No. COA 21-206 JUDICIAL DISTRICT 30-A

****

NORTH CAROLINA COURT OF APPEALS

****

REID GOLDSBY MILLER, Plaintiff-Appellant, vs. EASTERN BAND OF CHEROKEE INDIANS and/or other affiliated governmental entities and/or other affiliated private entities; WESTRIDGE RANCH, LLC; WALTER WILLIAM ELLSWORTH, III; RICHARD G. SNEED; ALAN B. ENSLEY; THE TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS; THE BUSINESS COMMITTEE OF THE EASTERN BAND OF CHEROKEE INDIANS; JOHN DOES 1-15 (fictitious names as identity is unknown); JANE DOES 1-15 (fictitious names as identity is unknown), Defendants-Appellees.	)	From Graham County No. 20-CVS-130

****

PLAINTIFF-APPELLANT'S BRIEF

****

INDEX

TABLE OF CASES AND AUTHORITIES

No. COA 21-206 JUDICIAL DISTRICT 30-A

****

NORTH CAROLINA COURT OF APPEALS

****

REID GOLDSBY MILLER, Plaintiff-Appellant,	)	
vs.	)	From Graham County No. 20-CVS-130
EASTERN BAND OF CHEROKEE INDIANS and/or other affiliated governmental entities and/or other affiliated private entities; WESTRIDGE RANCH, LLC; WALTER WILLIAM ELLSWORTH, III; RICHARD G. SNEED; ALAN B. ENSLEY; THE TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS; THE BUSINESS COMMITTEE OF THE EASTERN BAND OF CHEROKEE INDIANS; JOHN DOES 1-15 (fictitious names as identity is unknown); JANE DOES 1-15 (fictitious names as identity is unknown), Defendants-Appellees.	)	

****

PLAINTIFF-APPELLANT'S BRIEF

****

ISSUES PRESENTED:

I. Did the trial court err in not recognizing that Subject Property is not Indian country as defined by law, and is not a reservation established by Congress?

II. Did the trial court err in dismissing Tribal Defendants-Appellees by not applying the precedent set by the NC Court of Appeals in *Sasser v. Beck*?

III. Did the trial court err by permitting Defendant Eastern Band of Cherokee Indians to invoke a sovereign immunity defense to immunize itself from the Treaty of New Echota, Congress, and the jurisdiction of the State of NC?

IV. Did the trial court err in extending sovereign immunity to Tribal Defendants over recently purchased real property?

V. Did the trial court err by not recognizing and applying the immovable-property exception?

VI. Did the trial court err in dismissing Tribal Defendants under NC Rule of Civil Procedure 12(b)(1), and/or 12(b)(2), and/or 12(b)(6)?

VII. Did the trial court err by dismissing Tribal Defendants as a necessary party and to settle the controversy surrounding the immovable real property that resulted from a civil conspiracy?

VIII. Did the trial court err Constitutionally in this matter?

STATEMENT OF THE CASE

On 10 August 2020, I filed this action *pro se* against Defendants Eastern Band of Cherokee Indians and/or other affiliated governmental entities and/or other affiliated private entities; Westridge Ranch, LLC; Walter William Ellsworth, III; Richard G. Sneed; Alan B. Ensley; the Tribal Council of the Eastern Band of Cherokee Indians, the Business Committee of the Eastern Band of Cherokee Indians; John Does 1-15 (fictitious names as identity is unknown); and Jane Does 1-15 (fictitious names as identity is unknown). Simultaneous to this on 10 August 2020, I filed a *lis pendens* with the Graham County Register of Deeds, reflecting defendants and relief sought, which is the recovery of the title to Subject Property.[1]

On 23 October 2020, Defendants Eastern Band of Cherokee Indians ("EBCI") and/or other affiliated governmental entities and/or other affiliated private entities; Richard G. Sneed, Alan B. Ensley, the Tribal Council of the Eastern Band of Cherokee Indians; and the Business Committee of the Eastern Band of Cherokee Indians ("Tribal

[1] The heavy equipment claim(s) is against individuals involved, and not against the Tribe itself as an entity. *Sasser v. Beck*, 40 N.C. App. 668, 253 S.E.2d 577 (1979)

Defendants") filed Motions to Dismiss Under Rules 12(b)(1), 12(b)(2), and 12(b)(6), using the affirmative defense of sovereign immunity.

On 2 November 2020, Westridge Ranch, LLC and Walter William Ellsworth, III ("Westridge Defendants") filed their Motions to Dismiss, Answer, and Counterclaims.

On 2 November 2020, the trial court e-mailed to the parties a standing order relating to the COVID pandemic which, among other things, provided the option to argue Tribal Defendants' Motions to Dismiss by briefs only. Plaintiff-Appellant and Tribal Defendants agreed to argue the matter by briefs only. On 9 November 2020, the Honorable William H. Coward entered Consent Order reflecting the agreement to argue Tribal Defendants' Motions to Dismiss by briefs only and also called for filing of the briefs with the court. Tribal Defendants' briefs and my briefs were submitted to Judge Coward for review, with the final reply brief being submitted 2 December 2020.[2]

I filed my briefs with the court, as reflected in Consent Order. Tribal Defendants did not file their briefs with the court.

The Honorable William H. Coward entered an order on 24 December 2020 granting Tribal Defendants' Motion(s) to Dismiss Under Rules 12(b)(1), 12(b)(2) and 12(b)(6). I timely filed Notice of Appeal on 19 January 2021.

---

[2] As part of the argument before the trial court, Plaintiff-Appellant requested that the Court grant leave to amend her Complaint if the Court determined the Complaint did not properly plead the nature or legal basis(s) of the case, and it was deemed necessary to amend in the interest of justice because it was so required, pursuant to NC Rule of Civil Procedure 15(a). (R at 225, 227-228)

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW OF INTERLOCUTORY APPEAL

Judge William Coward's Order granting Tribal Defendants' Motions to Dismiss under Rules 12(b)(1), 12(b)(2), and 12(b)(6) affects a substantial right(s) of Plaintiff-Appellant's and, in effect, determines the action and prevents a judgment from which an appeal might be taken, and appeal therefore lies to the Court of Appeals pursuant to N.C.G.S. § 7A-27(b)(3)a; N.C.G.S. § 7A-27(b)(3)b; N.C.G.S. § 1-277(a); and N.C.G.S. § 1-277(b). Immediate appeal of Judge Coward's Order is proper pursuant to N.C.G.S. § 1-277(b), as Plaintiff-Appellant is an interested party.

