The Cherokee Supreme Court

Eastern Band of Cherokee Indians
Qualla Boundary, Cherokee, North Carolina

LOUIS CAMPOS, INDIVIDUALLY, AND AS HUSBAND AND PERSONAL REPRESENTATIVE OF THE ESTATE OF SHEILA DIANE CAMPOS,	)	
APPELLANT,	)	
V.	)	**CSC-19-06**
	)	**OPINION**
EASTERN BAND OF CHEROKEE INDIANS; HARRAH'S NC CASINO COMPANY, LLC; TRIBAL CASINO GAMING ENTERPRISE; SMOKEY MOUNTAIN PROPERTIES, LLC,	)	
APPELLEES,	)	
SMOKEY MOUNTAIN PROPERTIES, LLC AND EASTERN BAND OF CHEROKEE INDIANS	)	
THIRD-PARTY PLAINTIFFS,	)	
V.	)	
KATHI JACKSON,	)	
THIRD-PARTY DEFENDANT.	)	

Allen Stahl & Kilbourne, PLLC, by James W. Kilbourne, Jr., for Appellant Louis Campos.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Dale A. Curriden and Nevin Wisnoski, for Appellee Eastern Band of Cherokee Indians.

Loftin and Loftin, P.A., by John D. Loftin, and Cathey & Strain, LLC, by Dennis Cathey and Rebecca Payne, for Appellee Harrah's NC Casino Company, LLC and Appellee Tribal Casino Gaming Enterprise.[1]

Brazil & Burke, P.A., by Bill Brazil and Meghann K. Burke, for Appellee Smokey Mountain Properties, LLC.

Simpson Law Firm, PLLC, by George L. Simpson, IV and Caroline P. Stutts, for Third-Party Defendant Kathi Jackson.

PIPESTEM, Justice B. TOINEETA.

Plaintiff Louis Campos, individually, and as husband and personal representative of the Estate of Sheila Diane Campos, appeals pursuant to Cherokee Code (C.C.) § 7-2(e) from the 15 November 2019 Order entered by Judge Randle L. Jones in the Cherokee Court that dismissed Plaintiff's complaint against Defendant Eastern Band of Cherokee Indians (EBCI or the Tribe) and its entities (i.e., governmental entities), which include Defendant Tribal Casino Gaming Enterprise (TCGE) (collectively "the Tribe and its entities"), pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure and against Defendant Harrah's NC Casino Company, LLC (Harrah's NC) and Defendant Smokey Mountain Properties, LLC (Smokey Mountain Properties) pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.[2] Plaintiff sought damages from the aforementioned Defendants stemming from a tragic accident that occurred on 10 July 2016 in which his wife, Sheila Diane Campos (Ms. Campos), was struck by a vehicle driven by Third-Party Defendant Angel Ann Everett (Ms. Everett) after Ms. Campos stepped into a marked

[1] The court filed orders allowing attorneys Dennis Cathey and Rebecca Payne to appear *pro hac vice* in this matter.

[2] According to C.C. § 7-14(a), "[p]roceedings in the courts of the [EBCI] Judicial Branch shall be governed by the North Carolina Rules of Civil Procedure, the North Carolina Rules of Evidence, and the North Carolina Rules of Appellate Procedure." *Id.* § 7-14(a) (2020). All references to C.C. § 7-14 in this opinion are to C.C. § 7-14 (2020). Tribal Council subsequently recodified, but did not otherwise substantively amend, former C.C. § 7-14 as C.C. § 7-23 (2022). Ord. No. 186 (2022). The Cherokee courts, exercising inherent powers of the judiciary, have also promulgated local rules of practice and procedure, *see* E.B.C.I. LR (2020), and the Cherokee Supreme Court, exercising the same, has promulgated local rules of appellate procedure, *see* E.B.C.I. R. App. P. (2020).

crosswalk spanning Painttown Road/U.S. Route 19 while walking from Harrah's Cherokee Casino to Stonebrook Lodge where she planned to spend the night, which resulted in Ms. Campos sustaining serious injuries from which she subsequently died.[3] More specifically, the trial court concluded that Plaintiff's complaint against the Tribe and its entities required dismissal pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction because "Plaintiff ha[d] failed to establish an express[] and unequivocal waiver of sovereign immunity" by the Tribe and/or its entities for any of the purported claims in his complaint as mandated by C.C. § 7-13, which provides, in pertinent part:

> The Judicial Branch shall dismiss any claim or cause of action against the Eastern Band of Cherokee Indians, or any of its programs, enterprises, authorities, officials, agents, or employees acting in their official capacities, unless the complaining party demonstrates that the Cherokee Tribal Council or the United States Congress has expressly and unequivocally waived the Eastern Band's sovereign immunity for such a claim in a written ordinance, law, or contract.

C.C. § 7-13 (2020).[4] In arriving at this determination, the trial court rejected Plaintiff's argument that the Tribe had expressly and unequivocally waived sovereign immunity under C.C. § 1-2(g)(3)

[3] Ms. Everett has no affiliation with any of the named Defendants in the matter at issue here. When Plaintiff named Ms. Everett as a third-party defendant, Ms. Everett initially asserted that the Cherokee Court lacked jurisdiction over her, and, consequently, Plaintiff filed a complaint against her in the Superior Court, Jackson County (18-CVS-416) in the North Carolina court system. As for Plaintiff's complaint against Ms. Everett in the Cherokee Court stemming from her role as tortfeasor, Judge Jones subsequently approved a compromise settlement agreement, which stated, in pertinent part, that Ms. Everett's insurance carrier would provide a payment of $50,000.00 to Plaintiff; that all actions or claims against Ms. Everett in the Cherokee Court would be dismissed; and that Ms. Everett's "degree or percentage of fault" would "be determined by the fact finder in this action under comparative negligence without further financial liability to" Ms. Everett or her insurance carrier. After the settlement was approved in the Cherokee Court, Plaintiff's action against Ms. Everett in the North Carolina court system was dismissed by the Superior Court, Jackson County. Judge Jones subsequently entered a consent order amending the case caption in this matter by removing Ms. Everett's name therefrom; consequently, Ms. Everett is not listed as a party in the caption of this Court's opinion.

[4] All references to C.C. § 7-13 in this opinion are to C.C. § 7-13 (2020). Tribal Council subsequently recodified, but did not otherwise substantively amend, former C.C. § 7-13 as C.C. § 7-22 (2022). Ord. No. 186 (2022). Under the Cherokee Code, "[t]he Judicial Branch [is] . . . comprised of one Supreme Court, one Trial Court, and such other Trial Courts of Special Jurisdiction as established by law. The Supreme Court [is] known as the 'Cherokee Supreme Court' and the Trial Court [is] known as the 'Cherokee Court.'" C.C. § 7-1(a) (2020).

(2020) (providing that "[t]he Cherokee Court of Indian Offenses or any successor Cherokee Court shall exercise jurisdiction over actions against the [EBCI] seeking . . . [d]amages for tort claims where the Tribe maintains insurance coverage for such claims, with recovery not to exceed the amount of liability coverage maintained by the Tribe") and *Blankenship v. Eastern Band of Cherokee Indians*, 16 Am. Tribal Law 30, 42 (E. Cherokee Sup. Ct. 2019) (per curiam). With respect to its Rule 12(b)(6) ruling, the trial court more specifically concluded that Plaintiff's complaint warranted dismissal because the complaint was predicated "upon a theory of negligence involving premise[s] liability," which required Plaintiff to sufficiently allege, among other things, "the existence of a legal duty or standard of care owed to . . . Plaintiff by the[se] Defendants," and determined that because Defendant Harrah's NC and Defendant Smokey Mountain Properties "did not own, possess, or control the property where [Ms. Campos] sustained injury" or have control over the dangerous condition (i.e., the allegedly deficient crosswalk area), they "owed no duty to [her] with respect to any condition existing on the property," such that Plaintiff "failed to state a claim for which relief may be granted as to claims alleged against the landowners[5] adjacent to the

[5] Although the trial court dismissed the complaint against TCGE pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction based on the defense of sovereign immunity, the court also alternatively dismissed the complaint against TCGE pursuant to Rule 12(b)(6) for the same reasons it did with Harrah's NC and Smokey Mountain Properties – lack of ownership, control, or possession over the adjacent property and lack of control over the condition. Under the Tribe's unique property structure, Tribal lands located on the Qualla Boundary are held in trust by the Federal Government for the Tribe, but Tribal citizens (members) are eligible to hold possessory interest rights in Tribal lands. Possessory interest rights in Tribal lands are transferable to other Tribal citizens or first-generation lineal descendants of Tribal citizens, and anyone, Tribal citizens or non-Tribal citizens, may enter into a lease with the Tribe or a possessory interest holder in Tribal lands and thereby hold leasehold interest rights in Tribal lands. *See* C.C. § 47B-2 (2020) (stating that the legal title to land for which individual Tribal members may be issued a possessory holding will remain vested in trust for the Tribe and listing property rights reserved by the Tribe when a possessory holding is issued to a Tribal member); *see also* Ord. No. 453 (2019) (reorganizing C.C. Chapter 47 - Real Property into smaller chapters, including, among others, C.C. Chapter 47B – Possessory Holdings, C.C. Chapter 47D – Leasing, and C.C. Chapter 47E – Easements, Permits, and Rights-of-Way); C.C.§ 47B-3 (2022) (listing property rights of possessory holder Tribal members when the Tribe issues a possessory holding, including, among other things, "grant[ing] leases, permits, and licenses on this possessory holding to a member or nonmember of the Tribe, subject to Tribal law and, if applicable, subject to federal law"). Hence, the trial court's reference to Harrah's NC, Smokey Mountain Properties, and TCGE as "landowners" in its order is technically incorrect, albeit these three Defendants certainly occupied property or possessed property or leasehold interests adjacent to U.S. 19 where Ms. Campos was struck.

street, road[,] or highway where [Ms. Campos] was struck." In arriving at its determination, the trial court looked to North Carolina law on the standard or duty of care, which the court found persuasive and opined was the majority rule among United States jurisdictions regarding the duty of care owed to an invitee[6] by an owner or occupier of land who has no control over an alleged dangerous condition that exists on an adjacent or neighboring property and over which the owner or occupier has no possession, ownership, or control, namely that "the duty to protect from a condition on property arises from a person's control of the property and/or condition, and in the absence of control, there is no duty," *Lampkin ex rel. Lapping v. Hous. Mgmt. Res., Inc.*, 220 N.C. App. 457, 460, 725 S.E.2d 432, 435, *disc. rev. denied,* 366 N.C. 242, 731 S.E.2d 147 (2012). Plaintiff filed a notice of appeal with this Court from the trial court's order on 13 December 2019.

On 10 September 2020, the parties presented their respective oral arguments to this Court. Having carefully reviewed the controlling laws and the record, briefs, and oral arguments, we affirm the lower court's decision, as modified herein and as set out below, dismissing Plaintiff's complaint against the Tribe and its entities pursuant to Rule 12(b)(1) and the remaining Defendants pursuant to Rule 12(b)(6).

BACKGROUND

On 7 July 2017, Plaintiff filed a complaint in the Cherokee Court stemming from the accident in which he purported to allege various claims for relief seeking damages against the Tribe, TCGE, and Harrah's NC. On 17 July 2017, Plaintiff filed an amended complaint adding Smokey Mountain Properties as a defendant. On 21 September 2017, Plaintiff filed a corrected amended complaint without objection. Harrah's NC and TCGE subsequently moved to dismiss the complaint. Smokey Mountain Properties also moved to dismiss Plaintiff's complaint and filed

[6] *See Black's Law Dictionary* (11th ed. 2019) (defining "invitee" as "[s]omeone who has an express or implied invitation to enter or use another's premises, such as a business visitor or a member of the public to whom the premises are held open").

third-party complaints for contribution against Ms. Everett and Ms. Campos's sister, Third-Party Defendant Kathi Jackson (Ms. Jackson), who had accompanied Ms. Campos on the trip to Cherokee. The Tribe moved to dismiss Plaintiff's complaint pursuant to Rule 12(b)(1) based on sovereign immunity and filed a claim for contribution against Ms. Everett.

In January 2018, Ms. Jackson answered Smokey Mountain Properties' third-party complaint and asserted a counterclaim against Smokey Mountain Properties and a crossclaim against Ms. Everett. Smokey Mountain Properties later filed a reply to Ms. Jackson's counterclaim. On 8 June 2018, Ms. Everett filed her answer to the respective third-party complaints of the Tribe and Smokey Mountain Properties. On 9 July 2018, Plaintiff filed an action against Ms. Everett in the Cherokee Court.[7]

On 28 November 2018, Judge Jones held a hearing regarding one or more of the motions to dismiss filed by the Defendants.[8] After the hearing, but before the trial court entered an order, this Court decided *Blankenship*, 16 Am. Tribal Law at 30-42. Thereafter, with the consent of the parties, Plaintiff filed in May 2019 a second amended complaint[9] in the Cherokee Court against Defendants seeking damages in which he alleged that, on 10 July 2016, Ms. Campos, then a sixty-three-year-old resident of the state of Georgia, visited Harrah's Cherokee Casino (the Casino) in Cherokee, North Carolina, where she consumed beverages sold and/or provided to her by

[7] As noted earlier, the trial court subsequently approved a compromise settlement agreement between Plaintiff and Ms. Everett, which required her insurance carrier to pay $50,000.00 to Plaintiff in exchange for Plaintiff dismissing all claims against her.

[8] The record before us does not include a copy of the transcript of the hearing or indicate what transpired during it, including which of the various Defendants' motions to dismiss the trial court considered during the hearing.

[9] The second amended complaint for damages is the complaint specifically at issue before this Court.

employees/agents of the Casino, which is operated, managed, and controlled by Harrah's NC and TCGE, which is a single-purpose instrumentality and Tribal enterprise of the EBCI.[10]

At approximately 10:45 p.m. that night, Ms. Campos left the Casino to walk to her hotel room at Stonebrook Lodge, which is owned by Smokey Mountain Properties and located just across Painttown Road/U.S. Route 19 (U.S. 19) from the Casino. Stonebrook Lodge is accessible by foot via a pedestrian bridge located on the Casino's property that connects to a marked crosswalk that spans across U.S. 19. The pedestrian bridge provides access to and from the Casino for employees and patrons of the Casino who utilize the Casino's lower parking lot that is located adjacent to U.S. 19, and for Casino patrons staying at off-site hotels, like Stonebrook Lodge, which markets its location as being in the "center of Cherokee casino district" and "across the street" from the Casino.

U.S. 19 is located within the territorial jurisdiction of the EBCI. The Tribe has the responsibility to monitor and maintain the roadways located within its jurisdiction and has created and operated a Tribal transportation department (Cherokee DOT) for this purpose.[11]

On the night at issue, the streetlight located in front of Stonebrook Lodge was not in working order, and thus cast no light on or around the area of the crosswalk for pedestrians crossing U.S. 19 or for motorists driving on U.S. 19 in the vicinity of the crosswalk. After leaving the

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[10] A reviewing court "treats factual allegations in a complaint as true when reviewing a dismissal [for failure to state a claim upon which relief can be granted] under Rule 12(b)(6)." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010). Consequently, this Court views the factual allegations and background here in the light most favorable to Plaintiff. A reviewing court is not, however, required to accept as true allegations in a complaint that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008).

[11] Plaintiff cited C.C. § 136A-25 (2020) in the complaint, which provides that "[t]he Eastern Band of Cherokee have jurisdiction over all roads, highways, byways, and properties within the external boundaries of the [EBCI] Reservation." Plaintiff, however, does not allege or provide any statutory support for his assertion that the Tribe has a duty of care over a federal highway (U.S. 19) that runs through the Qualla Boundary. The Court notes that the Cherokee Code does not reference a Tribal Transportation department (Cherokee DOT), but does discuss the duties of the Cherokee Roads Commission, which is "solely responsible for the expenditure of all gasoline tax revenues and ensuring that such funds are utilized only in the manner and for the purposes designated by the Cherokee Gas Tax Ordinance" and by Chapter 137. C.C. § 137-1 (2020).

Casino on foot to walk to Stonebrook Lodge, both Ms. Campos and Ms. Jackson utilized the Casino's lower parking lot and the pedestrian bridge and arrived at the crosswalk spanning U.S. 19. Ms. Campos entered the crosswalk first, at which point Ms. Everett struck Ms. Campos with her vehicle and seriously injured her. Responding medical personnel flew Ms. Campos to the nearest medical facility where she remained in a coma until her death on 17 July 2016.

Plaintiff's complaint purported to allege several claims for relief, six of which are pertinent to the issues before this Court, which he labeled: (1) "Premises Liability — Negligent Creation of [an] Unsafe Condition," asserting that Defendants breached their duty of "ordinary care" owed to lawful visitors, like Ms. Campos, by failing to properly maintain the crosswalk area in a reasonably safe condition, including by failing to have sufficient warnings/signage to alert motorists of an existing crosswalk, using inadequate street lighting, and failing to provide sufficient warnings to pedestrians of the existing dangerous condition, i.e., the unsafe crosswalk spanning U.S. 19 (especially at night); (2) "Premises Liability — Negligent Failure to Correct Unsafe Condition," contending that Defendants breached their (unspecified) duty of care owed to Ms. Campos because they knew or should have known that the crosswalk area was improperly maintained, including that it had inadequate warnings/signage for motorists, was inadequately lit, and lacked sufficient warnings to pedestrians of the existing unsafe condition; (3) "Premises Liability — Negligent Failure to Detect Unsafe Condition," asserting (in the alternative) that Defendants breached "their duty of ordinary care" owed to Ms. Campos by failing to inspect and detect the unsafe condition involving the crosswalk area, particularly the lack of warnings/signage to motorists of an existing crosswalk, insufficient lighting, and insufficient warnings to pedestrians of the unsafe crosswalk; (4) "Premises Liability — Negligent Breach of duty of care to a Business Invitee," contending (in the alternative) that Defendants breached their "duty to exercise reasonable care" owed to Ms. Campos as their business invitee with respect to the crosswalk area by failing to erect proper

signage/warnings to alert oncoming motorists of the crosswalk, failing to maintain adequate lighting in the area, failing to inspect, detect, and/or correct the inadequate warning/signage and lighting issues, and failing to warn Ms. Campos about the alleged dangerous and defective condition involving the crosswalk area resulting from the lack of proper signage/warnings and inadequate lighting;[12] (5) "Breach of Custom and Traditions," contending that "[u]nder the custom and traditions of the [EBCI], a party has a duty to care and protect from harm outsiders[, like Ms. Campos,] who are invited onto the lands of the [EBCI]," and "an enhanced duty to care and protect from harm outsiders in their care who the party invited onto the lands of the [EBCI] for commercial gain of the Tribe or any of its members," such that "a party is responsible for any injury which befalls an outsider in their care who the party invited onto the lands of the [EBCI] for commercial gain of the Tribe or any of its members," which, in sum, appears to contend that Cherokee common law provides for a legal claim against a party based upon an enhanced premises liability standard or duty of care regarding business invitees; and (6) "Waiver of Sovereign Immunity under C.C. § 1-2(g)(3) and *Blankenship v. EBCI*," asserting that (A) the EBCI had obtained a Sovereign National Commercial Liability Insurance Policy from Gemini Insurance Company (Gemini Policy) that was in effect at the time of the accident, which provided coverage for the EBCI as a named insured party, as well as for members of Tribal Council, the Cherokee Roads Commission, and the Cherokee DOT while acting in the scope of their duties, for "personal injuries" or "property damage" caused in whole or in part by the Tribe's actions or omissions or by those acting on the

[12] In sum, the premises liability-based negligence claims generally assert that Defendants owed a standard or duty of care to Ms. Campos, who was a visitor or invitee on Tribal lands, that stemmed from the Defendants' ownership or occupation of land to adequately maintain the area in and around the crosswalk, which included having adequate signage and street lighting and an obligation to warn Ms. Campos about the crosswalk. Although Plaintiff's complaint also alleges that Defendants "jointly and severally either through interlocking contractual agreements or through shared duty owned, possessed or leased and were in full possession and control of the Casino, parking lots/pedestrian bridges, crosswalks, streets and surrounding properties, including Stonebrook Lodge," no such agreements were included in the record, and Plaintiff does not argue on appeal that any of his claims for relief are predicated on a duty or standard of care stemming from such an agreement. Consequently, we do not consider or express an opinion on that issue.

Tribe's behalf, or in connection with premises owned by or rented to the Tribe, and which included general liability coverage, tribal official errors and omissions coverage, and miscellaneous errors and omissions coverage, each of which allegedly "cover[s] the events of this complaint," (B) the Gemini Policy "contains express and unequivocal waivers of sovereign immunity as to the claims covered by the policy," such that the Tribe had "waived sovereign immunity as a defense," and (C) "[t]he [EBCI] is liable for damages for tort claims up to the amount of liability coverage maintained by the Tribe." [13]

On 10 September 2019, Judge Jones held a hearing addressing the EBCI's motion to dismiss. During the hearing, the Tribe noted that it previously had taken the position that C.C. § 1-2(g) did not involve or implicate an express and unequivocal waiver of tribal sovereign immunity based on this Court's opinion in *Teesateskie v. Eastern Band of Cherokee Indians Minors Fund*, 13 Am. Tribal Law 180 (E. Cherokee Sup. Ct. 2015) (per curiam), and the plain language found in section 1-2(g), which provides:

> (g) The Cherokee Court of Indian Offenses or any successor Cherokee Court shall exercise jurisdiction over actions against the Eastern Band of Cherokee Indians seeking the following relief:
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> (1) An injunction, writ of mandamus or a declaratory judgment concerning individual rights guaranteed by the Indian Civil Rights Act;
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> (2) Damages for condemnation by the Tribe;
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> (3) Damages for tort claims where the Tribe maintains insurance coverage for such claims, with recovery not to exceed the amount of liability coverage maintained by the Tribe.

[13] The Court notes that Plaintiff's complaint does not reference a statutorily authorized Tribal "tort claims" action, with an associated standard or duty of care, which can be brought against the Tribe. Instead, Plaintiff appears to assume or allege that the plain language of subsection (g)(3) constitutes and provides for a cause of action, specifically a statutorily authorized Tribal "tort claims" action, against the Tribe for which conditional relief may be granted based on the insurance contract.

