

No. _____

14th DISTRICT

SUPREME COURT OF NORTH CAROLINA

WILLIAM DAVID CARDEN,)
)
 Plaintiff-Appellant,)
)
 v.)
)
 OWLE CONSTRUCTION, LLC,)
)
 Defendant-Appellee.)
)

From Durham County
 No. 11 CvS 05119

DEFENDANT APPELLEE'S RESPONSE TO PLAINTIFF-APPELLANT'S PETITION
FOR DISCRETIONARY REVIEW

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OWLE CONSTRUCTION, LLC,)	
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**DEFENDANT APPELLEE'S RESPONSE TO PLAINTIFF-APPELLANT'S PETITION
FOR DISCRETIONARY REVIEW**

Pursuant to Rule 15(d) of the North Carolina Rules of Appellate Procedure, Defendant-Appellee Owle Construction, LLC respectfully responds to Plaintiff-Appellant's Petition for Discretionary Review. As the subject matter of the appeal does not meet the criteria for discretionary review set forth in N.C.G.S. §7A-31, the Defendant-Appellee respectfully requests that the Petition be denied.¹

¹The Plaintiff's Petition for Discretionary Review refers in its caption to Durham County case 06 CvS 06720. This reference is incorrect. It relates to prior court proceedings between the parties addressed by the Court of Appeals in *Carden v. Owle Construction, LLC*, ___ N.C. App. ___, 720 S.E. 2d 825 (2012). The correct trial court reference for the instant case is Durham County case 11 CvS 05119.

STATEMENT OF THE FACTS

The Defendant provides a brief statement of the facts for the sole purpose of emphasizing undisputed facts relevant to the Petition and this Response.

On December 12, 2003, the Plaintiff, as a pedestrian on or near N.C. Highway 19 on the Qualla Boundary Indian Reservation in Cherokee, North Carolina, was injured when struck by an automobile. In December 2003, defendant Owle Construction, LLC ("Owle"), an Indian owned corporation (R p. 29), was constructing a sidewalk adjacent to Highway 19 near the Cherokee Casino under a contract with Harrah's NC Casino Company, LLC. (R p. 8) The Plaintiff filed an action in Durham County Superior Court on or about December 8, 2006 against Harrah's NC Casino Company, LLC, Harrah's Operating Company, Inc., (collectively, "Harrah's") and Owle, alleging tort liability for injuries sustained in the accident.

On March 12, 2008, Harrah's filed motions in Durham County Superior Court to dismiss the case for lack of subject matter jurisdiction, to dismiss the case for failing to name the Tribal Casino Gaming Enterprise as a necessary party, to remove the case to the Cherokee Court², and to dismiss for failure to state a claim for which relief can be granted. (R p. 10)

² The Eastern Band of Cherokee Indians ("EBCI") is a federally recognized Indian tribe. As such, it possesses the status of a

On April 19, 2008, a Consent Order filed in Durham County Superior Court directed that the matter be removed to Cherokee Tribal Court, (the "Cherokee Court"), and the case was transferred to the Cherokee Court. (R p. 11, 28)

In November, 2009, the Cherokee Court conducted a multi-week jury trial that resulted in a mistrial. Following the mistrial, the Plaintiff settled with Harrah's and the Tribal Casino Gaming Enterprise, and he filed a Notice of Voluntary Dismissal with Prejudice as to those defendants. (R p. 29)

After dismissing Harrah's and the Tribal Casino Gaming Enterprise, the Plaintiff sought an order in Cherokee Court to "effectively transfer the case to Superior Court of Durham

domestic dependent nation with "certain retained inherent sovereign powers." *Wildcatt v. Smith*, 69 N.C. App. 1, 316 S.E.2d 870, 874 (1984). The retained sovereign powers include the power to create civil laws governing conduct and business relations on tribal lands and the power to establish a tribal court system. The EBCI has enacted a civil code, and in 1980, pursuant to federal authorization, established a tribal court system. *Id* at 872, fn. 1.

The established tribal court system consists of a Trial Court, called the Cherokee Court, and a Supreme Court. The Supreme Court hears appeals from the Trial Court. Cherokee Code §7-2(3).

