2011. At that point, the Cherokee Court had already told Mr. Carden the tribal court would lack jurisdiction of a complaint filed solely against Owle. Had Mr. Carden filed *Carden II* in the Cherokee Court, the tribal court would have dismissed Mr. Carden's action for its lack of subject matter jurisdiction of the re-filed action. The Court of Appeals' misapplication of N.C. Gen. Stat. § 1E-1 to an interlocutory order from the tribal court thus ignores what the Cherokee Court itself indicated about its jurisdiction, with the result that Mr. Carden is denied access both to the tribal court and to the state court for *Carden II*.

Although this case is relatively unusual because of its procedural posture and history, these jurisdictional issues will re-occur again and again in the North Carolina courts. Harrahs Cherokee Casino receives approximately 3.6 million visits a year.⁴ These visits generate a number of accidents involving visitors to the Qualla Indian Boundary, from which tort actions arise with similar procedural and jurisdictional issues. For these reasons, the Court should grant review of this case

⁴ <http://nc-chokeee.com/economicdevelopment/files/2011/02/OPD-Brochure.pdf>

to clarify both the legal principles that apply in the present case and in future cases.

ISSUES TO BE BRIEFED

In the event the Court allows this petition for discretionary review, the petitioner intends to present the following issues in his brief for review:

IF THE CHEROKEE TRIBAL COURT HAS ASSUMED JURISDICTION OVER AN ACTION THAT IS LATER VOLUNTARILY DISMISSED UNDER RULE 41, IS IT ERROR FOR THE GENERAL COURT OF JUSTICE TO EXERCISE JURISDICTION OVER THE CLAIM WHEN A NEW ACTION IS RE-FILED IN STATE COURT?

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?

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?

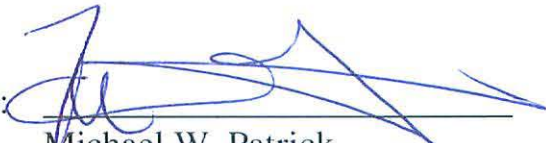
CONCLUSION

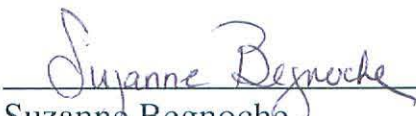
For the foregoing reasons, plaintiff William David Carden submits that the issues presented in this case are issues of substantial public interest in North Carolina, that the case involves legal principles of major significance to the

jurisprudence of the state, and that the decision of the Court of Appeals is in conflict with prior decisions of the Supreme Court. For these reasons, petitioner respectfully requests the Court to grant discretionary review of the issues presented in this appeal.

Respectfully submitted this the 22nd day of April, 2013.

LAW OFFICE OF MICHAEL W. PATRICK

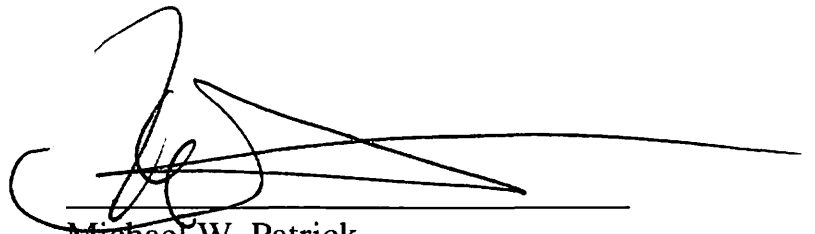
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CERTIFICATE OF SERVICE

I, Michael W. Patrick, do hereby certify that, on April 22, 2013, a true and correct copy of the foregoing Petition for Discretionary Review was filed with of the Clerk of the Supreme Court and was served on Defendant-Appellee by U.S. Mail addressed as follows:

Mr. David O. Lewis
Attorney at Law
P.O. Box 341
Durham N.C. 27702



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An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA12-493
NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2013

WILLIAM DAVID CARDEN,
Plaintiff,

v.

Durham County
No. 11 CVS 5119

OWLE CONSTRUCTION, LLC,
Defendant.

Appeal by plaintiff from order entered 5 March 2012 by
Judge Orlando F. Hudson, Jr., in Durham County Superior Court.

Heard in the Court of Appeals 26 September 2012.

*Law Office of Michael W. Patrick, by Michael W. Patrick and
Suzanne Begnoche, for plaintiff-appellant.*

*Bryant, Lewis & Lindsley, P.A., by David O. Lewis, for
defendant-appellee.*

BRYANT, Judge.

Where the Cherokee Court had subject matter jurisdiction over plaintiff's action, the Durham County Superior Court did not err by dismissing plaintiff's action pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. Where the trial court properly dismissed plaintiff's claim based on lack of subject matter jurisdiction, we do not reach plaintiff's

remaining argument that the trial court erred in dismissing his action for failure to state a claim upon which relief could be granted.

Facts and Procedural History

On 29 September 2011, plaintiff William David Carden filed a complaint alleging negligence against defendant Owle Construction, LLC, in Durham County Superior Court. Defendant, employed by Harrah's NC Casino Company, LLC, was making improvements to the curb and sidewalk at an intersection of U.S. Highway 19, near Harrah's Cherokee Hotel and Casino on the Qualla Boundary in Cherokee, North Carolina. Plaintiff alleged that on 12 December 2003, he was struck by a passing vehicle while standing at that intersection.

On 16 December 2011, defendant filed a motion to dismiss pursuant to Rule 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure.