C.C. § 1-2(g) (2020). The Tribe further noted that certain statements made by this Court in *Blankenship*, albeit nonbinding dicta,[14] suggested that the language found in C.C. § 1-2(g) indeed implicated a potential waiver of tribal sovereign immunity and that, with respect to C.C. § 1-2(g)(3) specifically, this Court's decision in *Blankenship* appeared to articulate a two-part test that a plaintiff must meet to demonstrate that the Tribe expressly and unequivocally waived its sovereign immunity to allow a plaintiff to pursue a tort claims action against the Tribe seeking damages "where the Tribe maintains insurance coverage for such claims, with recovery not to exceed the amount of liability coverage maintained by the Tribe," C.C. § 1-2(g)(3), namely that "(1) a policy of insurance must be maintained covering such tort claims, and *also* (2) that contract of insurance itself must contain an express and unequivocal waiver of sovereign immunity as to the claims covered by the policy." *Blankenship,* 16 Am. Tribal Law at 42 (citing C.C. § 7-13). The Tribe acknowledged that it maintained the Gemini Policy at the time of the accident, and that the Gemini Policy potentially provided coverage for Plaintiff's loss stemming therefrom;[15] that American Claims Management (ACM), the third-party administrator for Gemini, had communicated with the Tribe in August 2017 about Gemini's preliminary coverage position regarding the insurance claim[16] and Plaintiff's pending lawsuit; and that Gemini had indicated, among other things, that because Plaintiff framed his purported claims for relief in terms of premises liability, Gemini planned to address the loss and potential resulting insurance claim under "Insuring Agreement A

[14] *See Black's Law Dictionary* (11th ed. 2019) (defining *obiter dictum* as a "judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)").

[15] The record contains an affidavit from Barbara G. Owle, Risk Manager for the EBCI, in which Ms. Owle stated under oath that she is responsible for maintaining records of the insurance policies maintained by the EBCI and that the Tribe was insured with Gemini under Policy Number TGL0000097-02 (Gemini Policy) on the date at issue.

[16] The Gemini Policy provides: "The term 'claim' wherever used herein, shall mean any information that may give rise to damages covered by this policy, including suit(s) brought in connection therewith, which the Named Insured becomes aware of and provides written notice of the same to the Carrier."

— General Liability Coverage," which was subject to a $1,000,000.00 per occurrence and $2,000,000.00 aggregate limit and a $2,500.00 per occurrence deductible. ACM had also informed the Tribe that Gemini's preliminary position with respect to the lawsuit was that Gemini would provide the EBCI and TCGE with a defense thereto, but that Gemini reserved the right to raise any applicable defenses or exclusions to coverage under the Policy, including Exclusion Q regarding Federal Tort Claims, and that ACM would continue to investigate whether the Cherokee DOT is considered a "federal contractor" under the Indian Self-Determination and Education Assistance Act, Public Law 93-638, and "received funding via [Public Law] 93-638 to monitor and maintain the street lighting for the stretch of [U.S.] Highway 19 which lies next to the Harrah's NC Casino," because if ACM "confirmed the Federal Tort Claims Act [was] the sole and exclusive remedy for . . . Plaintiff's claim," then Plaintiff's loss and resulting claim would be excluded from coverage pursuant to Exclusion Q of the Gemini Policy. The Tribe further noted that the parties' disagreement centered on whether the second requirement of *Blankenship* had been met, not the first, and that it was the Tribe's position that the Gemini Policy itself contained no language indicating that the EBCI expressly and unequivocally waived sovereign immunity with respect to the tort claims covered under the Gemini Policy, such that dismissal pursuant to Rule 12(b)(1) was required.

In response, Plaintiff asserted that this Court's decision in *Blankenship* made it clear that he was correct when he had previously argued that the interpretation that the Tribe had previously advanced of C.C. § 1-2(g) was overly narrow and that *Blankenship* "clearly . . . says that [C.C. §] 1-2(g) is a waiver of sovereign immunity under [certain] circumstances." Plaintiff agreed that *Blankenship* appears to articulate a two-part test for a waiver of sovereign immunity under C.C. § 1-2(g)(3) with respect to a Tribal "tort claims" action. However, he contended only the first requirement is supported by the language of C.C. § 1-2(g) and that this Court incorrectly read a

second requirement into the statute, although he acknowledged that the trial court lacked the authority to overrule a decision of this Court. Plaintiff further argued that, even if the second requirement constituted good law, post-*Blankenship*, "there is no question that [C.C. §] 1-2(g) allows for a waiver of sovereign immunity where there is a contract for insurance and where that contract of insurance contains an express and unequivocal waiver of sovereign immunity as to the claims covered by the policy." According to Plaintiff, the Gemini Policy contains just such a provision, namely Paragraph T (Sovereign Immunity) in Section V (Conditions), which provides:

> In the event of a claim or suit, the Carrier agrees not to use the Sovereign Immunity of the "Insured" as a defense, unless the "Insured" authorizes the company to raise such a defense by written notice to the Carrier. Any such notice will be sent not less than 10 days prior to the time required to answer any suit. Any use of the Sovereign Immunity defense will only apply to coverage and limits of this insurance policy.
>
> The Carrier is not authorized or empowered to waive or otherwise limit the "Insured's" Sovereign Immunity outside or beyond the scope of coverage or limits of this insurance policy.
>
> Further, the "Insured", by accepting this policy, agrees to release the company from any and all liability to them or their members because of the failure on the part of the Carrier to raise the defense of Sovereign Immunity, except in cases where the "Insured" specifically requests the company to do so in the manner provided herein.

Although Plaintiff acknowledged that the above provision indicates that the Tribe still "maintains control over its particular sovereign immunity" in the event an injured party seeks to bring an insurance claim or lawsuit against the Tribe, Plaintiff contended that Paragraph T remains materially significant with respect to the alleged waiver of sovereign immunity at issue here with respect to the Tribal "tort claims" action he seeks to bring against the Tribe under C.C. § 1-2(g)(3) because, if the Tribe fails to notify Gemini that Gemini has the Tribe's authorization to raise tribal sovereign immunity regarding a claim for loss in the precise manner articulated in the contract,

i.e., in writing no less than ten days prior to the time required to answer a plaintiff's lawsuit, then the Tribe effectively waives or is divested of its right to assert sovereign immunity as a defense thereto. Plaintiff further maintained that whether the Tribe had, in fact, strictly complied with the above Gemini Policy provision constituted a key issue regarding whether the Tribe had expressly and unequivocally waived the defense here, and that this issue was still ripe for discovery and investigation, such that dismissal pursuant to Rule 12(b)(1) was improper.

In response, the Tribe asserted that Paragraph T is a confusing provision but that it is clear about one thing — the Tribe retains its right to raise the defense of sovereign immunity as a bar to suits seeking damages for claims for loss that are allegedly covered under the Gemini Policy — which is inconsistent with Plaintiff's assertion that Paragraph T constitutes an express and unequivocal waiver of sovereign immunity. Thus, the Tribe maintained that neither Paragraph T nor any other provision in the Gemini Policy expressly and unequivocally waives sovereign immunity as required by Tribal law, particularly given the high bar that an express and unequivocal waiver requires and the plethora of EBCI, federal, and other authority indicating that any ambiguity or lack of clarity in language allegedly waiving immunity should be viewed strictly in favor of the sovereign retaining immunity, such that Plaintiff's purported claims for relief against the Tribe and its entities are barred by sovereign immunity and warranted dismissal pursuant to Rule 12(b)(1).

As noted above, on 15 November 2019, the trial court entered an order that dismissed Plaintiff's complaint against the Tribe and its entities, including TCGE, pursuant to Rule 12(b)(1) and against Harrah's NC and Smokey Mountain Properties pursuant to Rule 12(b)(6).[17] With respect to its Rule 12(b)(1) ruling, the trial court concluded that this Court's opinion in *Blankenship*

[17] As noted earlier, the trial court alternatively dismissed Plaintiff's complaint against TCGE pursuant to Rule 12(b)(6).

indeed established a two-part test that must be met for Tribal Council to effectively waive the Tribe's sovereign immunity in accordance with C.C. § 7-13 with respect to a "tort claims" action brought against the Tribe under C.C. § 1-2(g)(3), such that Plaintiff had to demonstrate that the Gemini Policy itself contained an express and unequivocal waiver by Tribal Council as to the specific tort claims covered by the policy. Turning to Paragraph T of the Gemini Policy, the trial court noted that this provision is neither Tribal law nor a provision of the Cherokee Code, indicated that nothing in the record suggested that Tribal Council or any other legislative body intended to make Paragraph T jurisdictional, opined that the provision's language is not jurisdictional and does not provide that the Tribe waives or is divested of the defense of sovereign immunity for failing to notify Gemini in the manner specified therein, and concluded that Paragraph T does not constitute an express and unequivocal waiver of the Tribe's sovereign immunity in accordance with C.C. § 7-13. Based on its determination that Plaintiff failed to establish that Tribal Council had expressly and unequivocally waived its sovereign immunity for a Tribal "tort claims" action as required by EBCI law, the trial court concluded that it was required to dismiss Plaintiff's complaint against the Tribe and its entities pursuant to Rule 12(b)(1) because the alleged claims for relief were barred by sovereign immunity.[18]

Regarding its Rule 12(b)(6) determination, the trial court (1) opined that Plaintiff's claims for relief against Defendants were all based "upon a theory of negligence involving premise[s] liability," which required Plaintiff to allege "a prima facia [sic] claim of negligence," including the existence of a legal duty or standard of care owed to Plaintiff by Defendants, a breach of that duty, and a causal relationship between the breach and actual injury or loss sustained by Plaintiff; (2) noted that it was undisputed that Ms. Campos was not located on premises, i.e., property, owned

[18] It was undisputed that the Tribe and its entities had timely asserted the defense of sovereign immunity within the context of the lawsuit itself in their original answer to Plaintiff's original complaint.

or occupied by Harrah's NC, Smokey Mountain Properties, or TCGE (collectively, the "Adjacent Property Defendants") when she was injured, but on a neighboring roadway; (3) indicated that Plaintiff was "seek[ing] to establish a public policy duty" based on an expansive theory of liability that would result in owners or occupiers of land being under an affirmative obligation to warn all of their "[g]uest[s] about potentially hazardous locations, or activities off-site or in the area for which their guest[s] may engage in or visit while staying on or using their premises"; (4) emphasized its concerns that Plaintiff's theory of liability would make all property owners liable to invitees for injuries that occur on off-site properties for allegedly failing to give invitees adequate warnings of alleged dangerous conditions located on off-site properties or failing to correct those conditions, despite having no control over or possession of the off-site property, and "would increase the litigation of landowners who service tourist[s], customers, or patrons in the area in light of the inherent dangers associated with the common activities of the region, such as hiking, camping, rafting, and outdoor recreation"; and (5) indicated that "no credible record" had been presented to the court that Plaintiff's expansive theory of liability "has been or is the public policy or culture of the [EBCI]," and that the case law Plaintiff had provided to the court from other United States jurisdictions to support his expansive theory of liability reflected the minority rule among United States jurisdictions, which the trial court did not find to be particularly persuasive or on point. The trial court further indicated that it found *Lampkin*, 220 N.C. App. at 457-67, 725 S.E.2d at 432-39, and *Fellheimer v. Fairmont Hotels & Resorts, Inc.*, 2004 WL 2278533, at *1 (E.D. Pa. 2004) (unpublished), to be "on point and persuasive"; and that *Lampkin*, and the line of cases of which it is a part, reflects the majority rule among United States jurisdictions regarding a property owner or occupier's duty of care with respect to an alleged dangerous condition over which the owner or occupier has no control that is located on property that the owner or occupier does not possess, occupy, or control. Noting that it was "not bound by

North Carolina law," the trial court opined that "[C.C. §] 7-2(d) required the [c]ourt to consider the holdings of North Carolina Courts and apply them as precedent when deemed appropriate," which the trial court determined was the case in this matter.

Turning to North Carolina law, the court emphasized that (1) North Carolina case law clearly establishes that owners and occupiers of land have a duty to exercise reasonable care to keep their own premises safe for an invitee, but they are not insurers of the visitor's safety when the visitor is located off their premises, and they are not obligated to protect against injury from an alleged dangerous condition over which they have no control, *Lampkin*, 220 N.C. App. at 464, 725 S.E. 2d at 437; and (2) *Lampkin* (and the line of cases of which it is a part) establishes that "the duty to protect from a condition on property arises from a person's control of the property and/or condition, and [in the] absence of control, there is no duty." Ultimately, the trial court determined that here, as in *Lampkin* and *Fellheimer*, because the Adjacent Property Defendants "did not own, possess, or control the property where [Ms. Campos] sustained injury[, these three defendants] . . . thus owed no duty to [Ms. Campos] with respect to any condition existing on the property," and thus, could not "be liable in a claim for negligence," such that it was proper to dismiss Plaintiff's complaint against the Adjacent Property Defendants, who occupied land "adjacent to the street, road or highway" where Ms. Campos was struck, pursuant to Rule 12(b)(6). Plaintiff subsequently appealed to this Court from the 15 November 2019 Order.

DISCUSSION[19]

I. Dismissal of Complaint under Rule 12(b)(6)

[19] This Court typically would begin our discussion by reviewing the trial court's Rule 12(b)(1) ruling with respect to Plaintiff's complaint against the Tribe and its entities because said ruling involves foundational issues of subject matter jurisdiction and the sovereign immunity of the Tribe and its entities. However, because our analysis of those issues is lengthy and complex, we have elected to begin our discussion with our analysis of the trial court's Rule 12(b)(6) ruling with respect to the purported claims for relief against the Adjacent Property Defendants.

On appeal, Plaintiff primarily argues that the trial court erred by dismissing his complaint against the Adjacent Property Defendants pursuant to Rule 12(b)(6) because, in reviewing the complaint, the trial court allegedly failed to comply with Tribal Council's mandate to the Cherokee courts in C.C. § 7-2(d), which provides, in pertinent part:

> In deciding cases and controversies over which it has jurisdiction, the Judicial Branch shall be bound by the laws, customs, traditions, and precedents of the [EBCI]. If there is no applicable Cherokee law, the Judicial Branch shall look next to Federal law, then to North Carolina law, and finally to the law of other jurisdictions for guidance.

Id. § 7-2(d) (2020). Plaintiff contends that the trial court violated C.C. § 7-2(d) by: (1) failing to consider or apply Cherokee customs and traditions — the Cherokee Common Law — before looking to the English Common Law that had been adopted by North Carolina; (2) neglecting to address and ignoring the purported "Breach of Custom and Traditions" claim he lodged in the complaint; (3) incorrectly opining that C.C. § 7-2(d) "require[d] the [c]ourt to consider the holdings of North Carolina Courts and apply them as precedent when deemed appropriate" when this provision merely instructs the court to look to North Carolina law for "guidance" if neither EBCI law nor federal law applies; and (4) and incorrectly determining that it was "appropriate" to adopt and apply North Carolina common law here because Cherokee courts should only do so "when the outcome is consistent with Cherokee custom and tradition," which Plaintiff contends was not the case here.

Although Plaintiff admits that the record is not well-developed with respect to his alleged Breach of Customs and Traditions claim or the applicable standard or duty of care involved, he asserts that the trial court deprived him of a meaningful opportunity to establish said claim and to engage in discovery and develop the record to show how custom and tradition bears on the important question of the legal duty or standard of care that the Adjacent Property Defendants owe

to an invitee, like Ms. Campos, specifically "whether the legal duty of a business extended to inform its invitees of inherent dangers which they would foreseeably encounter, but which existed outside the boundary of the possessory holding," and hastily applied North Carolina law as precedent to dismiss his complaint via Rule 12(b)(6) in violation of C.C. § 7-2(d).

Plaintiff identifies, for the first time in his briefing to this Court, the Cherokee community values of *Gadugi* and *Duyvkta*, which he contends are two of the Tribe's customs and traditions that are particularly important to the purported Breach of Customs and Traditions claim that he asserts the trial court short-circuited, as well as to the applicable standard or duty of care owed to a business invitee by owners or occupiers of Tribal land with respect to alleged dangerous conditions that exist on neighboring premises that they do not own, occupy, or control. Plaintiff further contends for the first time on appeal that "[a]n expert in Cherokee custom and tradition could guide the Court to understand the application of these principals [sic] to particular cases and controversaries [sic]." Plaintiff argues that the application of these two specific customs and traditions (and potentially others) provides compelling guidance to adopt case law from other states that focuses on foreseeability with respect to the duty of care owed to an invitee by adjacent owners or occupiers of land regarding potential liability stemming from an injurious event or condition that occurs on an off-site neighboring property. Plaintiff maintains that, instead of viewing the legal authority he submitted through the lens of EBCI custom and tradition, the trial court followed North Carolina law set out in *Lampkin* in violation of C.C. § 7-2(d). Finally, in view of these alleged errors, Plaintiff asks us to reverse the lower court's order with respect to its Rule 12(b)(6) determination and remand this matter to the trial court for further development of his Breach of Customs and Traditions claim which, ultimately, requires the court to establish a new heightened standard or duty of care based on alleged Cherokee culture and tradition owed by an owner or

occupier of Tribal lands that covers or encompasses the premises liability-based negligence claims for relief that he raised in the complaint. [20]

The Adjacent Property Defendants contend that the trial court did not violate C.C. § 7-2(d) or otherwise err by dismissing Plaintiff's complaint against them pursuant to Rule 12(b)(6). With respect to the Cherokee concepts that Plaintiff mentions and discusses in his briefs to this Court in support of his alleged Breach of Customs and Traditions claim and the applicable issues involved with that alleged claim and the premises liability-based negligence claims, the Adjacent Property Defendants contend that, instead of properly raising these arguments in the trial court, Plaintiff has raised them for the first time on appeal, which is procedurally improper, and, accordingly, that this Court should disregard them. Finally, they assert that, given the absence of controlling EBCI or federal law that applies to the pertinent issues, the trial court, consistent with C.C. § 7-2(d), properly considered case law from North Carolina and other jurisdictions, including the case law provided by Plaintiff, as potential persuasive authority on the applicable duty of care before the court ultimately decided to apply North Carolina law. Accordingly, the Adjacent Property Defendants contend that the trial court correctly concluded that the purported claims for relief fail for lack of duty, and that the trial court did not err by dismissing the complaint against them pursuant to Rule 12(b)(6).

As discussed below, although the trial court's order lacks some clarity and precision, particularly with respect to how the lower court analyzed Plaintiff's purported Breach of Custom and Traditions claim and also contains a misstatement regarding the weight that North Carolina law carries under C.C. § 7-2(d), specifically that Cherokee courts are required to apply holdings

[20] As noted earlier, in this jurisdiction, all Tribal lands are held by the United States for the benefit of the Tribe. *See* footnote 5, *supra*. For purposes of this opinion, this Court uses the term "owner" to refer to the Tribe or a possessory interest holder of Tribal land and "occupier" to include leasehold interest holders in Tribal land, recognizing that the legal rights of ownership and occupancy under the Cherokee Code are not the same as under North Carolina law.

of North Carolina courts as precedent in the matters before them,[21] we ultimately conclude, based on the record before us, that the trial court did not violate C.C. § 7-2(d) in reviewing Plaintiff's complaint or in applying North Carolina law as set out in *Lampkin* to find that Plaintiff's claims against the Adjacent Property Defendants merited dismissal pursuant to Rule 12(b)(6).

The first part of the statutory mandate found in C.C. § 7-2(d) ("[i]n deciding cases and controversies over which it has jurisdiction, the Judicial Branch shall be bound by the laws, customs, traditions, and precedents of the [EBCI]," and if none applies, "the Judicial Branch shall look next to Federal law, then to North Carolina law, and finally to the law of other jurisdictions for guidance") requires the Cherokee courts to analyze and apply pertinent EBCI laws, customs, traditions, and precedents as controlling law in deciding matters over which the courts have jurisdiction and only permits the courts to consider legal authority from other jurisdictions when there is no applicable EBCI legal authority. The second part of the mandate provides a specific sequence that Cherokee courts are to follow in looking to other jurisdictions for guidance on the issues before them. *Id.* With the exception of federal law that expressly and directly applies to the EBCI or Indian tribes generally, however, none of the legal authority from other jurisdictions, including North Carolina, carries controlling or precedential value in Cherokee courts; in other words, it is, at most, persuasive. *See id.* § 7-2. Nevertheless, when consulting these non-binding legal authorities for guidance as potential persuasive authority in a matter, the Cherokee Code directs the Cherokee courts to look first to North Carolina law, and then to other jurisdictions.[22]

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[21] Despite this misstatement, the trial court correctly noted in its analysis that Cherokee courts are not "bound by North Carolina law."

[22] Cherokee courts have frequently decided to follow the guidance of North Carolina law, unless the court finds that the law of another jurisdiction more similarly situated to the EBCI, like another Tribal Nation, is more persuasive and/or provides a better legal standard or framework for the issue(s) before the court.

In view of the above, EBCI custom and tradition shall be taken into account when pertinent to the resolution of cases and controversies before the Cherokee courts, *see id.* § 7-2(d). To that end, the Tribe has entrusted the Cherokee courts with the duty and "power to [(1)] interpret and apply the Charter, laws, customs, and traditions of the [EBCI]," *id.* § 7-3(a) (2020), while reserving to the trial court the authority "to make findings of facts," *id.* § 7-4(a) (2020), and to (2) "develop a system of precedent based on the common law, customs, and traditions of the [EBCI]," *id.* § 7-3(b). Moreover, within this structure, the trial court, as the fact-finder with the judicial responsibility to assess the credibility of witnesses, *see id.* § 7-4, has the responsibility, when presented with a colorable claim under Cherokee custom and traditions, to develop the record and make key determinations regarding an alleged Cherokee common law claim, defense, or duty advanced by a party. When applicable, this includes hearing testimony regarding pertinent custom and tradition from witnesses learned in EBCI culture and tradition who are recognized in the EBCI community as Cherokee knowledge keepers, and making determinations on the record as to whether specific customs or traditions put forth to the trial court should establish a Cherokee common law claim or defense as alleged, or whether the court should establish an alleged legal standard informed by a purported Cherokee custom and tradition to be recognized in this jurisdiction as an established duty to be utilized in deciding issues brought before the court. Therefore, Cherokee courts must refrain from dismissing too quickly any colorable tribal common law claim(s) or defense(s) or specifically alleged Cherokee custom and traditions that purportedly inform the duties or standards to be adopted to adjudicate the alleged claim(s) or issue(s) before the court.