A substantial right(s) here exists insomuch as a federally recognized Indian tribe is expanding Indian country by its sole authority, ignoring Congress and 25 U.S.C. § 465, which Congress has provided as the sole mechanism for the expansion of Indian country. In so doing, Defendant EBCI has removed immovable real property from the jurisdiction and protections of the State of North Carolina, which directly affects the rights and privileges that exist for citizens of the state that might have an interest in the said immovable real property. The subject immovable real property has existed under the jurisdiction of the State since the boundaries were established as they exist today.

The Order entered by the trial court on 24 December 2020 granting Tribal Defendants' Motions to Dismiss under Rules 12(b)(1), 12(b)(2), and 12(b)(6) in effect determines this action, and in effect prevents a judgment from which appeal might be taken. The remedy Plaintiff-Appellant is seeking is to settle the controversy surrounding the subject immovable real property and to establish herself as the rightful party to hold title to Subject Property. Defendant EBCI is a necessary party and can be retained as a necessary party without affecting its sovereign immunity, as this is a controversy

surrounding immovable real property within the State's jurisdiction. The dismissal of Tribal Defendants as parties renders impossible the relief sought by Plaintiff-Appellant.

STATEMENT OF THE FACTS

My husband and I purchased what is Subject Property beginning with one tract in 1977, and the other contiguous tracts by 1979. (R at 6 ¶22)

The first tract we bought in 1977 transferred to us with, as an appurtenance to Subject Property, an existing, established access road ("Bird Road Easement") on a 30-foot-wide deeded easement through property held by the United States of America in trust for possessory interest holders, Solomon Bird, Minnie R. Bird, William Bird, and Ella Mae Bird. (R at 6 ¶22)

Defendant EBCI agrees on their own official website that they are not a reservation but are trust land.

> The Qualla Boundary is the home of the Eastern Band of Cherokee Indians. Cherokee people do not live on a reservation. which is land given to a Native American tribe by the Federal government. (R at 283)

https://visitcherokeenc.com/eastern-band-of-the-cherokee/

Defendant EBCI's land within the Qualla Boundary has existed as it is since the 1800s, and is held in trust by the Federal government pursuant to 25 U.S.C.§ 465, and are overseen by the Department of the Interior. There are also some outlying, noncontiguous tracts that are held pursuant to 25 U.S.C.§ 465, and have been since the late 1800s or possibly early 1900s. Subject Property, however, is not located within the boundary lines of either the Qualla Boundary or any of its associated, noncontiguous tracts, but rather is located solely within the jurisdictional boundary lines of the State of North Carolina and has been since the state lines were established as they exist today.

In October, 1971, Bird Road Easement had been initially authorized by Defendant Tribal Council of EBCI through unanimous passage of Resolution 8, and was duly ratified on 13 October 1971 and recorded with Graham County's Register of Deeds on 13 August 1981. (R at 229) Bird Road Easement also had approval from Defendant Business Committee of EBCI in 1971 and again in 1981. (R at 57, 229)

In 1977, the Birds ordered us not to use Bird Road Easement. Our title insurance policy insured access to Subject Property, and in 1981, the issue was settled in Federal Court by Consent Judgment signed by Solomon Bird, Minnie R. Bird, William Bird, and Ella Mae Bird, my husband, and me. (R at 52-54, 229)

The Consent Judgment was memorialized and shored up by a new deed from United States of America, as Trustee, and Eastern Band of Cherokee Indians, as Grantors, to my husband and me, as Grantees. (R at 55-58, 229)

Bird Road itself is a reliable monument indicating Bird Road Easement's original and intended location. The road began as a railroad bed for logging trains and dates back to World War I. The train tracks were removed during World War I so the steel could be used for the war effort. (R at 14 ¶88)

The easement that was reaffirmed by Federal Consent Judgment in 1981 is a 30-foot-wide easement that overlays the monument (Bird Road) that at some time during the course of history has become known as Bird Road. This monument has been in the location in which it currently exists since the early 1900s or before. (R at 14 ¶89)

Also, in Deed of Easement issued/reaffirmed in 1981, in addition to metes and bounds, the location of the easement is described as being fifteen feet either side of the center of an access road (Bird Road, the monument) which was established decades

before we bought Subject Property with rights to Bird Road. This deed reiterates the same language in the original survey granted to us in 1977. (R at 14 ¶90)

While conducting maintenance on Bird Road Easement in 2013 to comply with our NC timber management plan as well as to participate in an agricultural contract with a bottled water company[3] (R at 7-8, 10, 12, 15, 61-63), we were served with a Stop-Work Order by Defendant EBCI (R at 15 ¶98, R at 61-63) and were also threatened with arrest if any further use of the easement occurred. (R at 21, ¶148)

Simultaneous to this, it was made clear to us that Graham County tax office was planning to arbitrarily disqualify our timber management plan, possibly going back to the 1980s. (R at 6-7) Under this extreme duress, I felt there was no option but to enter a Purchase Agreement with Westridge Defendants on 8 August 2013. (R at 22 ¶161)

Graham County's tax assessor did disqualify us from the present-use value program on 14 August 2013. (R at 23, 64-67) Graham County's tax collector did initiate foreclosure proceedings against us on 9 December 2013. (R at 23-24, 74-77)

I filed a timely appeal with Graham County's Board of Equalization and Review which, after deliberations, ruled against me. I then filed a timely appeal with NC Property Tax Commission. (R at 24 ¶181) Also see *Miller v. Graham County,* 268 N.C.App. 466 (2019)(unpublished).

Around March of 2016, Defendant Ellsworth and realtor were driving their UTV on the Bird Road Easement when they were confronted by sworn Tribal officer, Game Warden/Deputy Jonah Bird, blocking Bird Road Easement, who informed them at that

---

[3] Defendant EBCI is in the bottled water business as well. (R at 34, 100)

time that if they used the easement again, they would be arrested. (R at 26-27, ¶207, R at 79)

My tax appeal was heard before Property Tax Commission on 27 April 2016. (R at 68) Property Tax Commission stated in open court that it was ruling in my favor and against Graham County, and that a final written order would be forthcoming.