Cherokee Civil Code Section 1-2(a) provides the Cherokee Court with jurisdiction over "all persons in civil suits which arise on the Cherokee Indian Reservation and involve the personal, property or legal rights of an individual Indian or an Indian owned business, corporation or other legal entity." Section 1-2(c) provides Cherokee Court jurisdiction over tortious conduct of all persons where the conduct occurs on Indian trust land. Section 1-2(g) establishes Cherokee Court jurisdiction over direct claims against the Tribe.

County." (R p. 28) In support of the motion, the Plaintiff argued that his dismissal of the tribal defendants destroyed the Cherokee Court's jurisdiction over the case, thus mandating a transfer of the case back to Durham County Superior Court. By order entered September 2, 2010, the Cherokee Court rejected that argument, denied the Plaintiff's motion to transfer, and expressly found that the Cherokee Court had jurisdiction over the parties and the subject matter of the action. (R pp. 28-32) The Plaintiff did not appeal the Cherokee Court's ruling to Cherokee Supreme Court.

On October 27, 2010, the Plaintiff filed a Notice of Voluntary Dismissal without Prejudice in the Cherokee Court as to the remaining defendant, Owle Construction, LLC. (R p. 16)

On October 21, 2010, after the Cherokee Court found that it had subject matter and personal jurisdiction in the case and before the Plaintiff filed a dismissal in the Cherokee Court, the Plaintiff filed a "Motion to Lift Stay" in Durham County Superior Court. (R p. 11) The Honorable Shannon Joseph, Superior Court Judge Presiding, heard arguments on the motion on December 15, 2010, after the dismissal in the Cherokee Court, and entered an Order denying the motion on December 16, 2010. Judge Joseph's Order found that the Plaintiff's action had been dismissed without prejudice, and that the Plaintiff could refile an action against the defendant Owle Construction "if proper

under applicable law." The Order expressly did not reach any jurisdictional issues, and made no findings or rulings concerning the proper jurisdiction, venue or forum for any refiling of any action. (R pp. 18-21)

The Plaintiff appealed Judge Joseph's December 16, 2010 order to the North Carolina Court of Appeals. As part of the appeal, the Plaintiff argued that Judge Joseph's ruling was erroneous because the Cherokee Court lacked jurisdiction over the action after the dismissal of Harrah's and the Tribal Casino Gaming Enterprise. The Court of Appeals rejected the contention, and held that any argument concerning the jurisdiction of the Cherokee Court should be raised in the Cherokee trial or appellate courts as an exercise of the self-governance of the Eastern Band of Cherokee Indians. *Carden v. Owle Construction, LLC*, ____ N.C. App. ____, 720 S.E.2d 825, 829 (2012).

The Plaintiff never refiled his action in the Cherokee Court. He filed a new action against Owle concerning the December 2003 accident in Durham County Superior Court on September 8, 2011. (R p. 8)

On December 16, 2011, Owle filed a motion in the new Superior Court case pursuant to Rule 12 of the North Carolina Rules of Civil Procedure to dismiss the action for lack of subject matter jurisdiction and for failure to state a claim for

which relief can be granted. (R p. 22) The trial court granted Owle's motion by Order entered March 5, 2012 (R pp. 25-27). The trial court's Order incorporates by reference the September 2, 2010 Cherokee Court order in which the Cherokee Court found that it had subject matter and personal jurisdiction in the case. The Plaintiff appealed the dismissal of the new action to the North Carolina Court of Appeals. In *Carden v. Owle Construction, LLC*, 2013 WL 112314 (Table), the Court of Appeals affirmed the trial court.

A basic timeline for this matter is summarized as follows:

Date	Event
12/12/2003	Date of accident.
12/08/2006	Plaintiff files suit in Durham County Superior Court against Harrah's defendants and Owle Construction
03/12/2008	Harrah's defendants move to dismiss in Durham County Superior Court on jurisdictional grounds.
04/19/2008	Consent Order in Durham County Superior Court transfers case to the Cherokee Court
11/--/2009	Multi-week trial in Cherokee Court results in a mistrial.
09/02/2010	After plaintiff settles with other defendants, Cherokee Court denies plaintiff's motion to transfer the case to Durham County Superior Court. The Cherokee Court expressly finds that it has jurisdiction over the subject matter and parties. Plaintiff does not appeal to the Cherokee Supreme Court.
10/21/2010	Plaintiff files "Motion to Lift Stay" in Durham County Superior Court.
10/27/2010	Plaintiff files voluntary dismissal without prejudice as to the Defendant in Cherokee Court.
12/16/2010	Durham County Superior Court denies "Motion to Lift Stay," finding that the dismissal in