A plaintiff cannot, however, expect to avoid dismissal of an alleged EBCI custom and traditions claim pursuant to Rule 12(b)(6) by merely reciting the words "Cherokee common law" or "custom and traditions" in the complaint. At a minimum, a plaintiff must articulate a colorable

Cherokee common law claim or identifiable Cherokee custom and traditions in the complaint (along with any supporting documentation attached thereto and incorporated therein)[23] and sufficiently allege how the purported Cherokee common law or the specific custom and traditions apply to, materially bear on, and potentially control the issue(s) at hand while also providing a forecast of evidence to support the existence of the asserted Cherokee common law, or a roadmap to show how alleged Cherokee custom and traditions can be utilized to inform the establishment of legal duties or standards owed by the Tribe or another party. For example, at the outset of a case, a plaintiff can attach (and incorporate) documentation into the complaint that establishes the recognition of the specifically asserted Cherokee custom and traditions, including affidavits from Cherokee language speakers, Tribal historians, and/or Cherokee knowledge and/or culture bearers recognized by the EBCI community. *See, e.g.*, *In re Saunooke*, 15 Am. Tribal Law 176, 183 (E. Cherokee Sup. Ct. 2018) (per curiam) (concluding that, under Tribal common and customary law, a Tribal member, who was a licensed attorney, could permissibly practice law before Tribal Council and the EBCI Board of Elections even though he did not possess a North Carolina law license, based on the Tribal member presenting several uncontradicted sworn affidavits from tribal leaders serving on Tribal Council and members of the EBCI Board of Elections that provided a factual, evidentiary basis of a Tribal custom and tradition allowing non-attorneys and attorneys licensed in other states to engage in the practice law before certain quasi-judicial tribunals).[24] However, if a plaintiff files a complaint asserting Cherokee custom and traditions without

[23] *See Laster v. Francis*, 199 N.C. App. 572, 577, 681 S.E.2d 858, 862 (2009) (stating that, under the North Carolina Rules of Civil Procedure, "'[w]hen documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b)(6) motion'" (quoting *Schlieper v. Johnson*, 195 N.C. App. 257, 261, 672 S.E.2d 548, 551 (2009))).

[24] In contrast to the instant matter, *In re Saunooke* involved the exercise of this Court's original jurisdiction to review election matters and disputes.

supporting documentation (as discussed above) that are allegedly material to the court's adjudication of issues raised and, thereafter, a defendant files a Rule 12(b)(6) motion to dismiss, the plaintiff has a final opportunity to reply to such motion and to provide documentation.[25]

Once a party provides a foundational standard and articulates a colorable Cherokee common law claim or defense, or identifies Cherokee customs and traditions that materially apply to the case at hand and provides pertinent evidence in support, then the trial court must hold a hearing to determine the authenticity of the evidence provided, its recognition as a Cherokee cultural norm, doctrine, or way of life within the community, and its bearing on the establishment of the alleged Cherokee claim, defense, or legal duty under Cherokee common law. During that hearing, a plaintiff can seek to present arguments and evidence in support thereof, and a defendant can do the same to rebut the plaintiff's evidence and arguments. The trial court can, among other things, rule on the admissibility of the parties' evidence, consider and weigh the evidence, and make the necessary findings of fact and conclusions of law to decide whether and how the specifically asserted Cherokee common law, custom, or tradition indeed constitutes Cherokee customary law that controls or applies to the issue(s) before the court. *See* C.C. § 7-3(a) (vesting the Cherokee courts with "the power to interpret and apply the Charter, laws, customs, and traditions of the [EBCI]"); *id.* § 7-3(b) (stating that the Cherokee courts "shall develop a system of precedent based on the common law, customs, and traditions of the [EBCI]"); *id.* § 7-4(a)

[25] *See* N.C. Gen. Stat. § 1A-1, Rule 12(b) (2020) (stating that "[i]f, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 [of the North Carolina Rules of Civil Procedure], and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56"); *but see Laster*, 199 N.C. App. at 577, 681 S.E.2d at 862 (providing that, even though the trial court is required to liberally construe a plaintiff's allegations and treat the allegations as true on a Rule 12(b)(6) motion, a trial court can consider the documents attached to and incorporated into the complaint by the plaintiff in conjunction with a Rule 12(b)(6) motion without converting it into a motion for summary judgment in certain instances because the trial court can reject allegations that are contradicted by the documentation that the plaintiff attached to the complaint and the court need not "'accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences'" (quoting *Stickland*, 194 N.C. App. at 20, 669 S.E.2d at 73)).

(stating that the "[Cherokee] Trial Court shall have the power to interpret and apply the Charter, laws, customs, and traditions of the [EBCI], and to make findings of fact and conclusions of law and issue all remedies in law and relief in equity").

Turning to Plaintiff's purported breach of customs and traditions (Cherokee common law) claim, Plaintiff alleged in his complaint that, "[u]nder the custom and traditions of the [EBCI]," (1) "a party has a duty to care and protect from harm outsiders who are invited onto the lands of the [EBCI]"; (2) "a party has an enhanced duty to care and protect from harm outsiders in their care who the party invited onto the lands of the [EBCI] for commercial gain of the Tribe or any of its members"; and (3) "a party is responsible for any injury which befalls an outsider in their care who the party invited onto the lands of the [EBCI] for commercial gain of the Tribe or any of its members." Accordingly, under Plaintiff's alleged Cherokee common law claim, the Adjacent Property Defendants "are liable for the injuries and untimely death suffered by [Ms.] Campos" and "Plaintiff should be made whole by [Adjacent Property] Defendants for all economic and non-economic losses" of Ms. Campos and her estate. In summary, Plaintiff's complaint appears to contend that Cherokee customary law provides for a legal claim by a person who experiences economic or non-economic losses due to a foreseeable injury on Tribal lands against any party located within the Tribe's territorial boundaries (the inviter) by virtue of that party extending an invitation to said person to engage in any activity on Tribal land for commercial gain of the Tribe or a tribal member that involves a heightened or elevated standard or duty of care based on alleged culture and tradition owed to such person (the invitee), as well as an expansive theory of liability in which the inviter is deemed responsible to the invitee for any injury whatsoever that occurs on Tribal lands even if the injury occurs on property that the inviter does not own, occupy, or control and involves a condition over which the inviter has no control.

Although the trial court's order does not explicitly state a ruling on Plaintiff's purported breach of Cherokee common law claim and largely uses negligence terminology in its analysis of Plaintiff's claims against the Adjacent Property Defendants, this Court, having reviewed the record, disagrees with Plaintiff's contention that the trial court wholly ignored or failed to rule on his purported breach of Cherokee common law claim. First, the trial court specifically noted in its order that Plaintiff's complaint purported to allege a breach of Cherokee common law claim, and the court collectively framed the claims against the Adjacent Property Defendants as "Plaintiff's *claims* of liability of adjacent property owners to keep property safe" (emphasis added). Also, like Plaintiff's alleged premises liability-based negligence claim(s), Plaintiff's purported breach of Cherokee common law claim was also predicated on the Adjacent Property Defendants breaching an alleged heightened or enhanced standard or duty of care based on unspecified Cherokee custom and traditions that Plaintiff contends the court was required to utilize in establishing the purported standard or duty of care for his alleged Cherokee common law claim. Second, the trial court emphasized its concerns about the expansive theory and interpretation of liability that Plaintiff was proposing, specifically that Plaintiff's "theory of liability would make all property owners liable to invitees for injuries [and alleged dangerous conditions] occurring off-site . . . which the . . . property owner failed to give the invitee adequate warnings of or failed to correct" even though the owner had no control over the property where the injury occurred. Further, the court expressed that Plaintiff's "interpretation would increase the litigation of landowners who service tourist[s], customers or patrons in the area in light of the inherent dangers associated with the common activities of the region such as hiking, camping, rafting, and outdoor recreation." The trial court then found that "[t]here [was] no credible record presented to the [c]ourt" that Plaintiff's interpretation and theory of liability "has been or is the public policy or culture of the [EBCI]," which implicitly indicates that the trial

court's review included the purported breach of the Cherokee common law claim and the alleged premises liability-based negligence claim(s) based on non-specific Cherokee custom and traditions, and concluded that Plaintiff had failed to state a claim on which relief could be granted.

Next, contrary to Plaintiff's assertions, the record does not suggest that the trial court short-circuited Plaintiff's development of his purported breach of Cherokee common law claim, but rather, the record shows that Plaintiff's complaint was facially insufficient, lacking adequate allegations that identified or supported even a colorable Cherokee common law claim or any specific Cherokee custom and traditions, necessary to provide a basis to justify the trial court holding a hearing on this issue of first impression. The complaint primarily relies on the mere recitation of the words "custom and traditions" to support his alleged claim, and merely includes conclusory statements of how unspecified Cherokee common law should be interpreted and applied, thus neglecting to provide foundational support for his alleged breach of Cherokee common law claim or the custom and traditions that he asserts are mandatory for the trial court to apply. Moreover, Plaintiff's complaint fails to provide even a hint or example of how the alleged unspecified "Cherokee custom and tradition" forms or shapes community expectations of behavior or responsibility, if any, toward invitees in a commercial setting aligned with or analogous to the specific facts and issues in this case. These materially significant shortcomings weigh in favor of dismissal of Plaintiff's alleged breach of custom and traditions claim without a hearing.

Furthermore, this Court agrees with Defendants that Plaintiff's belated attempts to name Cherokee concepts, not presented to the trial court, that he contends bear heavily on the establishment of his purported breach of Cherokee common law claim and to offer non-specific witness testimony of Cherokee experts and provide related arguments for the first time in this

Court are procedurally improper and insufficient to constitute an adequate forecast with respect to establishing Plaintiff's alleged Cherokee culture and tradition claim. *See* E.B.C.I. R. App. P. 9(b)(1) (2020) (mandating, in pertinent part, that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context" and "for the complaining party to obtain a ruling upon the party's request, objection or motion"); N.C. R. App. P. 10(a)(1) (2020) (mandating, in pertinent part, that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context" and "for the complaining party to obtain a ruling upon the party's request, objection, or motion"); *see also State v. Bursell*, 372 N.C. 196, 199-200, 827 S.E.2d 302, 305 (2019) (noting that, pursuant to North Carolina Appellate Rule 10(a)(1), the failure to raise an argument or issue before the trial court bars appellate review of said argument or issue). In view of the above, this Court concludes that the trial court did not violate C.C. § 7-2(d) or otherwise err by summarily dismissing Plaintiff's alleged Cherokee common law claim.

Turning to Plaintiff's premises liability-based negligence claim(s), the Court dismisses as procedurally improper and does not consider Plaintiff's belated submission of new substantive information, arguments, and assertions in his appellate briefs identifying Cherokee concepts in support of the alleged Cherokee custom and traditions that Plaintiff argues must be considered in regard to his alleged heightened standard or duty of care applicable to the purported premises liability-based negligence claim(s). Plaintiff's complaint purports to establish four such claims: (1) "Premises Liability — Negligent Creation of [an] Unsafe Condition," asserting that Defendants breached their duty of "ordinary care" owed to lawful visitors, like Ms. Campos, by failing to

properly maintain the crosswalk area in a reasonably safe condition, including by failing to have sufficient warnings/signage to alert motorists of an existing crosswalk, failing to use adequate street lighting, and failing to provide sufficient warnings to pedestrians of the existing dangerous condition, i.e., the unsafe crosswalk spanning U.S. 19 (especially at night); (2) "Premises Liability — Negligent Failure to Correct Unsafe Condition," contending that Defendants breached their (unspecified) duty of care owed to Ms. Campos because they knew or should have known that the crosswalk area was improperly maintained, including that it had inadequate warnings/signage for motorists, was inadequately lit, and provided insufficient warnings to pedestrians of the existing unsafe condition; (3) "Premises Liability — Negligent Failure to Detect Unsafe Condition," asserting (in the alternative) that Defendants "breached their duty of ordinary care" owed to Ms. Campos by failing to inspect and detect the unsafe condition involving the crosswalk area, particularly the lack of warnings/signage to motorists of an existing crosswalk, insufficient lighting, and insufficient warnings to pedestrians of the unsafe crosswalk; (4) "Premises Liability — Negligent Breach of duty of care to a Business Invitee," contending (in the alternative) that Defendants breached their "duty to exercise reasonable care" owed to Ms. Campos as their business invitee with respect to the crosswalk area by failing to erect proper signage/warnings to alert oncoming motorists of the crosswalk, failing to maintain adequate lighting in the area, failing to inspect, detect, and/or correct the inadequate warning/signage and lighting issues, and failing to warn Ms. Campos about the alleged dangerous and defective condition involving the crosswalk area resulting from the lack of proper signage/warnings and inadequate lighting. Plaintiff further alleged with respect to all these purported claims that Defendants' breach(es) proximately caused Ms. Campos's untimely injury and death and that he has suffered various types of damages "as a result of the death of [Ms. Campos] by wrongful act[s] of the Defendants."

However, Plaintiff's complaint does not identify or reference any provision of the Tribe's Charter and Governing Document (Charter) or the Cherokee Code as the basis or foundation for his premises liability-based negligence claim(s), which appear to be more appropriately classified as a premises liability-based wrongful death negligence claim based on alternative duties of an inviter that were allegedly breached. Instead, Plaintiff argues that proper consideration of the directive contained in C.C. § 7-2(d) should lead to a heightened standard or duty of care purportedly established by unspecified culture and tradition that would make adjacent property owners or occupiers liable for injuries that befall their invitees that occur on property that the inviters do not own, occupy, or control which stem from an alleged dangerous condition over which they have no control. Given the apparent lack of Cherokee or federal authority that controls and that Plaintiff merely offered generic allegations regarding custom and tradition in his complaint by neglecting to allege specifically identifiable EBCI customs or traditions and omitting any materials that potentially establish authenticity or express how the alleged customs and traditions support the establishment of Plaintiff's proposed heightened duty or standard of care applicable to his premises liability-based negligence claim(s), the Court concludes that the trial court did not err in failing to hold a hearing on Plaintiff's alleged custom and traditions and properly looked first to the law of North Carolina and then other jurisdictions for guidance as potential persuasive authority in accordance with C.C. § 7-2(d) regarding the duty of care owed by an inviter to an invitee in a premises liability-based negligence claim. Moreover, based upon our review of the record, it does not appear that the trial court violated C.C. § 7-2(d), or otherwise erred in finding *Lampkin* persuasive here. Although Plaintiff argues that the instant case "provides a particularly compelling factual scenario to reject" the application of law set out in *Lampkin*, we disagree. Like the trial court, we find the cases Plaintiff cites in support of his position to be inapposite and unconvincing with respect to the standard or duty of

care issue. In fact, after reviewing case law from numerous jurisdictions, including North Carolina and the jurisdictions provided by Plaintiff, this Court also concludes that the standard or duty of care as articulated in *Lampkin*, and in the line of North Carolina cases of which *Lampkin* is part, is the most persuasive. Accordingly, this Court holds that the trial court did not violate C.C. § 7-2(d) when electing to apply the law articulated in *Lampkin* to Plaintiff's premises liability-based wrongful death negligence claim against the Adjacent Property Defendants and the corresponding duty of care that they owed to Ms. Campos, their invitee, who was injured due to alleged dangerous conditions on property that they did not own, occupy, or control.

Having found no errors by the trial court under C.C. § 7-2(d), we next review the court's decision to dismiss Plaintiff's alleged premises liability-based negligence claim(s) pursuant to Rule 12(b)(6), which "requires a court to determine 'whether, as a matter of law, the [factual] allegations of the complaint treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.'" *Teesateskie*, 13 Am. Tribal Law at 188 (quoting *Dalenko v. Wake Cnty. Dep't of Human Servs.*, 157 N.C. App. 49, 54, 578 S.E.2d 599, 603 (2003)). The reviewing court is not, however, required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences, *Strickland*, 194 N.C. App. at 20, 669 S.E.2d at 73, and may properly dismiss a plaintiff's complaint under this standard "'if there is a want of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim.'" *Teesateskie*, 13 Am. Tribal Law at 188-89 (quoting *Dalenko*, 157 N.C. App. at 54-55, 578 S.E.2d at 603). On appeal, this Court reviews de novo the lower court's decision to grant a defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim. *Teesateskie*, 13 Am. Tribal Law at 188.

Under North Carolina law, "the duty to protect from a condition on property arises from a person's control of the property and/or condition, and in absence of control, there is no duty."

Lampkin, 220 N.C. App. at 460, 725 S.E.2d at 435. Accordingly, under the premises liability-based law articulated in *Lampkin*, an individual's duty to keep one's property or premises safe does not extend to guarding against injuries caused by dangerous conditions located on adjacent property if the individual has no control over the property and/or the alleged dangerous conditions located thereon unless the individual engaged in "affirmative action [that] *created* the dangerous condition that injure[d] the plaintiff off of [the individual's] premises." *Id.* at 461, 725 S.E.2d at 435 n.3 (citing *Dunning v. Forsyth Warehouse Co.*, 272 N.C. 723, 723-25, 158 S.E.2d 893, 893-95 (1968) (holding that even though the defendant property owner did not own or control the adjoining sidewalk on which the plaintiff had fallen and sustained serious injury, a jury could find that the defendant "created the defective condition which resulted in [the] plaintiff's injuries" because the defendant allegedly had, without obtaining a city permit required by law, excavated and removed part of the city's concrete sidewalk to construct a drainage culvert to divert surface water away from the defendant's building, directed the water to flow under the city's sidewalk and into the city's drainage system, and placed a thin metal sheet over the culvert and a portion of the city's sidewalk and covered the area with some concrete to make the surface conform to the undisturbed portion of the sidewalk, and later, the metal sheet, weakened by corrosion, gave way when the plaintiff stepped on the area of the sidewalk that the defendant had altered)).

Here, the Adjacent Property Defendants did not own, occupy, or control the adjacent U.S. 19 roadway or control the alleged dangerous condition involving the crosswalk that spans it, nor did Plaintiff sufficiently allege that these Defendants engaged in affirmative acts that created the alleged dangerous condition. To the extent that Plaintiff appears to contend that general advertisements highlighting a business's location — for example, Defendant Smokey Mountain Properties emphasizing Stonebrook Lodge's proximity to the Casino in some of its public advertisements — constituted affirmative acts that created the dangerous condition, specifically

the alleged conditions involving U.S. 19 that allegedly caused Ms. Campos's injuries, we disagree. *See, e.g.*, *Dunning*, 272 N.C. at 723-25, 158 S.E.2d at 893-95. Accordingly, following the premises liability-based law set out in *Lampkin*, this Court concludes that the Adjacent Property Defendants did not owe Ms. Campos any duty with respect to the alleged dangerous condition occurring on the adjacent property, and that the trial court did not err by dismissing Plaintiff's premises liability-based wrongful death negligence claim(s) against them pursuant to Rule 12(b)(6). *See Peace River Elec. Coop., Inc. v. Ward Transformer Co.*, 116 N.C. App. 493, 511, 449 S.E.2d 202, 214 (1994) (providing that to state a prima facie case of negligence, a plaintiff must allege "the existence of a legal duty or standard of care owed to the plaintiff by the defendant, [a] breach of that duty, and a causal relationship between the breach of duty and certain actual injury or loss sustained by the plaintiff"), *disc. rev. denied*, 339 N.C. 739, 454 S.E.2d 655 (1995).

II. Dismissal of Complaint against the Tribe and its Entities under Rule 12(b)(1)

Plaintiff asserts on appeal that, "[l]ike North Carolina and many other sovereigns, the [Tribe] has provided a process for litigation of tort claims such as [Plaintiff's] wrongful death suit" against it, specifically in C.C. § 1-2(g)(3) (providing that "[t]he Cherokee Court of Indian Offenses or any successor Cherokee Court shall exercise jurisdiction over actions against the [Tribe] seeking the following relief . . . (3) Damages for tort claims where the Tribe maintains insurance coverage for such claims, with recovery not to exceed the amount of liability coverage maintained by the Tribe"). Specifically, according to Plaintiff, C.C. § 1-2(g)(3) waives tribal sovereign immunity and allows a plaintiff to bring a Tribal "tort claims" action against the Tribe seeking damages if the Tribe has a liability insurance policy that provides coverage for the plaintiff's claims with the maximum potential monetary recovery being set by the limits of the applicable insurance policy. In other words, Plaintiff contends that C.C. § 1-2(g)(3) effectuates a conditional waiver of tribal

sovereign immunity that allows a plaintiff to bring a Tribal "tort claims" action against the Tribe seeking damages "if its provisions are satisfied," which merely requires that the Tribe have a liability insurance policy in place that provides the Tribe with coverage for the tort claims involved, a condition to which he alleges the Gemini Policy conforms. In sum, Plaintiff's main assertion is that the trial court erred in allowing the Tribe's motion to dismiss pursuant to Rule 12(b)(1) based on the defense of sovereign immunity because, in keeping with what he claims are the requirements of C.C. § 1-2(g)(3), the complaint alleges that, on the date of the accident, the Tribe maintained the Gemini Policy, which "included coverage for the Cherokee [DOT] and its employees for general liability coverage, Tribal official error and omissions liability, and miscellaneous errors and omissions liability" that covered acts or omissions by the Tribe and/or its entities that form the basis of his Tribal "tort claims" action and which "[u]nder the express terms of the statute, . . . would unequivocally resolve the matter in this case," such that Plaintiff's complaint against the Tribe should have survived dismissal.