On 26 May 2016, I informed Westridge Defendants that I was not willing to provide owner financing. (R at 26 ¶202, R at 28 ¶220a) Westridge Defendants and realtor continued to inform me of their ability to close, but also continued to request owner financing, which was never part of the Purchase Agreement. (R at 26 ¶202-204)

On 30 June 2016, Westridge Defendants' Purchase Agreement to purchase Subject Property expired, due to their nonperformance. (R at 28 ¶220a) The Purchase Agreement had a 14-day grace period, though, which was due to expire on 14 July 2016. (R at 28 ¶220b)

On 10 July 2016, Defendant Ellsworth sent me a lengthy e-mail. Within the e-mail, along with demanding owner financing, he stated that he had been threatened with arrest on the Bird Road Easement, and stated that in return for owner financing, he would accept the Bird Road Easement "liability." (R at 26 ¶206 -207, R at 78-80) He also accused me of not maintaining the property in the same condition it had been in. Both of these accusations, if true, would constitute breach of contract but were, at the same time, outside of my control.

He also stated he would prefer to owner finance and pay me rather than pay his attorneys. (R at 80) I took this as a clear statement that I must give him what he wanted, or he would sue me based on events that had happened after the entry of the Purchase Agreement on 8 August, 2013. His "consideration" for adding new terms to that

Purchase Agreement was the acceptance of the Bird Road Easement "liability" that came about after the Purchase Agreement. (R at 29 ¶224; R at 80)

I did not agree on 10 July 2016 to owner finance. (R at 28 ¶218)

On 11 July 2016, the following day after I received Defendant Ellsworth's letter, and even though I had just prevailed at Property Tax Commission which found Ms. Phillips' tax assessment to be arbitrary (R at 72), Graham County's Tax Collector proceeded to perform a garnishment/attachment of my Wells Fargo account and swept it of $31,429.68. (R at 27-28)

I mounted a timely defense to the garnishment, pursuant to N.C.G.S §§ 105-368(d) and (f) before the money was released from Wells Fargo, but Graham County ignored the mounting of the defense and proceeded with the garnishment. Graham County's attorney at the time stated not to worry about the timely defense, because he had instructed Graham County to just stick the check in the safe and not to cash it. [Miller v. Graham County, COA No. 21-81 (pending appeal) R at 61]. However, soon thereafter, Wells Fargo's legal department told me that the money had left the bank, so I believe that the check was cashed. (R at 39-40 §§ 310, 311, 313-316, 319)

Under this level of duress, I felt there was no option but to acquiesce to the Defendant Ellsworth's owner financing demands. (R at 27-28)

I never renewed the Purchase Agreement, though. (R at 28 ¶218, 220b, 220e; R at 33 ¶262)

In December of 2016, I requested my closing attorney to include the right of first refusal into the paperwork in the event that Westridge Defendants decided to sell Subject Property. (R at 31 ¶247; R at 32 ¶251a) The right of first refusal never ended up in the final paperwork. (R at 31 ¶250; R at 32 ¶251a)

On 16 December 2016, Property Tax Commission issued its final order, ruling that Graham County's assessment was arbitrary and ordered that it be reversed. (R at 29 ¶230; R at 68-73) Graham County in part refused to do so.

At the defective transfer on 22 December 2016, Graham County's tax office refused to reinstate me into present-use value program as ordered by Property Tax Commission's final written order, but instead applied it to Westridge Defendants, thereby placing the Westridge Defendants' tax liability on Plaintiff. (R at 30 ¶231-235, 239) Currently, Graham County still has not refunded the arbitrarily assessed money that is still the tax liability of Westridge Defendants.

Subject Property transferred under extreme duress to Westridge Defendants by means of owner financing on 22 December 2016 under what is a defective transfer. (R at 30 ¶239)

The terms of owner financing included the right to perform inspections of Subject Property. After I inspected Subject Property on 14 October 2017 and was shocked at the destruction that Westridge's logging crews were causing, I demanded in writing to Westridge Defendants that they cease and desist their activities. (R at 32 ¶252)

These logging activities were adjacent to the boundary line of EBCI trust land, and the massive amount of mud that was washing into the creek was washing into EBCI trust land and trust wetlands. However, Defendant EBCI's environmental department did not have one thing negative to say about it, to my knowledge, even though we were getting no mud in the creek, but were slapped with a Stop-Work for no reason other than revoking our easement. (R at 16-17, ¶109-111; R at 22 ¶162-165, R at 38)

Defendant Ellsworth responded by telling me that if I ever set foot on "his" property again, he would have the local sheriff arrest me and/or any of my people. (R at 32-33 ¶252)

On 15 July 2019, Westridge Defendants defectively transferred Subject Property to Defendant EBCI for approximately $622,000.00 over the price that the Westridge Defendants paid me for Subject Property roughly two and a half years before. (R at 34 ¶270; R at 42 ¶331)

On 10 August 2020, I filed this lawsuit against Tribal Defendants and Westridge Defendants in concert with a *lis pendens* against Subject Property reflecting the same and that was filed with Graham County Register of Deeds as well on 10 August 2020. (R at 3, 101-105)

On 23 October 2020, Tribal Defendants filed Motions to Dismiss under Rules 12(b)(1), 12(b)(2), and 12(b)(6) on the grounds of sovereign immunity. (R at 128) Their Motions to Dismiss under Rules 12(b)(1), 12(b)(2), and 12(b)(6) was granted on 24 December 2020 by order of The Honorable William H. Coward (R at 298-301) after which I timely filed a Notice of Appeal with this court. (R at 302-304)

ARGUMENT

STANDARD OF REVIEW

Being an appeal from motion(s) to dismiss, review in this is *de novo* for all Issues here presented, as a matter of law.

Plaintiff-Appellant ("I", "my") presents her argument and alternative bases in law.