	Cherokee Court dismissed the action. Plaintiff appeals to N.C. Court of Appeals.
09/08/2010	Plaintiff files new action in Durham County Superior Court. No new action is filed in Cherokee Court.
12/16/2011	Defendant files motion to dismiss new action in Durham County Superior Court.
01/17/2012	Court of Appeals affirms order finding that case had been transferred to Cherokee Court and denying "Motion to Lift Stay." Court of Appeals rejects contention that Cherokee Court lacked jurisdiction, holding that any argument about Cherokee Court jurisdiction should be raised in Cherokee trial or appellate courts as an exercise of the self-governance of the Eastern Band of Cherokee Indians.
03/05/2012	Durham County Superior Court grants motion to dismiss new Superior Court case on grounds of lack of jurisdiction and failure to state a claim for which relief may be granted.
03/19/2013	Court of Appeals affirms trial court order dismissing case.

CERTIFICATION SHOULD NOT BE GRANTED AS THE CAUSE DOES NOT INVOLVE LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF NORTH CAROLINA

N.C.G.S §7A-31(c) provides that after a unanimous decision of the Court Appeals, the Supreme Court may, in its discretion, certify a cause for review when the cause involves legal principles of major significance to the jurisprudence of the State. Most of Plaintiff's Petition argues that the Court of Appeals decision is erroneous. An argument that the Court of Appeals is wrong is not sufficient to meet the statute's criteria.

The case does not involve legal principles of major significance to the jurisprudence of the State. The case arises

out of a unique set of facts and unique procedural maneuvers.

The Plaintiff in this case consented to the jurisdiction of the Cherokee Court. After a mistrial in the Cherokee Court, he sought, in essence, to revoke his consent, arguing to the Cherokee Court that the case should be transferred back to North Carolina state court because the Cherokee Court lacked jurisdiction. The Cherokee Court expressly ruled that it had jurisdiction over the subject matter and the parties.³ The

³ The Cherokee Court ruled that it possessed subject matter and personal jurisdiction in the case. While the Cherokee Court indicated that the holding of *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) may have affected Cherokee Court jurisdiction had the case been originally filed in tribal court without tribal agencies or agents as parties, it made no definitive rulings in that regard. Given the court's analysis of its jurisdiction over the subject matter and parties, no definitive rulings on *Strate* type arguments were necessary. In any event, strong arguments exist that the *Strate* case would not abrogate the tribal court's jurisdiction. *Strate* concerned a nonmember suing a nonmember company for alleged negligence in the operation of a motor vehicle on a federal highway in an Indian reservation. The instant case concerns a nonmember's claim against an Indian owned business for construction work occurring adjacent to a roadway within a reservation. Jurisdiction exists under the language of the Cherokee Code as it involves allegedly tortious conduct on Indian lands (Cherokee Code §1-2(c)), and it involves the legal rights of an Indian owned business. (Cherokee Code §1-2(a)).

Additionally, any analysis of the tribal court jurisdictional issue may involve a variety of factors, including an examination of the membership status of the plaintiff as opposed to the defendant and the nature of commercial activities carried on inside the reservation. See, *Montana v. United States*, 450 U.S. 544 (1981). This is true even if the case involves a highway on a reservation. See, *Smith v. Salish Kootenai College*, 434 F3rd 1127(9th Cir. 2006).

Plaintiff did not appeal the Cherokee Court's ruling. Instead, he made arguments in North Carolina state court that the Cherokee Court lacked jurisdiction, and that his case somehow remained pending in North Carolina state court after he dismissed it in Cherokee Court. When the North Carolina state court rejected his arguments, and despite the Cherokee Court's jurisdictional determination, Plaintiff did not refile his dismissed action in Cherokee Court. Instead, he filed a new action in North Carolina state court, and subsequently appealed the dismissal of the new action. It is extremely unlikely that this sort of convoluted fact pattern and procedural maneuver will be a recurrent feature of North Carolina jurisprudence.