Plaintiff acknowledges that this Court's decision in *Teesateskie* casts doubt on his argument, 13 Am. Tribal Law at 187 (stating that C.C. § 1-2(g)(3) "should not be interpreted as constituting an express[] and unequivocal waiver"), but he asserts that this Court's subsequent decision in *Blankenship* disavowed *Teesateskie* and supports his interpretation of C.C. § 1-2(g)(3). Plaintiff also acknowledges that his above argument regarding C.C. § 1-2(g)(3) is undercut by this Court's decision in *Blankenship*, 16 Am. Tribal Law at 42 (stating that any limited waiver of sovereign immunity for an alleged Tribal "tort claims" action involving C.C. § 1-2(g)(3) would require "(1) [that] a policy of insurance must be maintained covering such tort claims, and *also* (2) that [the] contract of insurance itself must contain an express and unequivocal waiver of sovereign immunity as to the claims covered by the policy" (citing C.C. § 7-13)), but he contends that the Court's guidance there is dicta, and thus does not constitute controlling authority for this Court to

follow on the alleged waiver of sovereign immunity issue. Plaintiff further maintains that this Court should reject the second requirement articulated in *Blankenship* because he contends it is not supported by the plain language of C.C. § 1-2(g)(3) or prior decisions of this Court and is contrary to various rules of statutory construction. According to Plaintiff, notwithstanding this dicta from *Blankenship*, "[i]t is the act of purchasing the insurance to cover this claim which waives sovereign immunity under the [s]tatute"; "[t]he test for the waiver of sovereign immunity that the Tribal Council intended for the [Cherokee] [c]ourts to apply is whether the insurance policy covered the claims made by the [p]laintiff in a tort action"; and "[t]his Court should follow the clear directives of Tribal Council and disclaim any Court-created additional hurdles to jurisdiction."

Alternatively, Plaintiff maintains that, even if he must show that the "contract of insurance itself . . . contain[s] an express and unequivocal waiver of sovereign immunity as to the claims covered by the policy," *Blankenship*, 16 Am. Tribal Law at 42, Paragraph T of the Gemini Policy constitutes such a waiver. More specifically, Plaintiff argues that, notwithstanding the undisputed fact that the Tribe timely raised sovereign immunity as a defense from the outset of Plaintiff's lawsuit via its attorney in court proceedings, the Tribe still may have otherwise expressly and unequivocally waived the defense in the instant matter if the Tribe failed to notify Gemini in writing that it had the Tribe's authorization to assert the defense of sovereign immunity at least ten days before the Tribe was required to respond to Plaintiff's lawsuit as required by Paragraph T because, according to Plaintiff, the Tribe expressly and unequivocally waives tribal sovereign immunity under that provision if the Tribe fails to notify Gemini that it has the Tribe's authorization to assert the defense in the precise manner set forth therein. Plaintiff contends that important issues of fact requiring investigation and discovery remain regarding whether the Tribe

complied with this Gemini Policy provision, such that this case should be remanded to the trial court for further development and proceedings.

In response, the Tribe argues that *Teesateskie* and *Blankenship* both indicate that C.C. § 1-2(g)(3) "does not independently 'expressly and unequivocally' waive [tribal] sovereign immunity" for a Tribal "tort claims" action and that *Blankenship* indeed requires Plaintiff to demonstrate both that the Gemini Policy covered his "tort claims" and also that Tribal Council expressly and unequivocally waived tribal sovereign immunity as to the claims covered in the Gemini Policy itself. The Tribe asserts that neither Paragraph T nor any other provision in the Gemini Policy constitutes an express and unequivocal waiver of tribal sovereign immunity on the part of Tribal Council, particularly given the strict mandate to the Cherokee courts found in C.C. § 7-13, the plethora of caselaw from this Court, federal courts, and state courts emphasizing that language allegedly waiving sovereign immunity must be strictly and narrowly construed in favor of the sovereign retaining immunity, and Paragraph T's clear indication that the Tribe retains its right to assert sovereign immunity as a defense to claims or lawsuits under the Gemini Policy. Consequently, the Tribe argues that the lower court correctly dismissed Plaintiff's complaint against the Tribe based on sovereign immunity pursuant to Rule 12(b)(1).

A motion to dismiss pursuant to Rule 12(b)(1) based on the defense of tribal sovereign immunity implicates the issue of subject matter jurisdiction. *Teesateskie*, 13 Am. Tribal Law at 185 (citing *State ex rel. Cooper v. Seneca-Cayuga Tobacco Co.*, 197 N.C. App. 176, 182, 676 S.E.2d 579, 584 (2009)). This Court reviews the trial court's order allowing the Tribe's motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) de novo, meaning "the appellate court evaluates the materials without needing to pay deference to the lower court's order." *Id.* The applicable standard of review "allows us to consider matters outside the pleadings and weighed by the lower court when coming to its conclusions in determining whether subject

matter jurisdiction is properly asserted or denied." *Id.* (citing *Seneca-Cayuga Tobacco,* 197 N.C. App. at 181, 676 S.E.2d at 583).

"Indian tribes[, like the EBCI,] have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers," and cannot be sued absent a waiver of tribal sovereign immunity effectuated by the United States Congress (Congress) or the tribe itself. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677 (1978) (citations omitted). Courts also have routinely held that sovereign immunity is enjoyed by tribal entities or instrumentalities, including those, like TGCE, that manage casinos. *See, e.g., Cook v. AVI Casino Enterprises, Inc.,* 548 F.3d 718, 726 (9th Cir. 2008) (concluding that "as a tribal corporation and an arm of the Fort Mojave Tribe, ACE [AVI Casino Enterprises, Inc.] enjoy[ed] sovereign immunity from [the plaintiff's] suit"), *cert. denied*, 556 U.S. 1221, 129 S. Ct. 2159 (2009); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (4th Cir. 2006) (concluding that a casino, which was owned and operated by the Tyme Maidu Tribe, "function[ed] as an arm of the Tribe," and "accordingly enjoy[ed] the Tribe's immunity from [the plaintiff's] suit"), *cert. denied*, 549 U.S. 1231, 127 S. Ct. 1307 (2007). Importantly, with respect to waivers of sovereign immunity under Cherokee law, Tribal Council has mandated in C.C. Chapter 7:

> The Judicial Branch shall dismiss any claim or cause of action against the [EBCI], or any of its programs, enterprises, authorities, officials, agents, or employees acting in their official capacities, unless the complaining party demonstrates that the Cherokee Tribal Council or . . . Congress has expressly and unequivocally waived the [EBCI's] sovereign immunity for such a claim in a written ordinance, law, or contract.

C.C. § 7-13. Hence, even though the Cherokee Court has "original jurisdiction over all cases and controversies, both criminal and civil, in law or in equity, arising under the Charter, laws, customs, and traditions of the [Tribe], including cases in which the [Tribe] . . . [is] a party," *id.* § 7-2(b), Cherokee courts must dismiss any claim or cause of action brought against the Tribe and/or its

entities based on the defense of sovereign immunity unless a plaintiff sufficiently demonstrates that Tribal Council or Congress expressly and unequivocally waived tribal sovereign immunity in one of three ways — a written ordinance, law, or contract, *id.* § 7-13.[26]

Thus, the two central issues with respect to the sovereign immunity question raised by Plaintiff are whether, in accordance with C.C. § 7-13: (1) Tribal Council expressly and unequivocally waived sovereign immunity via a written law, namely under C.C. § 1-2(g)(3), to allow a plaintiff to bring a purported Tribal "tort claims" action against the Tribe seeking damages; or (2) Tribal Council expressly and unequivocally waived sovereign immunity for such a purported action via contract, namely the Gemini Policy. As set forth below, we agree with the trial court concluding that Plaintiff has failed to demonstrate, in accordance with C.C. § 7-13, that Tribal Council expressly and unequivocally waived tribal sovereign immunity under C.C. § 1-2(g)(3) to allow a plaintiff to bring a purported Tribal "tort claims" action against the Tribe in the Cherokee courts seeking damages. We further agree that regardless of whether the Gemini Policy provides insurance coverage for actions or omissions by the Tribe and/or its entities that allegedly form the basis of the purported tort claims alleged in Plaintiff's complaint, neither Paragraph T nor any other provision in the Gemini Policy constitutes an express and unequivocal waiver for any plaintiff to bring a purported Tribal tort claims action against the Tribe within the four corners of the insurance contract itself as required under C.C. § 7-13.

Determining whether Tribal Council waived tribal sovereign immunity under Tribal law, including C.C. § 1-2(g)(3), involves statutory interpretation, which is a question of law that this Court reviews de novo. *See E. Band of Cherokee Indians ex rel. Enrolled Members v. Lambert*, 15

[26] Plaintiff fails to discuss C.C. § 7-2 and C.C. § 7-13 in his appellate briefs to this Court. Plaintiff does not contend that Congress effectuated an express and unequivocal waiver of sovereign immunity regarding the Tribal "tort claims" action he seeks to bring against the Tribe and its entities or that Tribal Council has done so via Tribal ordinance.

Am. Tribal Law 55, 63 (E. Cherokee Sup. Ct. 2018) (citing *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998) (stating that "[a] question of statutory interpretation is ultimately a question of law for the courts"; *Maready v. City of Winston-Salem*, 342 N.C. 708, 716, 467 S.E.2d 615, 620 (1996))). In reviewing a provision of the Cherokee Code (i.e., statute), the Court will "first look to the plain meaning or the plain language of a statute to determine if the statute speaks directly to the issue presented." *Teesateskie* 13 Am. Tribal Law at 186 (citation omitted). "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *Lambert*, 15 Am. Tribal Law at 65 (alteration in original) (quoting *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 1031 (1989)). In order to ascertain the intent of the legislature, beyond applying the statute's language, the Court will, if necessary, consider its legislative history and the circumstances of its enactment. *Anders v. Cherokee Bd. of Elections*, 2021 WL 9351119, at *6 (E. Cherokee Sup. Ct. 2021) (per curiam) (citing *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 460, 665 S.E.2d 449, 451 (2008)).

"[M]ost courts across the country, [including this Court,] have followed the principle that [a] waiver of tribal sovereign immunity cannot be implied but must be unequivocally expressed." *Teesateskie*, 13 Am. Tribal Law at 187 (citing *Seneca-Cayuga Tobacco*, 197 N.C. App. at 182, 676 S.E.2d at 584); *cf. Orange Cnty. v. Heath*, 282 N.C. 292, 296, 192 S.E.2d 308, 310 (1972) ("The State and its governmental units cannot be deprived of the sovereign attributes of immunity except by a clear waiver by the lawmaking body. The concept of sovereign immunity is so firmly established that it should not and cannot be waived by indirection or by procedural rule. Any such change should be by plain, unmistakable mandate of the lawmaking body."). Because statutes that allegedly effectuate a waiver of sovereign immunity are in derogation of the sovereign right to immunity from suit, courts must strictly construe them. *Guthrie v. N.C. State Ports Auth.*, 307 N.C.

522, 537-38, 299 S.E.2d 618, 627 (1983) (citations omitted). Accordingly, courts construe ambiguities in statutes allegedly effectuating a waiver of immunity in favor of the sovereign retaining immunity, *U.S. v. Williams*, 514 U.S. 527, 531, 115 S. Ct. 1611, 1616 (1995), and even in instances in which the sovereign expressly waives sovereign immunity, the "limitations and conditions upon which the [sovereign] consents to be sued must be strictly observed and exceptions thereto are not to be implied," *Lehman v. Nakshian*, 453 U.S. 156, 161, 101 S. Ct. 2698, 2702 (1981) (citations and quotation marks omitted).

REVIEW OF PLAIN LANGUAGE

Turning to Plaintiff's contention that Tribal Council effectuated an express and unequivocal waiver of sovereign immunity under C.C. § 1-2(g)(3) for a purported Tribal "tort claims" action against the Tribe seeking damages when the Tribe maintains insurance that covers such claims with recovery capped at the policy limits, we first look to the plain language of the full text of the statute at issue, C.C. § 1-2(g), which states:

> (g) The Cherokee Court of Indian Offenses or any successor Cherokee Court shall exercise *jurisdiction* over actions against the [EBCI] seeking the following relief:
>
> (1) An injunction, writ of mandamus or a declaratory judgment concerning individual rights guaranteed by the Indian Civil Rights Act;
>
> (2) Damages for condemnation by the Tribe;
>
> (3) Damages for tort claims where the Tribe maintains insurance coverage for such claims, with recovery not to exceed the amount of liability coverage maintained by the Tribe.

Id. (emphasis added). On its face, the plain language of C.C. § 1-2(g) expressly granted "jurisdiction" to the former "Cherokee Court of Indian Offenses or any successor Cherokee

Court" over "actions" brought against the Tribe seeking the limited remedies specified under each of the statute's three subsections.[27]

This Court first discussed the language of C.C. § 1-2(g) in *Teesateskie* in which the plaintiff raised the same two basic arguments as Plaintiff here: (1) "that [C.C.] § 1-2(g)(3) . . . govern[ed the] case and should be interpreted as a waiver of tribal sovereign immunity" that allows a plaintiff to bring a Tribal "tort claims" action against the Tribe for damages "when the EBCI purchases liability insurance" that provides coverage for the claims, which the plaintiff alleged the Tribe had done, *Teesateskie*, 13 Am. Tribal Law at 185; or (2) alternatively, that tribal sovereign immunity had been waived under the Tribe's insurance contract with its insurance carrier based on the Tribe's "fail[ure] to comply with the sovereign immunity endorsement in the . . . insurance agreement," *id.* at 185-86. More specifically, the plaintiff there, who was a member of a class of seventeen-year-old beneficiaries of the EBCI's Minors Trust Fund,[28] argued, in pertinent part, that Tribal Council had waived tribal sovereign immunity under C.C. § 1-2(g)(3) to allow him to bring a Tribal "tort claims" action against the Tribe for: (1) violation of C.C. Chapter 16C; (2) negligence; and (3) breach of fiduciary duty against the Tribe, the individual

[27] As discussed more fully later in this opinion, "[t]he Cherokee Court of Indian Offenses," also known as the Cherokee CFR Court, was a court of limited jurisdiction that operated under the authority of the United States Department of the Interior - Bureau of Indian Affairs (BIA) and was utilized by the Tribe as a judicial forum until April 2000, at which point judicial authority and any jurisdiction granted to the Cherokee CFR Court was returned to the Tribe. *See* Res. No. 200 (Oct. 2, 1978) (articulating Tribal Council's decision to establish a CFR Court for and on the Cherokee Indian Reservation); Ord. No. 29 (2000) (adopting C.C. Chapter 7, i.e., the Cherokee Judicial Code, and vesting judicial authority in the Cherokee Judicial Branch); *Bradley v. Bradley*, 3 Cher. Rep. 17, 18, 2001 WL 36239694, at *1 (E. Cherokee Sup. Ct.) (noting that, in April 2000, the Cherokee Judicial Branch replaced the former Cherokee CFR Court); *see also* Ord. No. 117 (2000) (codifying transitional provisions pertaining to the transfer of judicial authority from the Cherokee CFR Court to the Cherokee Judicial Branch established under the Cherokee Judicial Code); Ord. No. 291 (2000) (same). As used in this opinion, the terms "the CFR Court" and "Cherokee CFR Court" refer to the former Cherokee Court of Indian Offenses.

[28] The plaintiff in *Teesateskie* also filed claims for unjust enrichment, imposition of a constructive trust, and punitive damages, but failed to argue on appeal to this Court that the trial court had erred by dismissing those claims, thereby abandoning those issues. *Id.* at 185 n.2. Therefore, this Court did not address those claims. *Id.* The plaintiff's claims against the various defendants in their individual capacities were dismissed pursuant to Rule 12(b)(6) based on public officer immunity. *Id.* at 190.

trustees of the Minors Trust Fund Investment Committee, and then-Chief Michell Hicks in their official and individual capacities in conjunction with the Tribe maintaining a liability insurance policy that potentially covered damages stemming from alleged acts or omissions committed by the trustees of failing to invest and allocate trust monies owed to the plaintiff and the fellow beneficiaries in accordance with C.C. Chapter 16C that resulted in financial loss. *Teesateskie*, 13 Am. Tribal Law at 184-85.

This Court's decision in *Teesateskie* did not specifically address or resolve the plaintiff's argument which relied on his interpretation of C.C. § 1-2(g)(3) to waive sovereign immunity for his claims. Instead, after emphasizing that the Cherokee courts must review any statutory language allegedly waiving tribal sovereign immunity under the directive contained in C.C. § 7-13, we concluded that the plaintiff's alleged action[29] was barred by tribal sovereign immunity because C.C. Chapter 16C specifically governed the Minors Trust Fund, and C.C. § 16C-5(*l*)(13) operated to rescind any waiver of sovereign immunity that might be found anywhere else in the Cherokee Code, such as the one that the plaintiff alleged existed under C.C. § 1-2(g)(3). *Teesateskie*, 13 Am. Tribal Law at 186-87 (emphasizing that "'[n]othing in . . . Chapter [16C] shall be deemed a waiver of the sovereign immunity of the [EBCI], or its officers, agents, or employees acting in their official capacities,'" and that "'*[t]o the extent that any other tribal law may be interpreted as such a waiver of sovereign immunity for any claim or action related to distribution of per capita payments, it is hereby rescinded*'" (quoting C.C. § 16C-15(*l*)(13) (2013))). In determining that C.C. § 16C-5(*l*)(13) operated to rescind the alleged sovereign immunity waiver that the *Teesateskie* plaintiff argued was effectuated under C.C. § 1-2(g)(3), the Court conclusively answered in the negative whether the Tribe waived sovereign immunity for

[29] For purposes of our decision in *Teesateskie*, this Court assumed for the sake of argument and without deciding that C.C. § 1-2(g)(3) provides for a cause of action, i.e., a "tort claims" action against the Tribe under Tribal law.

claims under the Minors Trust Fund in accordance with C.C. § 7-13, thereby eliminating the need for the Court to address and resolve the *Teesateskie* plaintiff's main contention regarding C.C. § 1-2(g)(3). Nevertheless, this Court did explore in dicta whether, hypothetically, the language used in C.C. § 1-2(g)(3) could properly be viewed as effectuating a waiver of sovereign immunity if C.C. § 16C-5(*l*)(13) had not applied and ultimately controlled the issues there.[30] *Teesateskie*, 13 Am. Tribal Law at 187-88. As for the statutory language employed in C.C. § 1-2(g)(3) upon which the *Teesateskie* plaintiff relied, we generally opined in dicta that, standing alone, C.C. § 1-2(g)(3) "should not be interpreted as constituting an express[] and unequivocal waiver" of tribal sovereign immunity, particularly given that the statute "does not use the terms 'waiver' or 'sovereign immunity' at all," *Teesateskie*, 13 Am. Tribal Law at 187, and we emphasized that accepting the plaintiff's interpretation of subsection (g)(3) as an express and unequivocal waiver of tribal sovereign immunity by Tribal Council to allow the plaintiff's purported Tribal "tort claims" action against the Tribe to go forward "would clearly violate . . . [C.C.] § 7-13." *Id.* As for the Tribe's procurement of an insurance contract (insurance policy), we further opined that, at most, this resulted in a "'plausible inference . . . [of] an intention to assume liability and waive tribal immunity, [but that] such an inference [was] not a proper basis for concluding that there was a clear waiver by the Tribe.'" *Id.* (citations omitted).

In this same vein of assuming the hypothetical absence of C.C. § 16C-5(*l*)(13), we also explicitly rejected the *Teesateskie* plaintiff's alternative argument and concluded that he had not demonstrated, in accordance with C.C. § 7-13, that Tribal Council had expressly and

[30] Because the *Teesateskie* holding was based on this Court's determination that C.C. § 16C-5(*l*)(13) controlled all pertinent claims involving the Minors Trust Fund, our musings in the hypothetical absence of C.C. § 16C-5(*l*)(13) on C.C. § 1-2(g)(3) and regarding the plaintiff's argument of an alleged waiver of tribal sovereign immunity thereunder was unnecessary and extraneous to the decision. Therefore, that discussion does not constitute controlling precedential authority from this Court.

unequivocally waived tribal sovereign immunity via the Tribe's contract for insurance (which allegedly covered his purported Tribal "tort claims" action against the Tribe) by alleging that the Tribe failed to comply with a sovereign immunity endorsement provision in the insurance policy contract entered into by the Tribe and its insurance carrier. *Teesateskie*, 13 Am. Tribal Law at 187-88 (concluding that the insurance policy "contain[ed] no language that expressly and unequivocally waive[ed the] EBCI's tribal sovereign immunity by purchasing, complying, or failing to comply with this policy . . . . [and] could not be interpreted as a waiver of tribal sovereign immunity" in view of C.C. § 7-13, and that the plaintiff had "failed to show that the policy contain[ed] a provision that contain[ed] a proper waiver of tribal sovereign immunity"). We note that the language in Paragraph T of the Gemini Policy advanced by Plaintiff is virtually identical to the language in the sovereign immunity endorsement provision in the insurance policy in *Teesateskie*. *See id.* at 188.[31]

This Court next briefly discussed C.C. § 1-2(g)(3) in *Blankenship*, 16 Am. Tribal Law at 42, even though the parties' dispute did not involve an issue regarding an alleged waiver of tribal sovereign immunity under C.C. § 1-2(g)(3), because the parties there advanced arguments

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[31] The pertinent provision in *Teesateskie* specifically provided:

> In the event of a claim or suit, the "Carrier" agrees not to use the Sovereign immunity of the "Insured" as a defense, unless the "Insured" authorizes the company to raise such a defense by written notice to the "Carrier". Any such notice will be sent not less than 10 days prior to the time required to answer any suit. Any use of the Sovereign Immunity defense will only apply to coverage and limits of this insurance policy.
>
> The "Carrier" is not authorized or empowered to waive or otherwise limit the "Insured's" Sovereign Immunity outside or beyond the scope of coverage or limits of this insurance policy.
>
> Further, the "Insured", by accepting this policy, agrees to release the company from any and all liability to them or their members because of the failure on the part of the "Carrier" to raise the defense of Sovereign Immunity, except in cases where the "Insured" specifically request the company to do so in the manner provided herein.