I. DID THE TRIAL COURT ERR IN NOT RECOGNIZING THAT SUBJECT PROPERTY IS NOT INDIAN COUNTRY AS DEFINED BY LAW, AND IS NOT A RESERVATION ESTABLISHED BY CONGRESS?

Indian country is defined at 18 U.S.C. § 1151 (a). In *Buzzard v. Oklahoma Tax Commission*, 992 F.2d 1073 (10th Cir. 1993), the United States Court of Appeals, 10th Circuit, in its majority opinion affirming the trial court, states:

> The United Keetoowah Band of Cherokee Indians in Oklahoma (UKB) purchased land subject to a restriction against alienation requiring the approval of the U.S. Secretary of the Interior. This case presents the issue whether the land can be considered Indian country and therefore exempt from state jurisdiction. The UKB, contending that land purchased by it subject to this restriction was Indian country, sought injunctive relief prohibiting Oklahoma from enforcing state tobacco taxing statutes against the UKB's smokeshops. The district court held that the restriction against alienation by itself was insufficient to make the UKB's land Indian country and granted summary judgment to Oklahoma. We agree and affirm the grant of summary judgment.

Buzzard, 992 F.2d at 1075 (1993) (emphasis added).

The restriction against alienation that the court is speaking of appears in the UKB's Tribal charter that when the Tribe purchases land in the private market in the manner of any other private party, they cannot sell or dispose of that land without the approval of the U.S. Secretary of the Interior. It appears that the UKB was attempting to fashion a work-around to 25 U.S.C. § 465. Their work-around failed.

Further, in the Factual Background that the Court of Appeals affirmed, it affirmed the following from the District Court:

> The district court held that, regardless of the source of the restraint against alienation, the requirement that the UKB obtain the approval of the federal government prior to

> disposing its land did not mean that the federal government had set aside the land for the UKB or agreed to serve as superintendent of the land. It therefore concluded that the UKB's land was not Indian country, and the UKB was not entitled to injunctive relief prohibiting Oklahoma from enforcing its tobacco taxes.

Buzzard, 992 F.2d at 1075 (1993).

Further, to quote the Appeals Court Discussion, which appears to be using the word Discussion as a synonym for Argument, the Court states that:

> For purposes of both civil and criminal jurisdiction, the primary definition of Indian country is 18 U.S.C. § 1151.

Buzzard, 992 F.2d at 1076 (1993). (Internal citations omitted.)

And further,

> Section 1151 defines Indian country to include (1) land within the limits of any Indian reservation, 18 U.S.C. § 1151(a); (2) dependent Indian communities, *id* § 1151(b); and (3) Indian allotments, the Indian titles to which have not been extinguished, *id.* § 1151(c). In addition, the Supreme Court has held that Indian country includes land " ' validly set apart for the use of the Indians as such, under the superintendency of the Government.' "

Buzzard, 992 F.2d at 1076 (1993). (Internal citations omitted.)

And further in the Court's discussion, it continues:

> Similarly, trust land is set apart for the use of Indians by the federal government because it can be obtained only by filing a request with the Secretary of the Interior, 25 C.F.R. § 151.9 (1992) who must consider, among other things, the Indian's need for the land, *id.* § 151.10(b), and the purposes for which the land will be used, *id.* § 151.10(c). If the request is approved, the United States holds the land as trustee. *Id* § 151.2(d). Thus, land is "validly set apart for the use of Indians as such" only if the federal government takes some action indicating that the land is designated for use by Indians.

Buzzard, 992 F.2d at 1076 (1993).

And the Court continues:

> The smokeshops thus were located on land purchased by the UKB in the same manner land purchased by any other property owner.

Buzzard, 992 F.2d at 1076 (1993).

And, finally, the U.S. Court of Appeals, 10th Circuit, finds:

> If the restriction against alienation were sufficient to make any land purchased by the UKB Indian country, the UKB could remove land from state jurisdiction and force the federal government to exert jurisdiction over that land without either sovereign having any voice in the matter. Nothing in *McGowan* or the cases concerning trust land indicates that the Supreme Court intended for Indian tribes to have such unilateral power to create Indian country.

Buzzard, 992 F.2d at 1077 (1993) (emphasis added).

Subject Property is in a rugged, isolated section of Graham County and in 1977 was part of 15,000 acres that had just recently been auctioned off by Bemis Lumber Company when we bought our first tract in 1977, Subject Property having been owned and managed by one large timber company or another since the late 1800s. (R at 273-274) Up until the year 2019, it had never been owned by Defendant EBCI or the Federal government as Indian country and had never been designated by Congress as part of a reservation. (R at 278)

What is today the Qualla Boundary came into existence after the Treaty of New Echota of 1835. The Qualla Boundary is a large tract, 57,000 acres, located in eastern Swain County and northern Jackson County just south of the Great Smoky Mountain National Park and extending eastward into Haywood County. (R at 283) This 57,000 acres does not include non-contiguous tracts located outside of the Qualla Boundary. These non-contiguous tracts, though, came into existence around the same time period or shortly thereafter and in similar manner.

The large tract (Qualla Boundary) and the outlying, non-contiguous tracts of land are held in trust, pursuant to 25 US Code § 465 as Indian country, set aside for benefit of Defendant EBCI, and as such, these tracts are granted sovereign status by the federal government and overseen by the Department of the Interior. (R at 283) This arrangement permits Defendant EBCI to exercise a form of sovereign immunity over those particular tracts only and which is overseen by the Department of the Interior.

One of those outlying tracts that is associated with the Qualla Boundary lies contiguous to the boundary line of Subject Property, and the Bird Road Easement is located upon that outlying tract. We held title to Subject Property uninterrupted since 1977 up until 2016. (R at 273) Subject Property is and was never part of a reservation, or Indian country, or trust land, or owned by Cherokees, and was not purchased in 2019 pursuant to 25 U.S.C. § 465. (R at 278)

The following wording is borrowed from the website of the Bureau of Indian Affairs, bia.gov, and it states:

> A federal Indian reservation is an area of land reserved for a tribe or tribes under treaty or other agreement with the United States, executive order, or federal statute or administrative action as permanent tribal homelands, and where the Federal government holds title to the land in trust on behalf of the Tribe.

https://www.bia.gov/frequently-asked-questions

As reflected by EBCI's deed (R at 94-99), Defendant EBCI holds title in the same manner as would any private individual.[4] It exists under the jurisdiction of the State within whose boundaries it is located, and, as such, the state has the jurisdictional

[4] There is no public record that I can find with the Graham County Register of Deeds that shows that EBCI initiated a process to deed Subject Property to the United States of America in trust for the benefit of the EBCI, nor have I located any record that Subject Property has been deeded to the United States, nor does the United States of America appear anywhere in EBCI's defective deed.

authority to settle a controversy surrounding the subject immovable real property. Tribal Defendants purchased Subject Property on the private market in the manner of a private individual.