In the underlying appeal and in his Petition, Plaintiff continues to argue that the Cherokee Court lacked jurisdiction over his case. In his first appeal, the Court of Appeals refused to countenance such arguments, stating:

Any argument concerning the jurisdiction of the Tribal Court would not be a matter for this Court to consider and rule upon. Rather, such issues should be raised before the Tribal Court and the appellate courts of that jurisdiction, as an exercise of the "self governance of the Eastern Band of Cherokee Indians."

Carden v. Owle Construction, LLC, ____ N.C. App. ____, 720 S.E.2d 825, 829 (2012), citing *Jackson County v. Swayney*, 319 N.C. 52, 352 S.E. 2d 413 (1987).

The U.S. Supreme Court has held that a federal court considering claims arguably within tribal court jurisdiction should "stay its hand" until the tribal court has an initial and full opportunity to determine its own jurisdiction. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) at 1406, citing *National Farmers Union Ins. Cos. V. Crow Tribe*, 471 U.S. 845, 105 S. Ct. 2447 and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S. Ct. 971.

The distinguishing factor in this case is the Cherokee Court Order finding that the Cherokee Court had personal and subject matter jurisdiction. N.C.G.S. §1E-1 requires that the North Carolina courts accord full faith and credit to the orders of the Cherokee Court. Additionally, the North Carolina Supreme Court has held that when the Cherokee Court has assumed jurisdiction over subject matter of a case prior to a subsequent North Carolina state court filing, an exercise of North Carolina state court jurisdiction would constitute an unlawful infringement on tribal sovereignty. *Jackson Co. v. Smoker*, 341 N.C. 182, 459 S.E. 2d 789 (1995). In affirming the dismissal of a subsequent state court action, the *Smoker* court held:

The Cherokee Indians have an interest in making their own laws and enforcing them. *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). This interest would be undermined if the Tribal Court were deprived of jurisdiction of a case after it had assumed it. We hold that it

would have been an unlawful infringement on the Cherokee tribe had the [North Carolina] district court taken jurisdiction of this case.

Id at 184.

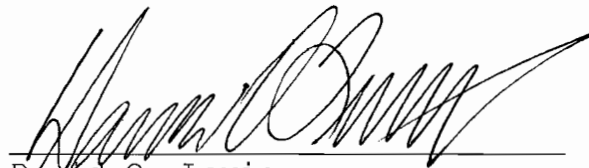
A litigant within the Cherokee Court system -- even a litigant that consents to proceedings in the Cherokee Court -- has the right to argue in the Cherokee trial and appellate courts that the Cherokee Court lacks jurisdiction over his case. Nothing in the Court of Appeals decision in the instant case changes that right. In the absence of a tribal court jurisdictional order, if a North Carolina state court defendant argues that the state court action must be dismissed because jurisdiction lies in the tribal court, the state court plaintiff is free to argue that the state court action does not infringe on tribal sovereignty. Nothing in the Court of Appeals decision in the instant case changes that right. The Court of Appeals decision does not foreclose litigants from making jurisdictional arguments in the proper forum.

Clearly, the cause in this case does not involve legal principles of major significance to the jurisprudence of the State. Therefore, the N.C.G.S. §7A-31's criteria for discretionary review are not met.

CONCLUSION

For the reasons stated herein, the Defendant-Appellee respectfully requests that the Petition for Discretionary Review be denied.

This the 2ND day of MAY, 2013.



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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the attached **DEFENDANT-APPELLEE'S RESPONSE TO PLAINTIFF-APPELLANT'S PETITION FOR DISCRETIONARY REVIEW** in the above-referenced action upon all other parties to this cause by:

___ Hand delivering a copy hereof to the attorney for each said party addressed as follows:

X Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

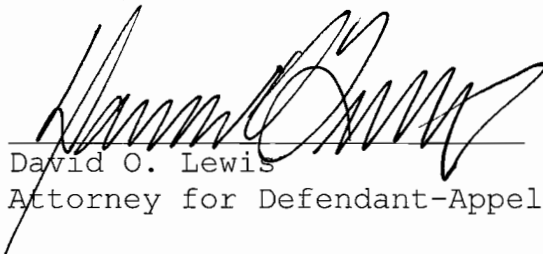
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___ Depositing a copy hereof with a nationally recognized overnight courier service, for overnight delivery, addressed to the attorney for each said party as follows:

___ Telecopying a copy hereof to the attorney for each said party as follows:

This the 2nd day of MAY, 2013.



David O. Lewis
Attorney for Defendant-Appellee