Id. at 188.

regarding waivers of sovereign immunity under C.C. § 1-2(g) that they had extrapolated from the non-controlling dicta in *Teesateskie*.[32] In *Blankenship,* this Court noted that the ground on which we resolved *Teesateskie* was a narrow one — specifically, that C.C. § 16C-5(*l*)(13) by its own terms superseded and rescinded any other provision of the Cherokee Code allegedly waiving sovereign immunity, including C.C. § 1-2(g)(3) as argued by the *Teesateskie* plaintiff, and we reiterated that C.C. § 1-2(g)(3) "standing alone [i]s not an express unequivocal waiver of sovereign immunity." *Blankenship*, 16 Am. Tribal Law at 42. Even though C.C. § 1-2(g) does not provide an express and unequivocal waiver of sovereign immunity standing alone, because C.C. § 7-13 clearly states that a waiver of sovereign immunity may also be found in an ordinance or contract, *id.* § 7-13 (providing that a plaintiff must show that "the Cherokee Tribal Council or . . . Congress has expressly and unequivocally waived the [Tribe's] sovereign immunity for such a claim in a written ordinance, law, or contract"), we indicated in *Blankenship* in dicta that *Teesateskie* should not be read to completely foreclose a hypothetical possibility that Tribal Council could, absent C.C. § 16C-5(*l*)(13), through express and unequivocal language in an applicable contract, such as an insurance contract, waive tribal sovereign immunity to allow a plaintiff to bring a purported "tort claims" action against the Tribe under Tribal law seeking the relief found in C.C. § 1-2(g)(3). *See Blankenship*, 16 Am. Tribal Law at 42. In doing so, however, the Court clearly emphasized that, under C.C. § 7-13, demonstrating any waiver of sovereign immunity requires more than pairing the language found in subsection (g)(3) with a liability insurance contract maintained by the Tribe that allegedly provides coverage for purported "tort claims," namely that a plaintiff must also show that Tribal Council has, in accordance with C.C. § 7-13, included explicit and clear

[32] The issues before the Court in *Blankenship* did not directly involve C.C. § 1-2(g)(3), nor was the Court presented with an insurance contract that allegedly waived the Tribe's immunity; consequently, our extraneous discussion of C.C. § 1-2(g)(3) therein was also dicta.

language in the contract itself that expressly and unequivocally waives tribal sovereign immunity for the specific cause(s) of action or claim(s) alleged by a plaintiff against the Tribe for which said relief is sought.[33] Unfortunately, Plaintiff in the instant matter has extrapolated and largely based his argument that an alleged Tribal "tort claims" action against the Tribe should be allowed to proceed based on his selective reading of this Court's dicta in *Blankenship* regarding sovereign immunity in which the Court discussed a purely hypothetical fact situation allowed under C.C. § 7-13 and centered on a hypothetical insurance contract read in conjunction with C.C. § 1-2(g)(3).

Also of note, in *Blankenship*, this Court elected to address the plaintiffs' request for a declaratory judgment with respect to whether a Tribal Council resolution that removed the plaintiffs from their positions as Commissioners of the EBCI Tribal Gaming Commission (TGC) was a bill of attainder prohibited by the Indian Civil Rights Act (ICRA) that violated the plaintiffs' rights, which possibly implicated C.C. § 1-2(g)(1) (potentially allowing for "a declaratory judgment concerning individual rights guaranteed by the [ICRA]"). *Blankenship*, 16 Am. Tribal Law at 41-42.[34] In providing the declaratory ruling, we emphasized several important points: (1) "[a]fter [the] ICRA became [federal] law, Tribal Council [later] incorporated its protections into

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[33] In other words, in view of the absence of a Tribal ordinance or law waiving sovereign immunity allowing for a Tribal "tort claims" action to be brought against the Tribe under Cherokee law, this Court left open the door for a future potential plaintiff to bring an alleged Tribal "tort claims" action against the Tribe by demonstrating that Tribal Council expressly and unequivocally waived sovereign immunity as to such an action or as to their specifically alleged torts via contract in accordance with C.C. § 7-13, identifying in hypothetical terms the possibility of an insurance contract as referenced in C.C. § 1-2(g)(3) as a potential type of contract that might meet the requirements of C.C. § 7-13. *See Blankenship*, 16 Am. Tribal Law at 42.

[34] The plaintiffs alleged that their removal was wrongful on various grounds, including that it violated their rights under the ICRA, and requested that the Cherokee Court grant them a declaratory judgment, injunctive relief, a writ of mandamus, and damages for compensation/wages. This Court affirmed the trial court's dismissal of the plaintiffs' complaint there, mainly on the ground that the removal of the plaintiffs from their commissioner positions presented a non-justiciable political question. *Blankenship*, 16 Am. Tribal Law at 40. We did, however, conclude that the trial court erred by failing to issue a declaratory ruling on the bill of attainder issue because said issue was not barred by the political question doctrine, albeit we ultimately determined that the resolution at issue "did not include the type of punishment required to constitute a bill of attainder, [such that the plaintiffs'] rights under [the] ICRA were not violated." *Id.* at 42.

the Cherokee Code in numerous places, clearly indicating that [certain] rights protected by [the] ICRA would be recognized and protected by the EBCI tribal government," *id.* at 41 (citing C.C. §§ 1-40, 15-7, 7A-27, 75-52, 48-10, and 150-1); (2) "ICRA, as adopted by Congress and incorporated [in part] into the Cherokee Code by Tribal Council, prohibits bills of attainder," *id.*; (3) a declaratory judgment is a remedy, not cause of action, albeit a remedy that is referenced throughout the Cherokee Code that is provided by the Tribe and potentially available to the court for resolution of a plaintiff's [alleged ICRA] claim where the Tribe has waived its immunity, *id.* at 40 n.4 (citing §§ 1-2, 16-7.03, 16E-3, 132-16, 136-27, 150-2, 150-9); and (4) because the Cherokee Code does not contain a Declaratory Judgment Act (DJA), let alone a comprehensive DJA like Congress has enacted and codified in the United States Code or like North Carolina has enacted and codified in the North Carolina General Statutes, and in view of the lack of any plain language in the Cherokee Code that clearly provides for a statutory right of action against the Tribe for the declaratory judgment remedy and a waiver of sovereign immunity under C.C. § 1-2(g)(1) or anywhere else in the Cherokee Code, it was, and remains, this Court's recommendation that Tribal Council consider enacting "authorizing legislation" in the Cherokee Code that clearly provides and sets out the requirements and parameters of a statutory cause of action against the Tribe for this remedy under Tribal law, *id.*[35] Finally, in the dicta of *Blankenship*, we summarily indicated that Tribal Council had effectuated limited waivers of sovereign immunity with respect to certain purported actions brought against the Tribe seeking specific remedies respectively found

[35] In emphasizing the above points, we intended to signal that this Court did not read the language, as presently written, by itself as creating any statutory causes of action against the Tribe under Tribal law. As explained more fully herein, this Court reads (1) the language found in subsection (g)(1) in conjunction with other pertinent Cherokee tribal ordinances and Cherokee Code provisions, as allowing for some form of limited action to be brought against the Tribe seeking the relief potentially available under subsection (g)(1), and (2) the language found in subsection (g)(2) in conjunction with other pertinent Tribal ordinances, Cherokee Code provisions, and the Charter, as creating and allowing for a specific limited Tribal condemnation action against the Tribe seeking the relief potentially available under subsection (g)(2).

in C.C. § 1-2(g)(1) (potentially allowing for an "injunction, writ of mandamus or a declaratory judgment concerning individual rights guaranteed by the [ICRA]") and C.C. § 1-2(g)(2) (potentially allowing for "[d]amages for condemnation by the Tribe") which we summarized as "requir[ing] no further acts and [for which] nothing else is needed," *Blankenship*, 16 Am. Tribal Law at 42.[36] In attempting brevity on an issue not before the Court, however, the Court did not intend to indicate that we viewed the plain language respectively found in subsections (g)(1) and (g)(2) — which like subsection (g)(3) omits the words "sovereign immunity" and "waiver," and which also fails to establish or provide for a cause of action in which to seek said potential remedies against the Tribe under Tribal law — as being facially sufficient through its own plain language or in its enacting ordinance to demonstrate that Tribal Council expressly and unequivocally waived tribal sovereign immunity as required by C.C. § 7-13. Therefore, to the extent our shorthand summation in the dicta of *Blankenship* could potentially be read to indicate that this Court interpreted the respective language found in subsections (g)(1) and (g)(2) as being sufficient by itself to demonstrate an express and unequivocal waiver of tribal sovereign immunity by Tribal Council for any purported actions therein, and as establishing or providing a statutory basis for any such purported causes of action, brought against the Tribe seeking potential remedies identified therein, we expressly disavow any finding or interpretation of such a reading as

[36] Unfortunately, *Blankenship* contains a scrivener's error which incorrectly suggests that the Tribe effectuated waivers of sovereign immunity with respect to all three subsections contained in C.C. § 1-2(g), instead of limiting this statement to subsections (g)(1) and (g)(2) as we had intended and as indicated by, among other things, this Court addressing those two subsections separately from subsection (g)(3). *See Blankenship*, 16 Am. Tribal Law at 42 (stating that "[t]he EBCI waived sovereign immunity under [C.C] §1-2(g), and specifically subsections 1 through 3," but separately discussing and differentiating (g)(3) from subsections (g)(1) and (g)(2)). *Blankenship* also did not involve any issue with respect to an alleged "condemnation" action under subsection (g)(2), such that our brief discussion of subsection (g)(2) was dicta.

inconsistent with and precluded by C.C. § 7-13, and set out the analysis for this Court's interpretation of C.C. § 1-2(g) more completely below.[37]

Although Plaintiff in the instant matter did not allege before the trial court a waiver of tribal sovereign immunity with respect to any purported claim or action brought against the Tribe seeking the relief found in C.C. § 1-2(g)(1) or (g)(2), and the parties have not presented briefs or arguments on such issues here, the interpretation of the entirety of subsection C.C. § 1-2(g) is critical to the foundational understanding of the limited authority and purposes for which C.C. § 1-2(g), and specifically subsection (g)(3), was enacted. Moreover, given this Court's important function with respect to the interpretation, application, and development of Cherokee law and the apparent confusion that has lingered regarding the meaning and import of C.C. § 1-2(g), we further construe, analyze, and discuss the entirety of C.C. § 1-2(g) in conjunction with the Charter, pertinent federal laws, Tribal laws, ordinances, and/or contracts as required under C.C. § 7-13 to assess whether Tribal Council has effectuated a waiver of tribal sovereignty for a purported claim or action brought against the Tribe in the Cherokee Court. *See Jacobson v. E. Band of Cherokee Indians*, 2006 WL 8435928, at *2 (E. Cherokee Sup. Ct. 2006) (stating that it was "appropriate" for this Court, "in its discretion, [to] construe the ordinance in question," including the various subsections contained therein even though the issue had not been presented to the trial court or

[37] Moreover, because no issue on appeal involving C.C. § 1-2(g)(2) or (g)(3) was squarely before us in *Blankenship,* we did not explain in the dicta our full analysis regarding C.C. § 1-2(g) therein. Instead, we addressed subsections (g)(1) and (g)(2) collectively to efficiently distinguish them from subsection (g)(3), without specifically identifying the pertinent federal law, Charter provision, or Tribal laws and ordinances enacted or adopted by Tribal Council in addition to the 1994 grant of jurisdiction to the Cherokee CFR Court under C.C. § 1-2(g) that operate in combination to support a determination that Tribal Council intended to effectuate and execute limited express and unequivocal waivers of tribal sovereign immunity so that particular limited actions could be brought against the Tribe under Tribal law for the specific remedies found in subsections (g)(1) and (g)(2) respectively. Hence, when we summarily stated that subsections (g)(1) and (g)(2) "require no further acts and nothing else is needed for the waiver of sovereign immunity for the relief found there," *Blankenship*, 16 Am. Tribal Law at 42, our statement was based on the totality of the Charter, Tribal laws, and ordinances enacted in the Cherokee Code that we did not delineate or discuss therein that work in tandem with the language found in subsections (g)(1) and (g)(2) to effectuate those waivers. We also note that throughout this opinion when we mention the enactment or adoption of an ordinance, resolution, or law by "Tribal Council," or the "Tribe," it means that the ordinance, resolution, or law was passed by Tribal Council and signed into law by the Chief.

briefed by counsel and the Court had resolved the matter on other grounds because "the interpretation of the [statute was] before the Court" and "[i]t is within our charge to interpret what the Tribal Council has enacted").

Although not expressly stated, the Court's general guidance regarding C.C. § 1-2(g) in *Blankenship* involved a consideration of the statute's plain language in conjunction with the applicable jurisdictional mandates and restraints found in (1) C.C. Chapter 7 (also known as the Cherokee Judicial Code), such as C.C. § 7-13 and C.C. § 7-2, which serve as the guardrails regarding the authority of the Cherokee courts to adjudicate purported claims or causes of action brought against the Tribe following the Tribe's establishment of the Cherokee courts under C.C. Chapter 7, *see* Ord. No 29 (2000) (codified at C.C. §§ 7-1 to 7-18 (2000)); C.C. §§ 7-1 to 7-18 (2020); and (2) the legal framework found in Title 25, Part 11 of the Code of Federal Regulations (CFR) entitled "Courts of Indian Offenses and Law and Order Code" (hereinafter, the Law and Order Code), which was adopted by the Tribe to establish and govern the Cherokee CFR Court,[38] in effect prior to the Tribe's adoption of C.C. Chapter 7, and expressly limited the jurisdiction of the Cherokee CFR Court in operation at the time the Tribe enacted and codified C.C. § 1-2(g). Under the Law and Order Code, the Cherokee CFR Court did not have jurisdiction or authority to take jurisdiction over any purported claims brought against the Tribe without Tribal Council first enacting a resolution or ordinance explicitly granting the Tribe's jurisdiction to the Cherokee CFR Court over purported claims allowed against the Tribe, *and*, before the Cherokee CFR Court could exercise any such jurisdiction granted by the Tribal Council to adjudicate purported claims against the Tribe, the Tribe had to expressly waive its inherent defense of sovereign immunity against such

[38] See 25 C.F.R. § 11.100(c) (1994) (explaining the intent of the CFR Court as being an interim court system until a Tribe adopts its own law-and-order code which includes the establishment of a court system in accordance with its constitution and by-laws or other governing documents, and the code has become effective).

purported claims. To that purpose, the Law and Order Code was explicit and clear about (1) how a tribal council could grant jurisdiction to a CFR Court over certain purported actions or claims against a tribe, and (2) assuming a tribal council chose to grant jurisdiction to a CFR Court over any such purported actions or claims, how a tribal council had to enact a resolution or ordinance to waive a tribe's defense of sovereign immunity before a CFR Court had the authority to exercise such expressly granted jurisdiction to adjudicate said actions or claims brought against the tribe, *see* 25 C.F.R. § 11.104(b) (1994) (mandating that "[u]nless otherwise provided by a resolution or ordinance of the tribal governing body of the tribe occupying the Indian country over which a [CFR Court] has jurisdiction, no [CFR Court] may adjudicate an election dispute or take jurisdiction over a suit against the tribe or adjudicate any internal tribal government dispute"); *id.* § 11.104(e) (1994) (mandating that "[a] tribe may not be sued in a [CFR Court] unless its tribal governing body explicitly waives its tribal immunity by tribal resolution or ordinance").[39]As discussed below, the legal and statutory frameworks governing the Cherokee CFR Court and the C.C. Chapter 7 Cherokee courts are critical to understanding C.C. § 1-2(g) and preclude the interpretation that Plaintiff advances with respect to the authority of the court to exercise jurisdiction over his alleged Tribal "tort claims" action against the Tribe seeking remedies under C.C. § 1-2(g)(3).

Under C.C. Chapter 7, "[t]he jurisdiction of the [Tribe], including the Judicial Branch, extends to all persons, activities, and property within the territory of the [Tribe] based upon inherent territorial or popular sovereignty," C.C. § 7-2(a), and the Cherokee Trial Court has "original jurisdiction over all cases and controversies, both criminal and civil, in law or in equity,

[39] Plaintiff does not discuss any of these important provisions in his briefs to this Court. Unless otherwise noted, this Court's citations to these two key provisions from Subpart A of the Law and Order Code are to the versions that were in effect at the time Tribal Council enacted C.C. § 1-2(g) in 1994, and these provisions remained unchanged until 2008 when the Law and Order Code was revised and reordered. *See* Law and Order on Indian Reservations, 73 Fed. Reg. 39857, 39859-60 (July 11, 2008) (codified at 25 C.F.R. pt. 11).

arising under the Charter, laws, customs, and traditions of the [Tribe], *including cases in which the [Tribe], or its officials and employees, [are] a party*," *id.* § 7-2(b) (emphasis added). Tribal Council further specified that the aforementioned "grant of jurisdiction shall not be construed to be a waiver of sovereign immunity," *id.* § 7-2(b), that "[a]ny such case or controversy arising within the territory of the [Tribe] shall be filed and exhausted in the [Cherokee courts] before it is filed in any other jurisdiction," *id.*, and that "[l]imitations on the authority of the Cherokee Court to grant certain types of relief, which are set forth in the Cherokee Code, shall remain in full force and effect, unless they are specifically rescinded by the Tribal Council," *id.* § 7-2(d). Further, Tribal Council emphasized, in pertinent part, that "[n]othing in this chapter," i.e., C.C. Chapter 7, "shall be construed as a waiver of the sovereign immunity of the [Tribe]," and mandated that Cherokee courts must "dismiss any claim or cause of action against the [Tribe] . . . unless the complaining party demonstrates that the Cherokee Tribal Council . . . has expressly and unequivocally waived the [Tribe's] sovereign immunity for such a claim in a written ordinance, law, or contract." *Id.* § 7-13. Hence, under the Cherokee Judicial Code, even though the Cherokee Trial Court has jurisdiction over a case and controversy brought against the Tribe, which certainly encompasses determining whether a plaintiff has demonstrated that Tribal Council has expressly and unequivocally waived the Tribe's sovereign immunity for the purported claim or action that the plaintiff seeks to bring, the court must dismiss the claim or action if the plaintiff does not meet this burden of demonstrating a waiver of sovereign immunity by Tribal Council, and even if a plaintiff meets this burden and prevails, the court must also comply with any other limitations that Tribal Council has imposed with respect to granting relief in the matter. Accordingly, C.C. Chapter 7 explicitly imposes a limitation on Cherokee courts regarding both the exercise of subject matter jurisdiction based on tribal sovereign immunity and

the remedial relief available to the courts when adjudicating an action or claim against the Tribe. *See id.* §§ 7-2, 7-13.

As noted earlier, prior to the April 2000 implementation of C.C. Chapter 7 establishing the Cherokee courts with the Tribe's inherent judicial powers, the Tribe adopted and utilized the Cherokee CFR Court, a court of limited jurisdiction governed by the Law and Order Code. *See Arneach v. Read*, 2000 WL 35789445, at *2 (E. Cherokee Sup. Ct. 2000) (stating that the CFR Courts "are charged with enforcing the Code of Federal Regulations (CFR), whose purpose is to 'provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country (as defined in 18 U.S.C. § 1151) where tribes retain jurisdiction over Indians that is exclusive of state jurisdiction but where tribal courts have not been established to exercise that jurisdiction,'" and that the Tribe had been "listed in the Courts of Indian Offenses as occupying the Indian country of which the [CFR] was applicable" (citations and footnotes omitted)); *see also* 25 C.F.R. § 11.100(a)(16) (1994) (listing the Tribe as having a CFR Court); *id.* § 11.100(c) (stating that "the regulations in this part shall continue to apply to tribes listed under [25 C.F.R.] § 11.100(a) until a law and order code which includes the establishment of a court system has been adopted by the tribe in accordance with its constitution and by-laws or other governing documents, has become effective," and the BIA "has received a valid tribal enactment identifying the effective date of the code's implementation, and the name of the tribe has been deleted from the listing of Courts of Indian Offenses"). Under the Law and Order Code, a CFR Court had both jurisdiction *and* the authority to exercise subject matter jurisdiction over certain prescribed legal actions or claims involving suits against individual Indians within a tribe's territory. *See id.* § 11.103(a) (1994) (stating that "[e]xcept as otherwise provided in this title, each [CFR Court] shall have jurisdiction over any civil action arising within the territorial jurisdiction of the court in which the defendant is an Indian, and of all other suits between Indians and non-Indians which are brought

before the court by stipulation of the parties"). Consistent with the Law and Order Code, the Tribe, exercising its sovereign authority, adopted and enacted Tribal ordinances which were codified in the Cherokee Code to empower the Cherokee CFR Court, with the approval of the BIA, to exercise jurisdiction within the Tribe's territory to interpret and enforce Tribal laws, which the CFR Court, a court of limited jurisdiction, did not otherwise possess. *See Arneach*, 2000 WL 35789445, at *2 (stating that "[i]n accordance with its sovereign authority to establish laws and policies, the Tribal Council . . . properly enacted [t]he Cherokee Code, containing the general laws and ordinances of the [EBCI]"); *see also* 25 C.F.R. §11.100(e) (1994) (providing that "[t]he governing body of each tribe occupying the Indian country over which a Court of Indian Offenses has jurisdiction may enact ordinances which, when approved by the . . . [BIA], shall be enforceable in the Court of Indian Offenses having jurisdiction over the Indian country occupied by that tribe").

Importantly, a CFR Court expressly lacked the jurisdiction and authority to adjudicate an alleged purported claim brought against a tribe unless, in accordance with the Law and Order Code, a tribe undertook two explicit actions — (1) providing a grant of jurisdictional power to a CFR Court over such purported claim against a tribe and (2) expressly waiving the tribe's defense of sovereign immunity from suit with respect to said claim — in a resolution or ordinance. Accordingly, a CFR Court was prohibited from "tak[ing] jurisdiction over a suit against the tribe" unless the tribal governing body passed a resolution or ordinance granting the CFR Court jurisdiction over the alleged purported claim(s) against the tribe. *Id.* § 11.104(b). Second, and equally important, the Law and Order Code expressly barred a CFR Court from adjudicating a claim against the tribe "unless [the] tribal governing body explicitly waive[d] its [defense of] tribal immunity [from suit] by tribal resolution or ordinance." *Id.* § 11.104(e). Therefore, under the Law and Order Code, a law passed by resolution or ordinance adopted by Tribal Council that simply granted the Cherokee CFR Court limited jurisdiction over a purported claim or action against the

Tribe, like C.C. § 1-2(g)(3), was insufficient to overcome the regulatory bar that prohibited the Cherokee CFR Court from adjudicating said claim or action brought against the Tribe, unless and until the Tribe passed a resolution or ordinance that explicitly waived tribal sovereign immunity for such claim or action; otherwise, the Cherokee CFR Court was required to dismiss the claim or action against the Tribe for lack of jurisdiction based on tribal sovereign immunity. *See id.* § 11.104(b), (e).