II. DID THE TRIAL COURT ERR IN DISMISSING TRIBAL DEFENDANTS-APPELLEES BY NOT APPLYING THE PRECEDENT SET BY THE NC COURT OF APPEALS IN *SASSER V. BECK*?

As an alternative basis in law, the Cherokee have a unique relationship with the State of North Carolina which is unlike the relationship between states and Indian tribes in most other jurisdictions. (R at 284)

Tribal Defendants individually do not have sovereign immunity at all in NC, and by no means can they unilaterally expand their sovereign immunity that exists within the Qualla Boundary (because the Federal government has designated the Qualla Boundary and its associated tracts for Indian use) over immovable real property that exists under the jurisdiction of NC. See *Sasser v. Beck*, 40 N.C. App. 668, 253 S.E.2d 577, disc.rev.den., 298 N.C. 300, 259 S.E.2D 915 (1979):

> Under the Treaty of New Echota, made in 1835, the remaining Cherokees ceded to the United States all their land east of the Mississippi and agreed to move to the western lands. Many of the eastern Cherokee were reluctant to emigrate, however, and eventually eleven or twelve hundred remained behind. The Supreme Court said in Eastern Band of Cherokee Indians v. United States, supra, that those who remained "ceased to be part of the Cherokee Nation, and henceforth they became citizens of and were subject to the laws of the state in which they resided."

Sasser, 40 N.C. App. at 670 (1979). (Internal citations omitted.)

Further, in *Sasser v. Beck, id.*:

> The limited case law on the subject, from both the North Carolina and federal circuit courts, supports our conclusion that North Carolina has had civil jurisdiction over the Eastern Band of Cherokee Indians at least since the emigration west following the Treaty of New Echota, when the Indians remaining in North Carolina became "subject

> to the laws of the state." The fact that these Indians have since been recognized as an Indian tribe and brought under federal supervision did not remove the existing jurisdiction of the State of North Carolina.

Sasser, 40 N.C. App. at 673 (1979) (emphasis added).

Under the Treaty of New Echota, the remaining Cherokee ceded all their rights to land east of the Mississippi, and SCOTUS said, in *Eastern Band of Cherokee Indians v. United States*, 117 U.S. 288, 6 S. Ct. 718, 29 L. Ed. 880 (1886) that those who remained ceased to be a part of the Cherokee Nation, and henceforth became citizens of and were subject to the laws of the state in which they resided (R at 233), so Tribal Defendants have no immunity in this matter, especially considering that it involves immovable real property within the jurisdictional boundary lines of NC. (R at 233)

III. DID THE TRIAL COURT ERR BY PERMITTING DEFENDANT EASTERN BAND OF CHEROKEE INDIANS TO INVOKE A SOVEREIGN IMMUNITY DEFENSE TO IMMUNIZE ITSELF FROM THE TREATY OF NEW ECHOTA, CONGRESS, AND THE JURISDICITON OF THE STATE OF NC?

The recent case of *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), concerns land established by Congress to serve as a reservation for the Five Civilized Tribes. Among those Five Civilized Tribes are the Cherokee. The land at issue in *McGirt* is located in Oklahoma. This reservation land established by Congress in Oklahoma was a result in part of the Treaty of New Echota. The Cherokee received lands west of the Mississippi River in exchange for land in NC and surrounding states. *McGirt* clearly substantiates the position that the Treaty of New Echota is still in full force and effect, as SCOTUS just recognized and upheld the Federal government's side of the treaty at issue in *McGirt*.

In the opinion of the court in *McGirt*, it is stated:

> ...the Constitution ... entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the "supreme Law of the Land." Art. I, § 8, Art. VI, cl. 2.

McGirt, 140 S. Ct. 2462 (2020).

In this case, Defendant EBCI is encroaching on State-controlled lands, in violation of the U.S. Constitution and Treaty of New Echota.

SCOTUS just reconfirmed in *McGirt* that Federal Indian treaties are the law of the land, and so the Treaty of New Echota is still the law of the land. Therefore, permitting Tribal Defendants to exercise the jurisdiction that they are exercising here would affect many other issues beyond simply taxation.

Subject Property before this court is not a reservation, and never was. Nor was the process followed to make it Indian country, and subject to the laws as written by Congress and subject to the Treaty of New Echota, it is impossible for Tribal Defendants to assert sovereign immunity over Subject Property and prevent the court from settling a controversy that surrounds Subject Property.

IV. DID THE TRIAL COURT ERR IN EXTENDING SOVEREIGN IMMUNITY TO TRIBAL DEFENDANTS OVER RECENTLY PURCHASED REAL PROPERTY?

Tribal Defendants do not possess sovereign immunity over real property that is bought on the open market in the same manner as a private individual. (R at 94-99) In the SCOTUS case of *City of Sherrill, N.Y., v. Oneida Indian Nation of New York*, 544 U.S. 197; 125 S. Ct. 1478; 161 L. Ed. 2d 386 (2005), SCOTUS decided the case with a solid majority. One issue that was decided in this case is that American Indian nations do not enjoy sovereign immunity as an automatic mechanism when they purchase real property in the manner of a private individual in the open market. Oneida Indian Nation is a federally recognized Indian tribe like EBCI.

> We now reject the unification theory of OIN and the United States and hold that "standards of federal Indian and federal

> equity practice" preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.

City of Sherrill, 544 U.S. 197 (2005).