On 5 March 2012, the trial court entered an order stating the following:

1. On December 8, 2006, the plaintiff filed a civil action in Durham County Superior Court against various defendants including Owle Construction, LLC, Harrah's Operating Company, Inc; and Harrah's N.C. Casino Company LLC (collectively, "Harrah's[") for personal injury claims arising out of an accident on the Qualla Boundary Indian Reservation.

2. After Harrah's filed a motion to dismiss the 2006 case for lack of subject matter jurisdiction, the case was removed by Consent Order to the Cherokee Court.
3. The Cherokee Court conducted a jury trial, which resulted in a mistrial on December 15, 2009.
4. Following the mistrial, the Cherokee Court ordered a mediation, which resulted in the settlement of plaintiff's claims against Harrah's and the Tribal Casino Gaming Enterprise [(TCGE)]. The plaintiff filed a voluntary dismissal with prejudice in the Cherokee Court on May 19, 2010 as to Harrah's and the [TCGE].
5. Following the dismissal of Harrah's and the [TCGE], the plaintiff filed a motion in the Cherokee Court seeking a transfer of the case back to Durham County Superior Court. That motion was denied by Judge Martin's September 2, 2010 Order. Judge Martin's order includes a finding of fact that, "The only remaining Defendant is Owle Construction, LLC, which is an Indian owned, North Carolina corporation." Judge Martin's order includes a conclusion of law that "The [Cherokee] Court has jurisdiction over the parties and the subject matter of this civil action."
6. On October 21, 2010, the plaintiff filed a motion in Durham County Superior Court bearing the 2006 Durham Superior Court case caption seeking to "lift the stay." The motion was denied by order entered in Durham County Superior Court on December 16, 2010. The Court of Appeals affirmed that order in an opinion issued January 17, 2012. [Carden v. Owle Construction, LLC, ___ N.C. App. ___, 720 S.E.2d 825 (2012).]

7. On October 27, 2010, the plaintiff filed a voluntary dismissal without prejudice in the Cherokee Court as to the defendant Owle.

8. The plaintiff filed the instant action in Durham County Superior Court on September 29, 2011.

The 5 March 2012 order dismissed plaintiff's complaint, holding that it lacked jurisdiction over the subject matter of the case and holding that the complaint failed to state a claim for which relief could be granted. From this order, plaintiff appeals.

Plaintiff presents the following issues on appeal: whether the trial court erred by (I) concluding that it had no subject matter jurisdiction; (II) concluding that plaintiff's complaint failed to state a claim upon which relief could be granted.

I

Plaintiff first argues the trial court erred in concluding that it lacked subject matter jurisdiction to hear plaintiff's action. We disagree.

"We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings." *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007) (citation omitted).

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Plaintiff argues that our Court's holding in *Sasser v. Beck*, 40 N.C. App. 668, 253 S.E.2d 577 (1979), established that North Carolina courts have subject matter jurisdiction to adjudicate tort claims arising on the Qualla Boundary between the Eastern Band of the Cherokee Indians (ECBI) and non-Indians. Further, plaintiff contends that because defendant is a corporation chartered by the State of North Carolina, "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."

However, the question before us in the instant case is whether once the Cherokee Court has assumed jurisdiction over a matter, it is error for the General Court of Justice to exercise jurisdiction over the same action.

Section 1E-1 of the North Carolina General Statutes provides that

[t]he courts of this State shall give full faith and credit to a judgment, decree, or order signed by a judicial officer of the Eastern Band of Cherokee Indians and filed in the Cherokee Tribal Court to the same extent as is given a judgment, decree, or order of another state, subject to the provisions of subsection (b) of this section; provided that the judgments, decrees, and orders of the courts of this State are given full faith and credit by the

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Tribal Court of the Eastern Band of Cherokee Indians.

N.C. Gen. Stat. § 1E-1(a) (2011).

On 2 September 2010, an order was entered in the Cherokee Tribal Court of the Eastern Band of Cherokee Indians regarding plaintiff's motion to transfer the case to Durham County Superior Court. The 2 September 2010 order found the following: Plaintiff argued that because there was an absence of tribal entities (Harrah's and TCGE were dismissed from the case), plaintiff's motion should be granted. The Cherokee Court held that

[a]t the time of the transfer Order [(from Durham County Superior Court to the Cherokee Court)], Tribal entities were party Defendants, and all parties agreed that the [Cherokee] Court properly possessed subject matter jurisdiction over the action and personal jurisdiction over them. Indeed, there was a jury trial on the matter.

"Once the jurisdiction of a court or administrative agency attaches, the general rule is that it will not be ousted by subsequent events. This is true even when the events are of such a nature that they would have prevented jurisdiction from attaching in the first instance." *In Re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978).

. . . .

The Court can only conclude that the dismissal of the Tribal entities had no effect on the continued exercise of its

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jurisdiction over the remaining parties and subject matter of the action. The Motion to dismiss should be denied.

Plaintiff's motion to dismiss before the Cherokee Court was denied.

Therefore, the trial court did not err in concluding that the Cherokee Court had jurisdiction over the parties and the subject matter of the action based on giving full faith and credit to the 2 September 2010 order.

II

Next, plaintiff argues that the trial court erred by dismissing his action based on failure to state a claim for which relief could be granted.

As the trial court properly dismissed plaintiff's action for lack of subject matter jurisdiction, we do not reach plaintiff's remaining argument. Therefore, the judgment of the trial court dismissing this action is affirmed.

Affirmed.

Judges HUNTER, Robert C., and STEELMAN concur.

Report per Rule 30(e).