Following the adoption and implementation of Ordinance No. 29, and amendments thereto, under the Cherokee Judicial Code, (1) the jurisdiction of the Cherokee courts, as established, includes all persons, activities, and property within the Tribe's territory based upon inherent territorial or popular sovereignty unless the exercise of jurisdiction is specifically prohibited by a binding decision issued by the United States Supreme Court or the United States Court of Appeals for the Fourth Circuit or by an act of Congress; (2) the Cherokee Trial Court was established with original jurisdiction over all cases and controversies arising under the Tribe's Charter, laws, customs, and traditions, including those brought against the Tribe, except for election disputes, a subject matter specifically granted to this Court as original and exclusive jurisdiction to review final determinations made by the Election Board; (3) any case or controversy arising within the Tribe's territory must first be pursued and exhausted in the Cherokee courts; (4) the Tribe's sovereign immunity from suit was not waived by the establishment of broad jurisdictional authority of the Cherokee Trial Court nor any other provision in the Cherokee Judicial Code, C.C. Chapter 7; and (5) the Cherokee Trial Court must comply with any additional limitations on jurisdiction or remedial relief available to the courts in the Cherokee Code, including C.C. § 7-13 and C.C. § 1-2(g)(3), unless and until Tribal Council rescinds the limitation(s). Ord. No. 29 (2000) (codified at C.C. §§ 7-1 to 7-18 (2000)); C.C. §§ 7-2, 7-13 (2020); *see also* Ord. No. 291 (2000) (codified at C.C. § 7-2(e)). The Cherokee Judicial Code includes a limitation on the

Cherokee courts' exercise of jurisdiction in C.C. § 7-13 in which Tribal Council chose to expressly retain control of when the Tribe and its entities would be subject to suit by mandating that the Cherokee courts must dismiss any purported claim or action brought against the Tribe based on the defense of sovereign immunity unless Tribal Council (or Congress) has expressly and unequivocally waived its tribal sovereign immunity in an ordinance, law, or contract. Ord. No. 29 (2000); C.C. § 7-13. Further, C.C. § 7-13, similar to the Law and Order Code, directs Tribal Council to identify the specific claim(s) or cause(s) of action that can potentially be brought against the Tribe when waiving its sovereign immunity in an ordinance, law, or contract. Although the Tribe retained C.C. § 1-2(g), which initially provided a limited grant of jurisdiction over broad categories of purported actions brought against the Tribe as required under the Law and Order Code and also limited the remedial relief available to the CFR Court therein, under C.C. § 7-2 and 7-13, the Cherokee Trial Court must exercise the jurisdiction established under the Cherokee Code to decide whether the Tribe has waived sovereign immunity with respect to the alleged purported action or claim, and if so, adjudicate the alleged action or claim limited by the remedial relief available to the court under C.C. § 1-2(g). *See* Ord. No. 29 (2000) (codified at C.C. §§ 7-1 to 7-18 (2000)); C.C. § 7-2 (2020); *id.* § 7-18 (stating that although "[t]he following sections of [C.C.] Chapter 1 are hereby rescinded, effective upon the implementation of the self-determination contract with the [BIA,] . . . . [a]ll other provisions of Chapter 1[,]" including C.C. § 1-2(g), which limits the potential relief available, if any, to the specific remedies respectively found in C.C. § 1-2(g)(1)-(g)(3), "shall remain in effect")[40]; *see also* Ord. No. 117 (2000); Ord. No. 291 (2000); C.C. § 1-41(c) (2020) (indicating that "[t]he Cherokee Court's jurisdiction shall not be limited by

[40] The provisions specifically rescinded by Tribal Council included "Sections 1-1, 1-4, 1-5, 1-7, 1-8, 1-9, 1-10, 1-12, 1-13, 1-15, 1-16, 1-17, and 1-18." *Id.* § 7-18. Unless otherwise noted, all references to C.C. § 7-18 in this opinion are to former C.C. § 7-18 (2020). Tribal Council subsequently recodified, but did not otherwise substantively amend, former C.C. § 7-18 as C.C. § 7-26 (2022). *See* Ord. No. 186 (2022).

restrictions set forth in the [CFR], and shall extend to all cases for which jurisdiction is granted by the Cherokee Code).

Plaintiff (as does our dissenting colleague) simply chooses to ignore the mandates of the Law and Order Code, adopted by the Tribe, that strictly governed the jurisdiction available to the Cherokee CFR Court when Tribal Council enacted C.C. § 1-2(g), and, later, the Cherokee Judicial Code, adopted and implemented by Tribal Council, that established broad jurisdiction in the Cherokee courts under C.C. § 7-2, defined when jurisdiction could be exercised over potential claims or actions brought against the Tribe in C.C. § 7-13, and maintained limitations on the remedies potentially available to the courts under C.C § 1-2(g). Instead, Plaintiff (and our dissenting colleague) attempts to persuade this Court to transform the Tribe's 1994 limited grant of jurisdiction to the Cherokee CFR Court in C.C. § 1-2(g)(3) into a broad waiver of tribal sovereign immunity for any alleged "tort claims" potentially covered by insurance maintained by the Tribe, despite being unable to point to an explicit and clear waiver in an ordinance, law, or contract that expressly and unequivocally waives tribal sovereign immunity as to his alleged action or claims against the Tribe in accordance with C.C. § 7-13.

REVIEW OF LEGISLATIVE HISTORY

Having reviewed the plain language in C.C. § 1-2(g), including under the legal framework of the Law and Order Code which expressly required from the Tribal Council both a grant of jurisdiction for purported actions or claims brought against the Tribe *and* an explicit waiver of the Tribe's sovereign immunity before the Cherokee CFR Court could adjudicate an alleged action or claim brought against the Tribe, the Court also recognizes that when interpreting a statute, one must not undermine the legislative intent of the drafters. *Lambert*, 15 Am. Tribal Law at 65 (stating that the plain meaning is generally conclusive except for rare instances where "'the literal application of a statute will produce a result demonstrably at odds with the intentions of its

drafters'" (citation omitted)). As such, the legislative history of C.C. § 1-2(g) and the circumstances of its enactment via ordinance are also important to consider in discerning whether the Tribe intended to waive sovereign immunity simply by granting the former CFR Court jurisdiction under C.C. § 1-2(g), despite the absence of clear and explicit terms like "waiver" and "sovereign immunity."

Enactment of C.C. § 1-2(g)

In 1994, Tribal Council adopted Ordinance No. 168 which amended the then-existing civil jurisdiction section of the Cherokee Code, C.C. § 1-2 (1993), by revising C.C. § 1-2(b)–(d) and enacting both C.C. § 1-2(g), the statute at issue here, and C.C. § 1-2(h) (providing that the CFR Court or "any successor Cherokee Court shall retain personal jurisdiction over persons or entities resident on Cherokee trust lands for a period of six months after such persons or entities move from Cherokee trust lands"). Ord. No. 168 (1994).[41] Again, at the time that C.C. § 1-2(g) was enacted, a CFR Court under the Law and Order Code did not have any jurisdiction over an action brought against a tribe and was prohibited from exercising a grant of tribal jurisdiction over an action or claim brought against the tribe unless the tribe's governing body *both*: (1) granted jurisdiction to the CFR Court over the action against the tribe via resolution or ordinance, 25 C.F.R. § 11.104(b); and (2) "explicitly waive[d] its tribal immunity by tribal resolution or ordinance," *id.*

[41] In 1986, Tribal Council enacted Ordinance No. 328, which was a civil jurisdiction ordinance that was codified at C.C. § 1-2(a)-(e) in the Cherokee Code in which the Tribe granted jurisdiction to the Cherokee CFR Court over broad categories of actions or claims against people and non-Tribally owned businesses arising within the Tribe's territorial jurisdiction, thereby asserting the Tribe's right to exercise its sovereignty to administer civil law within its territory. Ord. No. 328 (1986) (granting the Cherokee CFR Court or any successor Cherokee court "jurisdiction" over (1) "all persons in civil suits which arise on" Tribal lands and "involve the personal, property or legal right of an individual Indian or an Indian-owned business, corporation or other legal entity," codified at C.C. § 1-2(a); (2) "the domestic relations of all individuals residing on [Tribal lands] where one of the spouses is an Indian," including "for divorce, separation, child custody, support, alimony[,] and adoption and paternity," codified at C.C. § 1-2(b); (3) "tort[i]ous conduct of all persons where the conduct occurs on Indian trust land and either the victim or perpetrator is an Indian," codified at C.C. § 1-2(c); (4) disputes involving any contract that is negotiated signed or executed on Indian trust land," codified at C.C. § 1-2(d); and (5) "all persons, firms, corporations, partnerships or other legal business entitles which conduct business on Cherokee Trust lands" with respect to "transactions involving or affecting individual Indians, Indian owned businesses, [T]ribal laws and policy or Indian property," codified at C.C. § 1-2(e)).

§ 11.104(e). Undoubtedly, Tribal Council was aware of these clear and express mandates in the Law and Order Code at the time it adopted Ordinance No. 168 and enacted C.C. § 1-2(g)(1)-(3). *Cf. Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 587 U.S. 601, 611, 139 S. Ct. 1881, 1890 (2019) (stating that "[i]t is a commonplace of statutory interpretation that Congress legislates against the backdrop of existing law" (citation and quotation marks omitted)); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 325 (1990) ("We assume that Congress is aware of existing law when it passes legislation." (citation omitted)). The plain language of Ordinance No. 168 codified in C.C. § 1-2(g)(1)-(3), standing alone, met the first of the Law and Order Code requirements — i.e., an explicit grant of Tribal jurisdiction via Tribal ordinance to the Cherokee CFR Court over broad categories of purported claims or actions brought against the Tribe seeking the respective limited relief established in C.C. § 1-2(g)(1)-(3) — by expanding the scope of the Cherokee CFR Court's limited civil jurisdiction to include purported claims or actions seeking specified limited relief against the Tribe and thereby establishing the Cherokee CFR Court as the proper judicial forum in which such purported claims or actions against the Tribe must be brought at a time in which many Tribes, like the EBCI, were expanding the jurisdiction of their CFR Courts in response to non-Indians seeking to hail Tribes into judicial forums to which Tribes had not consented.[42]

[42] Contemporaneous with Tribal Council's enactment of Ordinance No. 168 in 1994, the Tribe was engaged in a legal dispute involving a campground business located on EBCI tribal lands which was operated by a non-Indian married couple who had purchased the lease, inventory, and equipment from the Tribe in a BIA-approved contract; the couple filed suit in federal court even though the contract they had signed with the Tribe indicated that the parties would submit themselves to the jurisdiction of the Cherokee CFR Court to resolve disputes regarding any breach of agreement. *Warn v. E. Band of Cherokee Indians*, 858 F. Supp. 524, 525-27 (W.D.N.C. 1994). Specifically, the plaintiffs filed suit against the Tribe, Tribal Council, the members of Tribal Council in their official and individual capacities, and the Principal Chief of the Tribe in his official and individual capacities, alleging that: (1) "the Tribe and the Tribal Council ha[d] breached a covenant of quiet enjoyment in the lease;" (2) "the Tribe, the Council, the Chief and certain members of the Council ha[d] breached the lease by constructively evicting them;" (3) "the Tribe, the Council, the Chief and the Council members ha[d] violated the ICRA, 25 U.S.C. § 1302(8);" and (4) "certain Council members ha[d] violated [the p]laintiffs' due process and equal protection rights under 42 U.S.C. §§ 1983 and conspired to do so in violation of 42 U.S.C. § 1985, and [the Chief had] failed to prevent such actions in violation of 42 U.S.C. § 1986" for which the plaintiffs sought "compensatory and punitive damages, counsel fees, [and] declaratory and injunctive relief against the [d]efendants for breach of contract and through the statutory mechanisms of the ICRA, 42 U.S.C. §§ 1983, 1985 and 1986." *Warn*, 858 F. Supp. at 526. The defendants moved to dismiss based on lack of

However, C.C. § 1-2(g) by itself is simply a grant of jurisdiction to the Cherokee CFR Court and did not meet the second requirement of the Law and Order Code, 25 C.F.R. § 11.104(e) — i.e., an explicit waiver of sovereign immunity via a tribal resolution or ordinance which would authorize the CFR Court to exercise its jurisdiction to adjudicate such actions against the Tribe — and the language of C.C. § 1-2(g) was not amended to facially comply with this mandate. Accordingly, absent the adoption of a resolution or ordinance by Tribal Council that explicitly waived the Tribe's right to raise and use sovereign immunity as a defense to suit in accordance with the Law and Order Code, the Cherokee CFR Court would have been required to dismiss any claim or action brought against the Tribe seeking the respective remedies potentially allowed under C.C. § 1-2(g) based on the defense of sovereign immunity for lack of jurisdiction. *See* 25 C.F.R. § 11.104(e) (1994).[43]

C.C. § 1-2(g)(1)

In 1996, two years after enacting Ordinance No. 168, Tribal Council enacted Ordinance No. 369 in which Tribal Council again amended C.C. § 1-2 by adding a new provision codified at C.C. § 1-2(i):

> That none of the foregoing language is intended to grant a waiver of sovereign immunity against the [EBCI] so that a temporary restraining order or preliminary injunction may be entered against the [EBCI] or any agent or official acting in their official capacity, ex parte or otherwise[,] unless said action is instituted by the [EBCI] against said agent or employee or official.

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jurisdiction. *Id.* In a Memorandum of Opinion filed 14 June 1994, the district court (1) dismissed the plaintiffs' contract claims against the Tribe and Tribal Council based on the lack of an express and unequivocal waiver of tribal sovereign immunity; (2) determined it had jurisdiction over the contract actions against the defendants in their individual capacities based on the diversity of citizenship of the parties, but refrained from exercising jurisdiction pending exhaustion of remedies in the Cherokee CFR Court; and (3) dismissed the ICRA claims based on the doctrine of sovereign immunity and lack of subject matter jurisdiction. *Id.* at 526-28.

[43] Although the dissent raises the absence of any language specifically stating that C.C. § 1-2(g) should not be interpreted as a waiver of sovereign immunity, the inclusion of such language would have been unnecessary given that a CFR Court operating under the Law and Order Code was otherwise bound by the jurisdictional limitations provided within the Law and Order Code.

Ord. No. 369 (1996) (codified at C.C. § 1-2(i)). Ordinance No. 369, as codified in C.C. § 1-2(i), does not explicitly mention any specific section or subsection under C.C. § 1-2, including § 1-2(g). Instead, it references "the foregoing language" and then specifically addresses the grant of jurisdiction to the Cherokee CFR Court in C.C. § 1-2(g)(1), the only statutory provision located in C.C. § 1-2 that expressly governed the CFR Court's authority over an action brought against the Tribe seeking injunctive relief as a remedy.[44] Hence, Ordinance No. 369 explicitly provides a waiver of tribal sovereign immunity for an action concerning the ICRA brought by the Tribe seeking a temporary restraining order or preliminary injunctive relief *against* an official, employee, or agent of the Tribe acting in their official capacity.[45] C.C. § 1-2(i) (providing that the language is not "intended to grant a waiver of sovereign immunity" for an action seeking injunctive relief "against the [Tribe] . . . or any agent or official acting in their official capacity, . . . unless said action is instituted by the [Tribe] against said agent or employee or official"). Notably, the

[44] *See* Ord. No. 369 (1996) (stating that "the Tribal Council as sovereign deems it necessary to be heard on all matters to which [the Tribe is] a party and no ex parte orders be entered against [it], and no preliminary injunctions be entered against [the Tribe's] actions[and] limits [the Tribe's]] waiver of sovereign immunity pursuant to Ordinance No. 168 so that no Court can have any jurisdiction [over an] action or make any remedy against the [Tribe] with regard to a temporary restraining order or preliminary injunction, ex parte or otherwise," and specifying that "[t]he [Tribe's] waiver of sovereign immunity pertains only to permanent injunctions after a full hearing on the merits of all pleadings"). The Court notes again that Ord. No. 168 (1994) included no language regarding a waiver of sovereign immunity.

[45] In 1968, Congress passed the ICRA, which was modeled in part on the United States Constitution and Bill of Rights and designed to provide specific limited rights and protections with respect to certain acts of tribal governments for persons subject to the jurisdiction of tribal governments. The ICRA is a federal law, such that the federal courts are the only forum available to bring an action against a tribe for relief based on an alleged a violation of the ICRA; however, the only remedial avenue available under the ICRA in the federal courts is habeas relief, i.e., a petition for writ of habeas corpus to determine whether an individual's imprisonment or detention by an Indian Tribe is lawful. The ICRA does not waive a Tribe's sovereign immunity with respect to the rights and protections contained therein. Generally, an Indian Tribe, as a sovereign, is not required to adopt the ICRA in whole or in part, or establish any remedies, or provide a venue to adjudicate alleged violations of the ICRA unless adopted by the Tribe, or enacts law(s) that have a penalty of imprisonment for more than a year, in which case the tribe must provide a defendant with protections under the ICRA as amended by the Tribal Law and Order Act of 2010, or if the tribe decides to exercise special domestic violence jurisdiction under the re-authorization of the Violence Against Women Act of 2013 and 2022, in which case a tribe must ensure that it provides the protections under the ICRA as amended in 2013 and 2022. *See generally* Stephen L. Pevar, *The Rights of Indians and Tribes* 361-376 (5th Ed. 2024). Thus, when the Tribe enacted subsection (g)(1), it provided a Tribal venue and potential non-monetary limited relief for rights and protections under the ICRA which the Tribe had yet to adopt in whole or in part at that time.

fact that Tribal Council took this step to effectuate an explicit waiver of sovereign immunity in Ordinance No. 369, as codified at C.C. § 1-2(i), for an action against the Tribe seeking the relief available under C.C. § 1-2(g)(1) even when the suit is brought by the Tribe itself underscores that, at the time these provisions were adopted, the Tribe needed to enact an ordinance that comported with the plain language of the Law and Order Code requiring a grant of jurisdiction to the CFR Court *and* an explicit waiver of sovereign immunity that allowed a purported action to be brought against the Tribe before the CFR Court could adjudicate and provide any potential relief established by the Tribe under C.C. § 1-2(g)(1). *See id.* § 1-2(i); 25 C.F.R. § 11.104(b), (e). When Tribal Council adopted Ordinance No. 369, codified at C.C. § 1-2(i), the Tribe expressly waived its sovereign immunity for purported actions involving the rights and protections under the ICRA, once adopted by the Tribe, when such action is brought by the Tribe against the Tribe and Tribal Council has granted limited jurisdiction to the Cherokee CFR Court over such actions seeking the limited relief potentially available under subsection 1-2(g)(1). *See* Ord. No. 407 (1996) (stating "[b]e [i]t [h]ereby [o]rdained, by the Tribal Council of the [EBCI] . . . that the appropriate protections guaranteed by the [ICRA] of 1968 shall apply to all members of the [Tribe]"). Additionally, this Court views the totality of the language and interplay between Ordinance No. 168, codified at C.C. § 1-2(g), Ordinance No. 369, codified at C.C. § 1-2(i), and the Tribe's subsequent incorporation of some of the protections of the ICRA into the Cherokee Code following the adoption of "appropriate protections" under the ICRA in Ordinance No. 407 (1996) as granting an explicit waiver of sovereign immunity with respect to some purported claim or action brought by the Tribe against the Tribe under subsection (g)(1), and as being suggestive of the Tribe's potential consideration to provide a limited waiver of tribal sovereign immunity permitting a plaintiff to potentially bring some form of limited action against the Tribe in the Cherokee CFR Court seeking the specified remedies potentially available under C.C. §1-2(g)(1) (an "injunction,

writ of mandamus or a declaratory judgment concerning individual rights guaranteed by the [ICRA]"), but to expressly exclude therefrom the specific relief of temporary restraining orders and preliminary injunctions for any party other than the Tribe itself. *See, e.g.*, C.C. § 1-40 (2020) (stating that "[a]ll provisions of the [ICRA], 25 U.S.C. 1301—1303, shall apply in all court proceedings before the Cherokee Court); C.C. § 15-7 (2020) (stating that, in the context of C.C. Chapter 15 (Criminal Procedure), the Tribe "adopts all the protections afforded in [the ICRA], as amended").

Consistent with our above discussion and understanding, this Court concluded in *Lambert* that Tribal Council waived the Tribe's sovereign immunity with respect to an action brought against the Tribe under C.C. § 1-2(i) seeking preliminary injunctive relief only "if the action is instituted by the [Tribe]." *Lambert*, 15 Am. Tribal Law at 63 (holding that the Tribe waived immunity with regards to the justiciable issues raised on the Tribe's behalf by the Tribe's Attorney General (citing C.C. § 1-2(i)). Subsequent to *Lambert*, this Court decided in *Blankenship* that the trial court erred by not addressing the plaintiffs' request for a declaratory judgment with respect to whether a Tribal Council resolution that removed the plaintiffs from their positions as Commissioners of the EBCI Tribal Gaming Commission (TGC) was a bill of attainder prohibited by the ICRA, which implicated C.C. § 1-2(g)(1). Notwithstanding the fact that Tribal Council did not provide for a clear waiver of sovereign immunity or a clear cause of action against the Tribe for a party seeking a declaratory judgment remedy under C.C. § 1-2(g)(1), either in subsection (g)(1) itself or elsewhere in the Cherokee Code, this Court recognized a limited waiver of sovereign immunity by the Tribe that allows a party to bring some form of limited action concerning alleged violations of "appropriate protections" under the ICRA against the Tribe in the Cherokee Court seeking a declaratory judgment under C.C. § 1-2(g)(1) (potentially allowing for "a declaratory

judgment concerning individual rights guaranteed by the [ICRA]"). *Blankenship*, 16 Am. Tribal Law at 41-42.

The dissent again ignores the totality of Tribe's legislative actions, disregards the mandates of the Law and Order Code, and violates bedrock rules of statutory construction regarding sovereign immunity to effectuate his interpretation of a broad waiver of tribal sovereign immunity applicable to the entirety of C.C. § 1-2(g). As we noted earlier, Tribal Council easily could have included a waiver of sovereign immunity in Ordinance No. 369 for the entirety of C.C. § 1-2(g) if Tribal Council had so intended. Thus, the fact that Tribal Council deemed it necessary to waive sovereign immunity with respect to an action brought by the Tribe against itself in Ordinance No. 369, codified at C.C. § 1-2(i), clearly indicates to this Court that Tribal Council understood the jurisdictional limitations of the CFR Court and the mandates in the Law and Order Code as requiring strict compliance, which further counters the dissent's reading, and demonstrates that Tribal Council did not view the language it employed in C.C. § 1-2(g) as creating various causes of action against the Tribe for which tribal sovereign immunity is waived, and therefore, that Tribal Council did not intend to effectuate any such waivers based on the language found therein alone. To construe and apply the language found in Ordinance No. 369 as a blanket waiver of tribal sovereign immunity, as our dissenting colleague does, goes well beyond our inherent function of interpreting law and ventures into the legislative realm, which the majority maintains is outside the Court's purview.