The appropriateness of Tribal Defendants' claim of sovereign immunity in this case must be evaluated in light of the long history of state sovereign control over Subject Property, and taking into account Defendant EBCI's unique relationship with the State of NC that has existed between Defendant EBCI and the State of NC since the signing of the Treaty of New Echota in 1835. The Tribe is currently still paying taxes to the State on Subject Property, which Plaintiff-Appellant respectfully asks this court to consider to the extent necessary in determining whether Tribal Defendants have immunity in this action. (R at 242-248) I assume taxes have been paid to Graham County on Subject Property since 1872 when the county was formed, or at the very least, has been included in Graham County's tax base since 1872. For the past two centuries and a few decades longer, North Carolina and its county and municipal units have continuously governed the Subject Property. Quoting Justice Ginsberg's majority Opinion from *City of Sherrill*:

> For the past two centuries, New York and its county and municipal units have continuously governed the territory. The Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970's. See, *supra*, at 10, n.4. and not until the 1990's did OIN acquire the properties in question and assert its unification theory to ground its demand for exemption of the parcels from local taxation. This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude OIN from gaining the disruptive remedy it now seeks.

City of Sherrill, 544 U.S. at 216-217 (2005). (Internal citations omitted.)

Defendant EBCI cannot expand its lands and territory in the manner that it is attempting to do. To quote SCOTUS in *City of Sherrill*:

> ("The rule, long-settled, and never doubted by this Court, is that long acquiescence by one state in possession by another and in the exercise of sovereignty and dominion over it, it is conclusive of the latter's title and rightful authority.")

City of Sherrill 544 U.S. at 218 (2005). (Internal citations omitted.)

To further quote majority Opinion in *City of Sherrill*:

> Parcel-by-parcel revival of their sovereign status, given the extraordinary passage of time, with dishonor "the historic wisdom and the value of repose." Finally, this court has recognized the impracticality of returning to Indian control land that generations earlier passed into numerous private hands.

City of Sherrill, 544 U.S. at 219 (2005). (Internal citations omitted.)

Further, SCOTUS clearly indicated that they were deciding *City of Sherrill* as a jurisdictional issue and not just a state tax issue.

> ...little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area."

City of Sherrill, 544 U.S. at 220 (2005).

To further quote *City of Sherrill*:

> Recognizing these practical concerns, Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interest of others with stakes in the area's governance and well-being. Title 25 USC § 465 authorized the Secretary of the Interior to acquire land in trust for Indians and provides that the land "shall be exempt from state and local taxation."

City of Sherrill, 544 U.S. at 220. (Emphasis added.) (Internal citations omitted.)

25 U.S.C. § 465 provides the proper avenue that Indian tribes must follow to enjoy sovereign immunity over land recently purchased. In the case before this court, Defendant EBCI purchased Subject Property in the open market in the manner of a

private individual, and they are currently paying property taxes on Subject Property to the State of NC. Therefore, Tribal Defendants are not entitled to and do not enjoy sovereign immunity as a defense against the immovable real property claim against Subject Property.

V. DID THE TRIAL COURT ERR BY NOT RECOGNIZING AND APPLYING THE IMMOVABLE-PROPERTY EXCEPTION?

The immovable-property exception supports actions brought against immovable real property when the action is brought in the court of the sovereign within whose territorial boundaries the immovable real property lies. The immovable-property rule or exception, by common law and historically, is a very well-settled defense to Tribal Defendants raising sovereign immunity as their affirmative defense to dismiss a complaint brought to settle a controversy surrounding the immovable Subject Property.

Indian tribes and more specifically, Tribal Defendants in this action, do not possess a form of super-sovereign immunity as is being claimed here by Tribal Defendants. Tribal Defendants are claiming a form of super-sovereign immunity that would place them above all other sovereigns on earth. The immovable-property exception is very well-established and predates the Commerce Clause of the United States Constitution.

In *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018), the U.S. Supreme Court addressed the immovable-property exception at length during oral argument. A brief history of this case is that the Lundgrens owned real property that they had owned for many decades when the Upper Skagit Tribe acquired some adjacent property on the open market in the manner of a private individual. This property adjoined the Lundgren's property. When the Tribe had their newly-acquired property

surveyed, the survey put an acre of the Lundgrens' land into the Tribe's newly acquired land. The Tribe claimed the acre, and the Lundgrens filed suit. The federally-recognized Upper Skagit Tribe asserted sovereign immunity as an affirmative defense. The trial court recognized that it had *in rem* jurisdiction as the sovereign over the land in question, so it separated the tribe's immunity from *in personam* jurisdiction from the trial court's *in rem* jurisdiction over the property in question, and entered summary judgment in favor of the Lundgrens to settle the controversy around the real property in question.

The Tribe then appealed for review to the Washington State Supreme Court. Upon review, the Washington State Supreme Court rejected the Tribe's argument and found that the State court had *in rem* jurisdiction in the matter, and that the Tribe's sovereign immunity did not create a barrier to jurisdiction. The Upper Skagit appealed yet again to the US Supreme Court. SCOTUS saw a difference between *in rem* jurisdiction and the immovable-property exception, and in oral argument were leaning very favorably in favor of the immovable-property exception, but simply thought it had been raised as an issue too late in the case, and so remanded the case back to the Washington State Supreme Court to decide the issue of how the immovable-property exception applies to a controversy surrounding immovable real property and to reach a decision consistent with SCOTUS's opinion.

Upon remand, the Upper Skagit filed for dismissal and quitclaimed the land in question to the Lundgrens, whereupon the case was dismissed by the Washington State Supreme Court. The Lundgrens prevailed.

During oral argument, SCOTUS simply stated that bringing up the immovable-property exception that late in the case was too late, and the case needed to be

remanded back to the Washington State Supreme Court for it to decide. In oral argument, it is very clear that SCOTUS is very favorable to the immovable-property exception argument. Justice Kagan even stated in oral argument that the immovable-property exception is an extremely strong argument. Justice Kagan further made the very good point when she was speaking about Indian tribes and sovereign immunity on land they purchase.

Justice Kagan pointed out in oral argument in *Lundgren* that when the prince pops up in another jurisdiction and buys land, he ceases to be the prince.

It appears clear that the Upper Skagit Tribe believed that the immovable-property exception was a strong argument and did not want to go any further to determine the answer to that question, as evidenced by their filing for dismissal and quitclaiming the real property at issue to the Lundgrens.

VI. DID THE TRIAL COURT ERR IN DISMISSING TRIBAL DEFENDANTS UNDER NC RULE OF CIVIL PROCEDURE 12(b)(1), and/or 12(b)(2), and 12(b)(6)?

Sovereign immunity is an improper basis to invoke Rule 12(b)(1). Recent cases hold that sovereign immunity is properly asserted only as a personal jurisdiction defense. *See, e.g., Data General Corp. v. County of Durham,* 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-6 (2001). Thus, the trial court should have rejected Tribal Defendants' argument that their alleged claim to sovereign immunity deprives the Court of subject-matter jurisdiction under Rule 12(b)(1). *Id.* (R at 226)

In *Sasser*, the Court borrowed from *Cohen's Handbook of Federal Indian Law,* (1942) *(Sasser*, 40 N.C.App.673-674), and the Court concluded that jurisdiction shall be exercised by the state for any matter involving non-Indian questions sufficient to ground state jurisdiction. This action involves controversy surrounding non-Indian real

property that is neither a reservation nor Indian country, and even though Bird Road Easement was and is on Federal trust land, Defendant EBCI wielded it to move onto non-reservation trust land under the jurisdiction of the State to affect what happened on that land.

We were told by our attorney after prevailing at Federal Court in 1981 that the Deed of Easement that was given us in reaffirmation of the original Deed was one of only three like it in the entire United States, and that Howard Hughes was the grantee on the other two. I only bring this to the Court's attention to show that there are some unique circumstances at play here that are not to be found in the ordinary order of business.

If Tribal Defendants are permitted to exert sovereign immunity as they are doing in this matter, it will have further ramifications, including but not limited to, Defendant EBCI could block state-sponsored infrastructure such as highways. They could block utility companies and could completely ignore local zoning laws, as well as environmental regulations, and also remove real property at will from the state tax base.

It is without question that this court holds subject matter jurisdiction over the Subject Property that is in question.

VII. DID THE TRIAL COURT ERR BY DISMISSING TRIBAL DEFENDANTS AS A NECESSARY PARTY AND TO SETTLE THE CONTROVERSY SURROUNDING THE IMMOVABLE REAL PROPERTY THAT RESULTED FROM A CIVIL CONSPIRACY?

All the arguments that involve civil conspiracy are incorporated within this argument by reference.

Pursuant to Rule 19 of NC Rules of Civil Procedure, Tribal Defendant(s) are necessary parties for a judgment to be rendered that would settle the controversy surrounding the immovable real property that is the subject of this action. Tribal

Defendants are necessary because Plaintiff-Appellant is not seeking money. No one in our family wanted to sell Subject Property. Our children grew up on it, and it was our home since 1977.

Subject Property with its state-approved spring defectively transferred to Westridge Defendants for less than half of its value, which is supported by the fact that Westridge Defendants then defectively transferred it to Tribal Defendants two and a half years later for $622,000 more, plus or minus. Subject Property defectively transferred to Westridge Defendants for less than half its appraised value, but actually for much less than that, because the appraised value did not include consideration for the state-of-the-art, state-approved spring on Subject Property.

With dismissal of Tribal Defendants, it is not possible for Plaintiff-Appellant to obtain the relief sought, which is title to Subject Property pursuant to Declaratory Judgment Act, N.C.G.S.§ 1-253 *et seq.*, Tribal Defendants, by obtaining defective title to Subject Property in the manner they did and then claiming sovereign immunity, are depriving me of the right, as a resident and citizen of this State and of the United States, to settle the controversy that has been generated around the immovable real property in which Tribal Defendants are not an innocent third party, and the situation was subsequently leveraged by Westridge Defendants.

Tribal Defendants are depriving me of the right, among other things, to a statute of limitations as afforded by North Carolina law to reestablish myself as the rightful and proper person to hold title to Subject Property. Westridge Defendants' dealings with Tribal Defendants has the distinct feel of a straw-man situation, or it could be various other scenarios, but whichever it is, the transfer of Subject Property from me to Defendant Westridge was and is defective, and the transfer of Subject Property from

Defendant Westridge to Defendant EBCI was and is defective. Whatever the relationship was between Westridge Defendants and Tribal Defendants, whether consciously or not, it was helped along by the Graham County tax office. (R at 8-9, ¶32-45, R at 23-24, ¶175-181, R at 26, ¶201, R at 27-28, ¶215-217) Also see *Miller v. Graham County*, 268 N.C.App. 466 (2019) (unpublished) and *Miller v. Graham County*, COA No. 21-81 (pending appeal).

Further evidence of the existence of civil conspiracy can be found in the events surrounding Bird Road Easement. The area of Bird Road Easement in most need of maintenance was the landslide area referred to by Defendant Ellsworth on 10 July 2016. (R at 78-80) This need of maintenance was most likely precipitated and necessitated by a log-jam created on Little Snowbird Creek by the Bird family, against all environmental rules, regulations, and Best Management Practices ("BMPs"). (R at 17-18) The Birds with their heavy equipment, which consisted of a good-sized excavator, a bulldozer, and a skidder, and numerous chainsaws, created a log-jam on Little Snowbird Creek, with no known objection from Defendant EBCI's environmental department. Subsequently, the elevated water level and flood plain of Little Snowbird Creek resulted in a landslide area on Bird Road Easement. I believe that this was not an accident. [5]

In contrast to Defendant EBCI allowing the Birds to engage in environmental destruction, they blocked us from the lawful use of our deeded and recorded easement, and then threatened to arrest anyone who used it, including Westridge Defendants.

The Tribal attorney general at that time, Annette Tarnawsky, in the Tribal Council meeting in August of 2013, stated in open session that the Tribe needed to

---

[5] After Defendant EBCI obtained title to Subject Property, the Birds' log-jam on Little Snowbird Creek appears to have been removed, thereby allowing the water level and flood plain to recede back to its natural state so that the landslide area has become much more repairable and usable.

figure out how to revoke Bird Road Easement (R at 22 ¶162-165), which is exactly what Tribal Defendants effectively did with the Stop-Work Order and subsequent law enforcement involvement, which then led in part to my losing Subject Property by way of two defective transfers and the subsequently-resulting controversy.