C.C. § 1-2(g)(2)

Tribal Council's adoption of Ordinance No. 168 (1994), codified at C.C. § 1-2(g)(2), explicitly granted jurisdiction to the Cherokee CFR Court over a broad category of purported condemnation actions brought against the Tribe and limited the relief available to the court for such purported actions to "[d]amages for condemnation by the Tribe," *id.* § 1-2(g)(2), thereby

complying with 25 C.F.R. § 11.104(b) of the Law and Order Code; however, Tribal Council did not include therein an explicit waiver of the Tribe's sovereign immunity with respect to a condemnation action against the Tribe as required by the Law and Order Code, *see* 25 C.F.R. § 11.104(e). Tribal Council also did not use language therein that clearly established a condemnation action against the Tribe under subsection (g)(2). As such, the Cherokee CFR Court would have been required under the Law and Order Code, 25 C.F.R. § 11.104(e), to utilize the jurisdiction granted by subsection (g)(2) to determine whether the Tribe had enacted an additional resolution or ordinance that explicitly waived the Tribe's sovereign immunity for any purported condemnation action brought by an affected party against the Tribe seeking the limited relief allowed under C.C. § 1-2(g)(2), and absent such a resolution or ordinance, the CFR Court would have been obligated to dismiss such actions based on the defense of sovereign immunity for lack of jurisdiction. *See* 25 C.F.R. § 11.104(e).

Unlike with subsection (g)(1) above, which was enacted prior to the Tribe's adoption of "appropriate protections" under the ICRA, Tribal Council, prior to its enactment of Ordinance No. 168, codified at C.C. § 1-2(g)(2), enacted Ordinance No. 19, codified at C.C. Chapter 40, which set out the Tribe's comprehensive substantive treatment of condemnation and eminent domain under Tribal law as authorized in Section 24 of the Charter. *See* Ord. No. 19 (1991) (codified at C.C. §§ 40-1 to 40-4 (1991)). The Charter provided occupants (e.g., possessory holders or leasehold tenants) of Tribal land with a right to compensation for the value of the betterments or improvements that they placed or had placed on their assigned interests in Tribal land subsequently taken by the Tribe for unspecified public purposes benefitting the Tribe through eminent domain, and stated at that time:

> Whenever it may become necessary, in the opinion of the council to appropriate to public purposes for the benefit of the Tribe any of the lands owned by the Eastern Band of Cherokee Indians, and occupied

> by any individual Indian or Indians of the Tribe, the Council may condemn such land for the aforesaid purposes only by paying to the occupant of such land the value of such improvements and betterments as he may have placed or caused to be placed thereon, and the value of such improvements or betterments shall be assessed by a jury of not less than six competent persons, who are members of the Tribe, under such laws and regulations as may be prescribed by the Council.

Charter § 24 (1991). Under the Charter — the Tribe's foundational source of law that vests Tribal Council with the power "to adopt laws and regulations for the general government of the Tribe, govern the management of real . . . property held by the Tribe, and direct and assign among its members thereof . . . land held by them as a Tribe," *id.* § 23 —Tribal Council enacted and codified C.C. Chapter 40 - Eminent Domain (via Ordinance No. 19), which created a specific Tribal condemnation action against the Tribe under Tribal law, and delineated the requisite parameters of said action, including: the purposes for which the Tribe may condemn Tribal property held by possessory interest or by leasehold interest; the types of investments made in the land for which relief may be granted; the methods for calculating damages for condemnation; and, importantly, regarding disagreement over the valuation of damages, the requirement that the Tribe (as landowner) bring the action in the Cherokee Court, acting as plaintiff on behalf of an affected party, for damages due to condemnation by the Tribe. *See* Ord. No. 19 (1991); *see also* C.C. § 40-1 (2020) (stating that "[t]he Tribe shall have the power to condemn land within the Cherokee Indian Reservation whenever such land is deemed by the Tribal Council to be necessary for a public purpose," and that "[t]he exercise of eminent domain shall be initiated by the Tribal Council passing a resolution identifying the land to be taken for a public purpose, the possessory holder and leasehold tenants and the purpose for which the land will be used"); *id.* § 40-2 (2020) (stating that "the possessory holder or leasehold tenant shall be compensated for such condemnation by payment of the value of the improvements or betterments placed on the land"); *id.*§ 40-3 (2020)

(stating that "[i]f the possessory holder or leasehold tenant does not agree with the Tribe on the value of the improvements or betterments, the Tribe shall file suit in the Cherokee Court and deposit with the Clerk a sum equal to the Tribe's appraised value of the improvements or betterments," and "[t]he actual value shall be determined by a jury of six Tribal members"); *id.* § 40-4 (2020) (stating that "[t]he Tribe may proceed with construction of the public purpose while the suit is pending but not without having first obtained the agreement of the possessory holder or leasehold tenant or having filed suit and deposited an amount equal to the appraised value of improvements or betterments"). Importantly, Tribal Council's mandate in Ordinance No. 19, codified at C.C. Chapter 40, that the Tribe must bring an action for damages on behalf of possessory holders or leaseholders of Tribal lands when the Tribe and possessory holders or leasehold tenants disagree as to the compensation provided for the Tribe's condemnation of their interest in Tribal land, effectively removed the Tribe's sovereign immunity defense as to the only condemnation action authorized against the Tribe under Tribal law. Thus, and in sum, when Tribal Council adopted Ordinance No. 168, codified at C.C. § 1-2(g)(2), it explicitly provided the Cherokee CFR Court with jurisdiction over the specific condemnation action that Tribal Council created via Ordinance No. 19, codified at C.C. Chapter 40, in which the Tribe as legal owner of all Tribal lands[46] was required to act as plaintiff on behalf of a possessory holder or leasehold tenant in the event the parties disagree as to the damages offered by the Tribe for its acts of condemnation as set forth in C.C. Chapter 40. *See* Ord. No. 19 (1991) (codified at C.C. §§ 40-1 to 40-4); *see also* Ord. No. 168 (1994) (codified at C.C. § 1-2(g)(2)).

[46] *See* C.C. § 47B-2(a) (2020) (stating that "[l]egal title to land shall remain vested in the United States of America in Trust for the Eastern Band of Cherokee Indians"); *see also* Ord. No. 453 (2019) (re-organizing C.C. Chapter 47 - Real Property into smaller chapters, including C.C. Chapter 47B - Possessory Holdings).

Section 24 of the Charter was later amended by Tribal referendum in 1995 by further limiting the scope of public purposes for which the Tribe may exercise eminent domain over possessory interests in Tribal land to "bridges, roads, power lines, schools, hospitals, or sewer and water lines," and by mandating that "[e]ach Tribal member shall receive proper notice, proper hearings, and proper compensation for their lands." Res. No. 480 (1995) (approved by Tribal referendum (1995)); Charter § 24 (2000) (including the following sentences at the end of Section 24: "The Eastern Band of Cherokee Indians will not use eminent domain under this section or any other Tribal or Federal laws to take an individual Tribal member's possessory holding except for bridges, roads, power lines, schools, hospitals, or sewer and water lines. Each Tribal member shall receive proper notice, proper hearings, and proper compensation for their lands."). The provisions in C.C. Chapter 40 have not been updated to reflect the 1995 additions to Section 24 of the Charter.

As discussed earlier, when Tribal Council later adopted Ordinance No. 29 in 2000 implementing the Cherokee Judicial Code, the limited jurisdiction of the Cherokee CFR Court under the Law and Order Code was transferred to the Cherokee Trial Court under C.C. § 7-2. *See* Ord. No. 29 (2000) (codified at C.C. §§ 7-1 to 7-18 (2000)); C.C. §§ 7-1 to 7-18 (2020); *see also* Ord. No. 117 (2000); Ord. No. 291 (2000); C.C. § 1-41(c) (2020). Under C.C. § 7-2, the Cherokee Court has broad original jurisdiction over cases and controversies arising under the Charter, laws, customs, and traditions, including in actions in which the Tribe is a party, and the relief available to the Cherokee Court with respect to purported condemnation actions under subsection (g)(2) remains limited to damages. *See* Ord. No. 29 (2000) (codified at C.C. § 7-1 to § 7-18 (2000)); C.C. § 7-2 (2020); *id.* §§ 7-13, 7-18.

Consistent with the above discussion of the interplay between Section 24 of the Charter, Ordinance No. 19, codified at C.C. Chapter 40, and Ordinance No. 168, codified at C.C. § 1-2(g)(2), this Court opined in dicta in *Blankenship* that under current Tribal law, an action seeking

damages for condemnation by the Tribe could be heard in the Cherokee Court under C.C. § 1-2(g)(2). *Blankenship*, 16 Am. Tribal Law at 42. In other words, when this Court briefly opined in *Blankenship* in regard to C.C. § 1-2(g)(2) that a claim for damages for condemnation "require[d] no further acts . . . for the waiver of sovereign immunity for the relief found there," *Blankenship*, 16 Am. Tribal Law at 42, our statement was based on the jurisdiction of the Cherokee Court under C.C. § 7-2, the Cherokee Judicial Code's retention of the limitations on court remedies found in C.C. § 1-2(g)(2), and the substantive rights of occupants regarding the value of their improvements made thereon as well as the Tribe's duty to serve as plaintiff on behalf of such interest holders in Tribal land in bringing a condemnation action in the Cherokee Court when there is disagreement over a damages valuation as established in Section 24 of the Charter and Ordinance No. 19, as codified in C.C. Chapter 40, described above. In sum, by adopting Ordinance No. 19, codified at C.C. Chapter 40, and setting out the requisite parameters through which the Tribe must exercise eminent domain over any interest in Tribal land, including the directive that the Tribe must file suit as the plaintiff on behalf of affected interest holders against the Tribe in the event the parties disagree as to the Tribe's valuation of damages thereunder, the Tribe effectively waived its defense of sovereign immunity under C.C. Chapter 40 and in accord with the Charter by requiring the Tribe to consent to the jurisdiction of the Cherokee Court when filing suit under C.C. § 1-2(g)(2). *See* Charter § 24 (2020); Ord. No. 19 (1991) (incorporating C.C. Chapter 40); C.C. §§ 40-1 to 40-4 (2020); Ord. No. 168 (1994) (codified at C.C. § 1-2(g)(2)); C.C. § 1-2(g)(2) (2020).[47] In addition to the value of improvements made to their interests in Tribal land set out in C.C. Chapter 40,

[47] We note that the limited Tribal condemnation action that Tribal Council has created and authorized to be brought against the Tribe does not appear to permit the affected possessory holders or leasehold tenants to file suit directly against the Tribe.

possessory interest holders in Tribal lands also have a right to "proper compensation for their lands" taken through eminent domain. Charter § 24.

In arriving at a different interpretation of C.C. § 1-2(g)(2), our dissenting colleague chooses to dismiss the plain language of the provisions discussed above, including the Charter and C.C. Chapter 40, and fails to consider the strictures of the Law and Order Code at the time Ordinance No. 29 was adopted and the Cherokee Judicial Code, specifically C.C. §§ 7-2 and 7-13, which govern the Cherokee courts today. Instead, the dissent chooses to employ a highly subjective reading of the language found in Ordinance No. 369 and C.C. § 1-2(g)(2) to substitute his view for that of Tribal Council to erroneously find that Tribal Council waived sovereign immunity for any purported condemnation actions brought against the Tribe under subsection (g)(2). In fact, the dissent's reading that Ordinance No. 369 effectuates a general waiver of tribal sovereign immunity as to any purported actions or claims for damages from Tribal condemnation under subsection (g)(2) would vastly expand the scope of the condemnation action under the Charter, as well as the potential types of recoverable damages stemming therefrom, in a manner that would allow *any* plaintiff to bring an condemnation action against the Tribe in the Cherokee Court seeking damages in contravention of the Charter and C.C. Chapter 40. Further, our dissenting colleague's position essentially attempts to substitute his judgment for that of Tribal Council with respect to the delineation and granting of property rights of possessory interest holders and leaseholders, which per the Charter and the Cherokee Code is strictly the purview of Tribal Council.[48] It is not the role of this Court to judicially legislate fee simple ownership property rights in Tribal land or to make other changes in Tribal law that equate fee simple absolute ownership in land with a possessory interest in Tribal land.

[48] The dissent also appears to view C.C. § 1-2(g)(2) as creating a broad condemnation action against the Tribe under Tribal law even though, as written, C.C. § 1-2(g)(2) does not provide for or create a cause of action against the Tribe under Tribal law for "condemnation." *See Blankenship*, 16 Am. Tribal Law at 42.

C.C. § 1-2(g)(3)

As explained above, in summary, although Tribal Council's adoption of Ordinance No. 168, codified at C.C. § 1-2(g)(3), which explicitly granted jurisdiction to the Cherokee CFR Court over a potentially broad category of purported actions brought against the Tribe seeking the limited relief available under C.C. § 1-2(g)(3) (potentially allowing for "[d]amages for [purported] tort claims where the Tribe maintains insurance coverage for such claims, with recovery not to exceed the amount of liability coverage maintained by the Tribe"), complied with 25 C.F.R. § 11.104(b) of the Law and Order Code and established the Cherokee CFR Court as the judicial forum in which a plaintiff was required to bring any such purported actions against the Tribe, Tribal Council did not create or provide therein for a tort claims action against the Tribe under Tribal law nor did Tribal Council waive sovereign immunity with respect to any such purported Tribal tort claims action as required by 25 C.F.R. § 11.104(e) of the Law and Order Code. Accordingly, under the Law and Order Code, in any purported tort claims action brought against the Tribe seeking damages under subsection (g)(3), the Cherokee CFR Court would have been required to exercise the jurisdiction granted in subsection (g)(3) to determine whether the plaintiff had demonstrated that the Tribe had, in a resolution or ordinance, waived sovereign immunity with respect to such alleged "tort claims" action and, finding none as our review here has shown, the CFR Court would have been required to dismiss any such purported "tort claims" action brought against the Tribe under C.C. § 1-2(g)(3) for lack of jurisdiction based on the defense of sovereign immunity.

After Tribal Council adopted Ordinance No. 29 implementing the Cherokee Judicial Code, the limited jurisdiction granted by the Tribe to the Cherokee CFR Court under the Law and Order Code transferred to the Cherokee Court under C.C § 7-2, as did the limitations imposed on the court's ability to grant remedial relief in a purported "tort claims" action against the Tribe under C.C. § 1-2(g)(3), like the instant one. *See* Ord. No. 29 (2000) (codified at C.C. §§ 7-1 to 7-18

(2000)); C.C. § 7-2 (2020); *id.* §§ 7-13, 7-18; *see also* Ord. No. 117 (2000); Ord. No. 291 (2000); C.C. § 1-41(c) (2020) (stating that "[t]he Cherokee Court's jurisdiction shall not be limited by restrictions set forth in the [CFR]Regulations, and shall extend to all cases for which jurisdiction is granted by the Cherokee Code"). The Cherokee Court, under C.C. § 7-2, has broad original jurisdiction over cases and controversies arising under the Tribe's Charter, laws, customs, and traditions, including in actions in which the Tribe is a party. Therefore, for a plaintiff to survive a motion to dismiss with respect to a purported action brought against the Tribe seeking the limited relief potentially allowed under subsection (g)(3), the plaintiff must first demonstrate to the Cherokee Court, as a threshold matter, that Tribal Council has waived its defense of sovereign immunity in a Tribal ordinance, law, or contract as required under C.C § 7-13; otherwise, the court, after exercising its jurisdiction to hear from the plaintiff, must then dismiss the plaintiff's purported action for lack of subject matter jurisdiction based on the defense of tribal sovereign immunity in accordance with C.C. § 7-13.

As for the instant matter, Plaintiff has not directed this Court's attention to any such Tribal ordinance or law, but Plaintiff does point to the Tribe's liability insurance contract (the Gemini Policy), specifically Paragraph T, that the Tribe maintained at the time of injury as providing a waiver of sovereign immunity for his purported "tort claims" action against the Tribe seeking damages under C.C. § 1-2(g)(3).

Thus, the question that this Court must now answer is whether, as Plaintiff contends, the Gemini Policy speaks directly to Tribal Council's intent to provide for a waiver of sovereign immunity to allow for a plaintiff to bring a Tribal "tort claims" action against the Tribe in the Cherokee Court. Unfortunately, Plaintiff fails to point to any language in the Gemini Policy that speaks directly to the Tribe's intent to provide for a waiver of sovereign immunity for his purported Tribal "tort claims" action against the Tribe, let alone language that demonstrates that Tribal

Council expressly and unequivocally waived sovereign immunity as to such Tribal "tort claims" action or any specific tort claims covered by the Gemini Policy. Here, the language in the Gemini Policy merely provides that "[a]ny use of the Sovereign Immunity defense will only apply to coverage and limits of this insurance policy" and that "[t]he Carrier is not authorized or empowered to waive . . . the 'Insured's' Sovereign Immunity outside or beyond the scope of coverage or limits of this insurance policy," which makes it clear to this Court that the intent behind said language was narrow in purpose and specifically designed to strictly address the scope of coverage or limits of the policy, and that the Gemini Policy itself had no material bearing on whether, as a fundamental matter of jurisdiction, Tribal Council waived the Tribe's sovereign immunity to allow Plaintiff to bring his purported Tribal "tort claims" action or specific tort claims against the Tribe seeking damages under C.C. § 1-2(g)(3). Therefore, the Court concludes that the language in the Gemini Policy advanced by Plaintiff here does not constitute an express and unequivocal waiver of tribal sovereign immunity by Tribal Council in a Tribal contract in accordance with C.C. § 7-13. Accordingly, the Court holds that Plaintiff has failed to demonstrate that Tribal Council expressly and unequivocally waived tribal sovereign immunity in accordance with C.C. § 7-13 as to the purported Tribal "tort claims" action that Plaintiff desires to bring against the Tribe seeking the limited relief found under C.C. § 1-2(g)(3), and, consequently, that the trial court did not err in dismissing Plaintiff's complaint against the Tribe and its entities, including TCGE,[49] pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction based on the defense of tribal sovereign immunity.

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[49] *See* C.C. § 16A-5(h) (2020) ("The TCGE, as an unincorporated instrumentality of the Tribe, retains all of the Tribe's rights, privileges, and immunities, including sovereign immunity from suit."); *see also Cook*, 548 F.3d at 726 (concluding that "as a tribal corporation and an arm of the Fort Mojave Tribe, ACE [AVI Casino Enterprises, Inc.] enjoy[ed] sovereign immunity from [the plaintiff's] suit"); *Allen*, 464 F.3d at 1047 (concluding that a casino, which was owned and operated by the Tyme Maidu Tribe, "function[ed] as an arm of the Tribe," and "accordingly enjoy[ed] the Tribe's immunity from [the plaintiff's] suit").

The Court is confident that the holding here is fully consistent with the Tribe's intent with respect to C.C.§ 1-2(g)(3) under the Law and Order Code, and under the Cherokee Judicial Code. The words Tribal Council chose to enact along with the legislative history and circumstances of Ordinance No. 168, codifying C.C. § 1-2(g)(3), and the adoption of Ordinance No. 369, codifying C.C. § 1-2(i), do not support Plaintiff's (or the dissent's) position that the Tribe intended to waive sovereign immunity for a broad array of purported Tribal "tort claims" against the Tribe when at the time of the injury the Tribe maintained an insurance policy that allegedly provides coverage for such purported claims. Tribal Council has not enacted a resolution, ordinance, contract, or law waiving sovereign immunity with respect to any such purported Tribal "tort claims" action that could be brought against the Tribe under C.C. § 1-2(g)(3), nor has Tribal Council established a Tribal Tort Claims Act setting out the parameters for a tort claims action against the Tribe including the procedures and timelines for such action, or developed a schema of actionable torts, with a delineated standard or duty of care owed or otherwise, in accordance with the Law and Order Code or the Cherokee Judicial Code.

In arriving at his position, our dissenting colleague fails to fully consider the above legal authority, principles, and contemporary landscape in the development of the Tribe's judiciary that ultimately compel the Court to arrive at the conclusions we have reached here. Instead, he chooses to hold fast to his conviction that Tribal Council, contrary to the dictates of the Law and Order Code, indeed intended to create a cause of action under Tribal law for anyone to bring a purported "tort claims" action against the Tribe in C.C. § 1-2(g)(3) through the Tribe's limited grant of jurisdiction to the CFR Court and the establishment of a potential conditional limited remedy for such purported actions or claims under C.C. § 1-2(g)(3). Moreover, our dissenting colleague again chooses to substitute his views for that of Tribal Council regarding what is best for the Tribe by concluding that the Tribe intended to effectuate a broad waiver of tribal sovereign immunity that

encompasses any act or omission by the Tribe that can fairly be classified as a "tort," which is a vast and expansive category of potential actions and claims, so long as the Tribe maintains insurance that allegedly covers damages for injuries stemming therefrom, even though Tribal Council has not adopted an ordinance or law or entered into a contract to that effect.[50] Further, in opining that Tribal Council intended to create a waiver of tribal sovereign immunity that allows a plaintiff to bring a Tribal "tort claims" action against the Tribe under C.C. § 1-2(g)(3) based on the language of subsection (g)(3) alone, the dissent again contravenes established rules of construction regarding sovereign immunity that require this Court to "construe ambiguities in favor of immunity," *Williams*, 514 U.S. at 531, 115 S. Ct. at 1616 (citation omitted), and to strictly construe an alleged waiver in terms of scope in favor of the sovereign, *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 2096 (1996), and he judicially reduces to mere suggestion, or even dismisses in full, the jurisdictional limitations that Tribal Council has placed on the Cherokee courts in the Cherokee Judicial Code with respect to any such purported actions brought against the Tribe seeking the limited relief potentially allowed under C.C. § 1-2(g)(3) and that the Law and Order Code formerly imposed on the Cherokee CFR Court. This Court is compelled to remind our dissenting colleague that "[i]t is within our charge to interpret what the Tribal Council has enacted. It is not within our province to rewrite [or interpret] legislation as we think it should be; the choice of words is for the Council, not this Court." *Jacobson*, 2006 WL 8435928, at *2.[51]

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[50] *See Black's Law Dictionary*, 11th Ed (2019) (defining "tort" as "[a] civil wrong, other than breach of contract, for which a remedy may be obtained, [usually] in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another," providing that "[t]ortious conduct is typically one of four types: (1) a culpable or intentional act resulting in harm; (2) an act involving culpable and unlawful conduct causing unintentional harm; (3) a culpable act of inadvertence involving an unreasonable risk of harm; and (4) a nonculpable act resulting in accidental harm for which, because of the hazards involved, the law imposes strict or absolute liability despite the absence of fault," and alternatively defining the plural term "torts" as "[t]he branch of law dealing with such wrongs").