Tribal Defendants do not possess the defense of innocent third-party status, because they directly and with conscious effort interfered in my spring water opportunities and in my dealings with Westridge Defendants, Westridge Defendants then used the situation to their benefit which resulted in a defective deed and title, which was not marketable except for transferring back to me with consideration for whatever refund would be due.

Retaining Tribal Defendants as a necessary party in this matter is proper and does not affect their sovereign immunity, and it is necessary to retain Tribal Defendants as a party to settle the controversy surrounding the immovable real property, the same as any other sovereign on earth would be retained as a necessary party to settle a controversy surrounding immovable real property. Tribes do not enjoy super-sovereign immunity status, as many of the justices were pointing out in oral argument during *Lundgren*.

I alleged throughout the Complaint and Record and argue here in part but not limited to, that my Purchase Agreement with Westridge Defendants expired due to their nonperformance and that they used an unfair bargaining position to obtain owner financing terms under duress with no consideration. By alleging this in the Complaint, I was alleging, among other things, that the transfer of Subject Property to Westridge was

and is a defective transfer, and further, that the transfer of Subject Property from Westridge to Defendant EBCI was and is a defective transfer.[6]

Since this court has jurisdiction over the immovable real property, this court can exercise that jurisdiction to settle a controversy surrounding the subject immovable real property and is not exercising *in personam* jurisdiction over the Tribe which exists as its own dependent sovereign within its own boundaries which are held in trust by the Federal government. It is proper to retain Tribal Defendants as necessary parties insomuch as is necessary for this court to settle the controversy surrounding the immovable real property.

VIII. DID THE TRIAL COURT ERR CONSTITUTIONALLY IN THIS MATTER?

Tribal Defendants are wielding sovereign immunity to remove immovable real property from the jurisdiction of the state and, more particularly, the subject real property that is at issue here and which has continuously been under the jurisdiction of the state since the boundary lines were surveyed as they exist today. By permitting Tribal Defendants to remove the subject real property from the jurisdiction of the state, the trial court directly deprives citizens of the state and of the United States who have an interest in the subject real property of due process and also any other constitutionally-provided right or privilege to settle a controversy surrounding the subject real property. Allowing Tribal Defendants to exert sovereign immunity over recently purchased real property and by exerting such sovereign immunity removing the subject real property from the jurisdiction from the State of NC is in opposition to the U.S. Constitution.

---

[6] A document filed *pro se* is to be liberally construed and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers. *Erickson v. Pardus*, 127 S. Ct. 2200 (2007). (Internal citations and quotation marks omitted).

Again, in the opinion of the court in *McGirt*, it is stated:

> ...the Constitution ... entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the "supreme Law of the Land." Art. I, § 8, Art. VI, cl. 2.

McGirt, 140 S. Ct. 2462 (2020).

We can see that *McGirt*, just in 2020, effectively confirmed the Treaty of New Echota, which prevents Tribal Defendants from doing what they are doing.

Pursuant to 25 U.S.C. § 465, there is a statutory process that Congress has provided, and as was just confirmed in *McGirt* in 2020, statutes and treaties relating to tribes are the law of the land, pursuant to the U.S. Constitution art VI, cl. 2. Therefore, pursuant to 25 U.S.C. § 465, tribes must obtain prior approval from the U.S. Department of the Interior whereby, if approval is granted by the U.S. Department of the Interior, property that exists under the jurisdiction of the state can be removed from the jurisdiction of the state and become *Indian country* which then exists under the jurisdiction and oversight of the Federal government, which then grants a limited, supervised jurisdiction over the land to the Tribal government, so the jurisdiction over the land becomes a form of shared jurisdiction between the federal government and the dependent, sovereign tribe.

Furthermore, as was ruled in the federal appellate case of *Buzzard*, this prior approval is a very necessary component, for without it, a tribe could wield sovereign immunity over immovable real property with neither federal government nor the state having any say in the matter. Also, in the alternative, Congress can simply designate land within the United States as a reservation. However, in the case of the Subject Property at question in this action, it was not purchased by Tribal Defendants pursuant

to 25 U.S.C. § 465, and it was not designated by Congress as a reservation. Therefore, no sovereign immunity exists over it.

My family and I have over 40 years of our lives and all of our financial lives tied up in Subject Property, and as a matter of equity, Tribal Defendants should not be dismissed, to settle the controversy around Subject Property.

CONCLUSION

For these reasons, I respectfully request this Court to reverse the trial court's order, entered on 24 December 2020 and signed by the Honorable William H. Coward, granting the motions to dismiss of the Tribal Defendants (the EBCI Defendants.)

Respectfully submitted this 4th day of June, 2021.

Reid Goldsby Miller, *pro se*
P.O. Box 5451
Asheville, NC 28771
(251) 923-8889
reidgmiller@yahoo.com

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, Plaintiff-Appellant certifies that the foregoing Plaintiff-Appellant's Brief is fewer than 8,750 words (excluding cover, indexes, tables of authorities, certificate of service, this certificate of compliance, and appendices) as reported by the word-processing software.

REID GOLDSBY MILLER, *pro se*
P.O. Box 5451
Asheville, NC 28813
(251) 923-8889

CERTIFICATE OF SERVICE

The undersigned certifies that she has this day served the foregoing Plaintiff-Appellant's Brief in the above-captioned action upon all other parties to this cause by depositing a copy hereof in a postage-paid envelope in a post office under the custody of the United States Postal Service, properly addressed to the parties:

Dale A. Curriden
Nevin Wisnoski
The Van Winkle Law Firm
P.O. Box 7376
Asheville, NC 28802

dcurriden@vwlawfirm.com and by e-mail

Jay Gallinger, Attorney General
Eastern Band of Cherokee Indians
P.O Box 455
Cherokee, NC 28719

Kelly Langteau-Ball
Ridenour & Goss, P.A.
P.O. Box 965
Sylva NC 28779

This the 4th day of June, 2021.

Reid Goldsby Miller

Reid Goldsby Miller, *pro se*
P.O. Box 5451
Asheville, NC 28813
(251) 923-8889
reidgmiller@yahoo.com