[51] Again, the Court is confident in its holding here under the Cherokee Judicial Code; however, if Tribal Council decides to waive tribal sovereign immunity for any Tribal claim(s) or cause(s) of action against the Tribe seeking the

The Tribe has had countless opportunities over the past 30 years to waive sovereign immunity for a Tribal "tort claims" action under C.C. § 1-2(g)(3), including, for example, by adding explicit and express language in an ordinance to demonstrate the Tribe's intent to waive sovereign immunity for a Tribal "tort claims" action against the Tribe seeking damages under C.C. § 1-2(g)(3). Tribal Council also has had the opportunity to adopt an ordinance clearly providing for a private right to a "tort claims" action against the Tribe, that comprehensively identified, delineated and defined said action (or at the very least the specific torts included under that umbrella), and that set out the specific standard or duty of care owed by the Tribe therein, similar to Tribal Council's adoption of Ordinance No. 19 and the concomitant enactment of the comprehensive condemnation provisions codified in C.C. Chapter 40, or similar to the comprehensive tort reform adopted and implemented by the State of North Carolina in its Tort Claims Act, N.C. Gen. Stat. §§ 143-291 to 143-300.1(a) (2020). However, Tribal Council has not taken any such action to date with respect to C.C. § 1-2(g)(3).[52]

Finally, although our dissenting colleague cannot understand why Tribal Council would have granted jurisdiction to the former Cherokee CFR Court and any successor court under C.C. § 1-2(g)(3) and maintained a liability insurance policy if Tribal Council did not intend to waive sovereign immunity to allow a plaintiff to bring a Tribal "tort claims" action against the Tribe,

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relief found in C.C. § 1-2(g)(3), then the Court respectfully requests that Tribal Council establish a clear cause of action against the Tribe and effectuate a waiver of sovereign immunity in accordance with C.C. § 7-13.

[52] We certainly recognize that Plaintiff's complaint alleges what appears to be a premises liability-based wrongful death negligence claim for relief, that negligence is a "tort," and that the comparative negligence standard in the Cherokee Code appears to acknowledge the existence of a Tribal wrongful death action, *see* C.C. § 1-19 (2020) (providing, in pertinent part, that "[i]n all actions hereunder brought in the Cherokee Court for personal injuries, *wrongful death*, or for injury to property, the fact that the person injured . . . may not have exercised due care shall not bar a recovery, but damages shall be diminished by the finder of fact in proportion to the percentage of negligence attributable to the person injured") (emphasis added). However, there is absolutely no language found therein that indicates that such an action can be brought against the Tribe or that Tribal Council intended to effectuate a waiver of tribal sovereign immunity for such an action, let alone language that meets the "express and unequivocal" strictures of C.C. § 7-13.

particularly when an insurance policy can potentially serve to mitigate the Tribe's financial exposure in such an action, and when there are potential benefits to the Tribe in doing so, we must stress again: it is not the role of this Court or individual justices to legislate from the bench and stray into the policy-making realm of Tribal Council. And, as emphasized in *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977), a decision which we cited with approval in *Teesateskie*, 13 Am. Tribal Law at 187, "one of the primary reasons for judicial recognition of tribal sovereign immunity has been the protection of tribal assets," *Atkinson*, 569 P.2d at 169, and while "the analogy is made that since the tribal funds are protected to the extent of insurance coverage, tribal funds would not be harmed[,] . . . . this analogy is deficient for several reasons," *id.*

> First, it ignores the fact that insurance premiums tend to rise after claims have been paid. Second, the policy would encourage poor fiscal management by rewarding the tribe which did not prepare for the possibility that the courts may not recognize its claim to sovereign immunity. Thus, by encouraging those tribes with insurance to drop it and discouraging those tribes which do not have insurance from obtaining it, the policy opens the gate to uncovered loss if at some point the courts decide that the sovereign immunity defense is invalid. This problem is of particular importance in Indian affairs, since once the tribal property is dissipated by tort judgments, it is very difficult to replace. In municipal cases, the burden from the cost of accidents is spread throughout the community because the community can tax to replace the lost funds. However, most tribes do not have the ability to tax in a similar way . . . once lost, the property cannot be replaced.

Id. Ultimately, as for projecting the intent of Tribal Council, the record is too sparse, so we do not take a conclusive position on whether Tribal Council may have intended, then or at some future date, to waive sovereign immunity to allow for a plaintiff to bring some form of limited "tort claims" action against the Tribe seeking damages. We do, however, maintain that the steps that Tribal Council took in 1994 to adopt Ordinance No. 168 did not comport with the requirements of the Law and Order Code during the time of the Cherokee CFR Court, nor do those steps comport with the requirements of the Cherokee Judicial Code today which only allow the Cherokee courts

to adjudicate a purported tort claims action brought against the Tribe seeking damages under C.C. § 1-2(g)(3) if the Tribe expressly and unequivocally waived its immunity for such an action.

CONCLUSION

In sum, we affirm, as modified, the trial court's order determining that Plaintiff's complaint against the Tribe and its entities, including TCGE, warranted dismissal pursuant to Rule 12(b)(1) based on tribal sovereign immunity and that Plaintiff's complaint against the Adjacent Property Defendants, which include Harrah's NC, Smokey Mountain Properties, and TCGE (in the alternative) warranted dismissal pursuant to Rule 12(b)(6).

AFFIRMED.

Justice HUNTER, concurring in part and dissenting in part.

I write to respectfully dissent from the majority opinion regarding C.C. § 1-2(g)(3) and the decision to affirm the lower court's dismissal of Plaintiff's premises liability-based claims against the Tribe and TCGE pursuant to Rule 12(b)(1) based on the defense of sovereign immunity. In my view, Tribal Council intended to not only grant jurisdiction but also to waive the Tribe's sovereign immunity by vesting the Cherokee CFR Court (and any successor Cherokee Court) with jurisdiction over actions against the Tribe seeking "[d]amages for tort claims where the Tribe maintains insurance coverage for such claims, with recovery not to exceed the amount of liability coverage maintained by the Tribe," C.C. § 1-2(g)(3) (2020), and mandating that the Cherokee court "shall exercise jurisdiction over [such] actions," *id.* Specifically, I contend that Tribal Council intended to waive sovereign immunity to allow parties, such as tribal members and invitees allegedly harmed by tortious action committed by the Tribe on tribal trust lands, to file actions in the Cherokee Court against the Tribe seeking monetary damages for any claim(s) based in tort that are covered as an insurable occurrence or risk under an applicable liability insurance policy maintained by the Tribe, with any recoverable damages capped at the policy limits for the claim(s).

Here, the Tribe did not contest the fact that it maintained the Gemini Policy or that the Gemini Policy potentially covered Plaintiff's alleged "tort claims" on the date at issue in this matter. Gemini's preliminary position regarding coverage was that Plaintiff's premises liability claims were covered under the policy and that, under the terms of the policy, it was willing to provide the Tribe and TCGE with a defense in relation to Plaintiff's premises liability-based claims, although Gemini specifically reserved its right to decline coverage if its investigation determined that the Federal Tort Claims Act was the sole and exclusive remedy for Plaintiff's

claims, such that coverage for the claims was excluded pursuant to Exclusion Q. Gemini also generally reserved its right under the policy and applicable law to cite additional provisions that could further limit coverage for the claims. The Gemini Policy defined "claim" as "any information that may give rise to damages covered by th[e] policy, including [law]suit(s) brought in connection therewith, which the [Tribe] becomes aware of and provides written notice of the same to [Gemini]."

As a result, I would reverse the trial court's order with respect to the Rule 12(b)(1) dismissal of Plaintiff's premises liability-based claims seeking damages against the Tribe under C.C. § 1-2(g)(3), and I would remand this matter to the trial court to determine whether any of Plaintiff's claims under the Gemini Policy constitute "tort claims" pursuant to C.C. § 1-2(g)(3) that are covered by the Gemini Policy, such that Tribal Council waived tribal sovereign immunity for any such claims up to the policy limits. Accordingly, I respectfully dissent from the Court's decision to affirm the lower court's order dismissing Plaintiff's premises liability-based claims against the Tribe pursuant to Rule 12(b)(1) based on the defense of sovereign immunity.[1]

Although I disagree with the majority's determination that the trial court correctly concluded that Plaintiff's premises liability-based claims against TCGE should have been dismissed pursuant to Rule 12(b)(1) based on tribal sovereign immunity, I would nonetheless conclude that the trial court correctly dismissed those claims against TCGE pursuant to Rule 12(b)(6) for the same reason it dismissed those claims against Harrah's NC and Smokey Mountain Properties. Consequently, I would dismiss the premises liability-based claims against

[1] Nevertheless, I do agree with the majority that the notice provision contained in Paragraph T, Section V of the Gemini Policy, which states that Gemini shall not use the Tribe's sovereign immunity as a defense to a claim made under the insurance policy unless the Tribe authorizes Gemini to do so via written notice sent by the Tribe to Gemini no less than ten days prior to the time required to answer suit, does not qualify as a contractual waiver of sovereign immunity with respect to Plaintiff's claims here. Plaintiff was not in privity as a party to the insurance contract nor an intended beneficiary of this particular provision that releases Gemini from all liability to the Tribe and its members should Gemini fail to assert sovereign immunity as a defense to a claim unless the Tribe specifically requested that Gemini raise the defense in the specific manner provided by this Gemini Policy provision.

TCGE pursuant to Rule 12(b)(6), not pursuant to Rule 12(b)(1) like the majority, or pursuant to Rule 12(b)(1) and alternatively pursuant to Rule 12(b)(6), like the trial court. Additionally, I do fully concur in the majority's opinion and its decision to affirm the trial court's order as to the dismissal of Plaintiff's EBCI custom and traditions arguments against all Defendants, and the Rule 12(b)(6) dismissal of the premises liability-based claims against Harrah's NC and Smokey Mountain Properties.

Again, my disagreement with my colleagues centers on the majority's decision to affirm the trial court's dismissal of Plaintiff's remaining claims against the EBCI based on tribal sovereign immunity pursuant to Rule 12(b)(1). In arriving at my position, I am cognizant that, pursuant to former C.C. § 7-13 (current C.C. § 7-22), Tribal Council has mandated that the Cherokee courts do not have jurisdiction over any actions or claims against the EBCI absent an express and unequivocal waiver of tribal sovereign immunity, and that abundant case law exists requiring courts to resolve ambiguities in favor of the sovereign retaining its immunity and to strictly construe the scope of any waiver in favor of the sovereign. However, in my view, and as set out more fully below, the language employed by Tribal Council in C.C. § 1-2(g)(3), the Tribe's enactment of Ordinance No. 168 in 1994, the Tribe's enactment of Ordinance No. 369 in 1996, and the legislative history and circumstances surrounding their adoption clearly demonstrate that Tribal Council intended not only to grant jurisdiction as the majority holds, but also to expressly and unequivocally waive the Tribe's sovereign immunity. I contend that my position is in keeping with Tribal Council's intent as expressed therein.

Importantly,

> [l]egislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish. The statute's words should be given

> their natural and ordinary meaning unless the context requires them to be construed differently.

Shelton v. Morehead Mem'l Hosp., 318 N.C. 76, 81-82, 347 S.E.2d 824, 828 (1986) (citations omitted). As this Court has stated:

> A statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter. . . . Courts construe all parts of a statute together, without according undue importance to a single or isolated portion. The meaning of a statute is determined, not from special words in a single sentence or section, but from the statute as a whole and viewing the legislation in light of its general purpose.

Sessions v. Cherokee Bd. of Elections, 15 Am. Tribal Law 39, 43 (E. Cherokee Sup. Ct. 2017) (per curiam) (alteration in original) (quoting 2A Sutherland Statutory Construction § 46:5 (7th ed. 2016)). Moreover, when necessary, this Court can and will properly consider legislative history and the circumstances surrounding enactment to discern legislative intent. *Anders v. Cherokee Bd. of Elections*, 17 Am. Tribal Law 200, 208 (E. Cherokee Sup. Ct. 2021) (per curiam). Finally, notwithstanding the rules of construction that favor the sovereign, a reviewing court should not "find that the abrogation of sovereign immunity impels such a strict construction as to thwart the obvious legislative intent and to render meaningless an act of the [legislative body, like Tribal Council] . . . ." *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 331, 293 S.E.2d 182, 186 (1982) (citations omitted).

While the majority raises some interesting points in its discussion and analysis of C.C. § 1-2(g), it is my contention that the majority's interpretation of C.C. § 1-2(g)(3) is overly strict and thwarts Tribal Council's legislative intent, whereas my interpretation is consistent with Tribal Council's intent behind the enactment of C.C. § 1-2(g), which states:

> (g) The Cherokee Court of Indian Offenses or any successor Cherokee Court shall exercise jurisdiction over actions against

> the Eastern Band of Cherokee Indians seeking the following relief:
>
> (1) An injunction, writ of mandamus or a declaratory judgment concerning individual rights guaranteed by the Indian Civil Rights Act;
>
> (2) Damages for condemnation by the Tribe;
>
> (3) Damages for tort claims where the Tribe maintains insurance coverage for such claims, with recovery not to exceed the amount of liability coverage maintained by the Tribe.

Id. § 1-2(g)(1)–(3) (2020). Significantly, Tribal Council enacted all three grants of jurisdiction therein simultaneously using similar language that has not been amended. *See* Ord. No. 168 (June 2, 1994) (codified at C.C. § 1-2(g)(1)–(3)). Notably, in crafting C.C. § 1-2(g), Tribal Council did not merely indicate that it was granting jurisdiction to the Cherokee CFR Court or any successor Cherokee court over actions against the Tribe seeking the respective relief found in C.C. § 1-2(g)(1)–(3). Tribal Council also included a specific mandate to the Cherokee court that it "shall," i.e., must, exercise the jurisdiction it had been granted over such actions or claims, which, in my view, expresses an intent to eliminate or waive tribal sovereign immunity as a defense to such actions and allow the Cherokee courts to fulfill their obligation to exercise jurisdiction and adjudicate them. *Id.* § 1-2(g)(1)–(3). Tribal Council did not place any conditions in C.C. § 1-2(g) on the grant of jurisdiction (and the Cherokee court's obligation to exercise it) over actions against the Tribe seeking the respective relief found under subsections (g)(1) or (g)(2). Tribal Council did, however, condition the grant of jurisdiction and the mandate to exercise said jurisdiction over an action against the Tribe seeking the relief found under subsection (g)(3) on the Tribe maintaining a liability insurance policy that covers the injured party's "tort claims."

The majority has added an additional condition: the contract of insurance itself must contain an express and unequivocal waiver of sovereign immunity as to the specific tort claims covered by the policy, or an additional ordinance or resolution must apply in combination with C.C. § 1-2(g)(3) to effectuate a waiver. The majority concedes that this reading lacks support in the plain language of C.C. § 1-2(g)(3), but believes it is necessary based on the applicable mandate found in former C.C. § 7-13 and the formerly-applicable mandates from the Law and Order Code. As discussed later in my dissent, the majority's requirement is unnecessary given the clarity with which I find Tribal Council expressed its intent to waive the Tribe's immunity under C.C. § 1-2(g)(3). In my view, the only condition that Tribal Council has imposed is for a plaintiff to be pursuing an action against the Tribe that seeks "[d]amages for tort claims where the Tribe maintains insurance coverage for such claims, with recovery not to exceed the amount of liability coverage maintained by the Tribe." C.C. § 1-2(g)(3).

Tribal Council's decision to use the broad term "tort claims" further evidences its intent to waive immunity under C.C. § 1-2(g)(3). *See Black's Law Dictionary* (11th ed. 2019) (defining "tort" as "[a] civil wrong, other than breach of contract, for which a remedy may be obtained, [usually] in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another," providing that "[t]ortious conduct is typically one of four types: (1) a culpable or intentional act resulting in harm; (2) an act involving culpable and unlawful conduct causing unintentional harm; (3) a culpable act of inadvertence involving an unreasonable risk of harm; and (4) a nonculpable act resulting in accidental harm for which, because of the hazards involved, the law imposes strict or absolute liability despite the absence of fault," and defining the plural form "torts" as "[t]he branch of law dealing with such wrongs"). More specifically, by employing the well-known legal term of "tort claims," Tribal Council

indicated its intent to effectuate a statutory waiver for the broad range of tortious conduct reflected in the natural and ordinary meaning of the term, when those claims are covered by a liability insurance policy maintained by the Tribe, with the scope of the waiver tied to and ultimately determined by which tortious acts or omissions are covered as insurable occurrences or risks under the policy and the maximum recoverable damages tied to and ultimately determined by the policy limits.

However, even assuming, *arguendo*, that Tribal Council's intent to effectuate a limited waiver of sovereign immunity in C.C. § 1-2(g)(3) was unclear when that section was enacted in 1994, Tribal Council explicitly clarified its intent when it enacted Ordinance No. 369 and created C.C. § 1-2(i) in 1996. Specifically, in adopting Ordinance No. 369, Tribal Council stated, among other things:

> WHEREAS, the Eastern Band of Cherokee Indians is entitled to sovereign immunity for all actions against them. *Based upon the civil jurisdictional ordinance no. 168 (1994) they have waived sovereign immunity in certain instances*, particularly with regard to an injunction, writ of mandamus, or declaratory judgment concerning individual rights guaranteed by the Indians Civil Rights [Act].
>
> . . . .
>
> WHEREAS, the Tribal Council as sovereign deems it necessary to be heard on all matters to which they are a party and no ex parte orders be entered against their actions, and no preliminary injunctions be entered against their actions, *limits their waiver of sovereign immunity pursuant to Ordinance No. 168* so that no Court can have any jurisdiction of action or make any remedy against the Eastern Band of Cherokee Indians with regard to a temporary restraining order or preliminary injunction, ex parte or otherwise. The . . . waiver of sovereign immunity pertains only to permanent injunctions after a full hearing on the merits of all pleadings.

Ord. No. 369 (Oct. 17, 1996) (emphases added). The latter emphasized quotation indicates that Tribal Council was limiting its waiver of sovereign immunity pursuant to Ordinance No. 168, not the jurisdiction granted, as Tribal Council could have done. These legislative pronouncements speak to the legislative history and the circumstances of enactment, which as previously noted, are proper for the Court to consider with respect to discerning Tribal Council's intent. *Anders*, 17 Am. Tribal Law at 208.

Although the majority contends that I am stretching these words beyond what was intended by Tribal Council, I disagree. To me, this language plainly states that Tribal Council intended to waive tribal sovereign immunity when it adopted Ordinance No. 168 and enacted all three statutory subsections together in 1994. More specifically, this language explicitly indicates that Tribal Council adopted Ordinance No. 369 and enacted C.C. § 1-2(i) in 1996 to place a limitation on the waiver of tribal sovereign immunity under C.C. § 1-2(g)(1) that it had previously granted in Ordinance No. 168 in 1994 (not to effectuate the waiver for the first time in 1996, as the majority holds) and explicitly acknowledges that Tribal Council intended to waive sovereign immunity for actions against the Tribe seeking the relief available under C.C. § 1-2(g)(2) and (g)(3), not just C.C. § 1-2(g)(1). Moreover, in doing so, Tribal Council did not include any language placing additional limitations or conditions on the respective waivers found in subsections (g)(2) and (g)(3). Nor did Tribal Council explicitly state that these respective grants of jurisdiction should not be construed as waivers of tribal sovereign immunity, which Tribal Council has done in other parts of the Cherokee Code and which I believe Tribal Council would have done here, if it so intended. *See, e.g.*, C.C. § 16C-5(l)(13) (2020) (providing that "[n]othing in this Chapter shall be deemed a waiver of the sovereign immunity of the [EBCI], or its officers, agents, or employees acting in their official capacities," and that "[t]o the extent that

any other Tribal law may be interpreted as such a waiver of sovereign immunity for any claim or action related to distribution of per capita payments, it is hereby rescinded"); *see also id.* § 1-2(i) (2020) (stating that "[n]one of the foregoing language is intended to grant a waiver of sovereign immunity against the [EBCI] so that a temporary restraining order or preliminary injunction may be entered against the [EBCI] or any agent or official acting in their official capacity, ex parte or otherwise, unless said action is instituted by the [EBCI] against said agent or employee or official").

Hence, I maintain that, with the adoption of Ordinance No. 369, codified at C.C. § 1-2(i) in 1996, Tribal Council explicitly indicated that it intended to waive the Tribe's sovereign immunity for actions seeking the respective relief found under C.C. § 1-2(g)(1), (g)(2), and (g)(3) at the time it adopted Ordinance No. 168 and enacted C.C. § 1-2(g) in 1994, notwithstanding the fact that Tribal Council did not use the words "waiver" and "sovereign immunity" in C.C. § 1-2(g), particularly when the failure to use those words is not fatal to a determination that the legislative body intended to waive sovereign immunity. *See FAA v. Cooper*, 566 U.S. 284, 291, 132 S. Ct. 1441, 1448 (2012) (stating that "Congress need not state its intent in any particular way" in order to abrogate immunity and that the United States Supreme Court has "never required that Congress use magic words" to make its intent to abrogate clear); *see also Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 563 (8th Cir.) (noting that "while the [United States] Supreme Court has expressed its protectiveness of tribal sovereign immunity by requiring that any waiver be explicit, it has never required the invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity"), *cert. denied*, 516 U.S. 819, 116 S. Ct. 78 (1995).

Again, the only condition that appears on the face of C.C. § 1-2(g)(3) is for the Tribe to maintain an insurance policy that covers the "tort claims." Nevertheless, the trial court determined that our opinion in *Blankenship v. Eastern Band of Cherokee Indians*, 16 Am. Tribal Law 30 (E. Cherokee Sup. Ct. 2019) (per curiam) mandates a second general requirement to effectuate a waiver of sovereign immunity under C.C. § 1-2(g)(3), namely that the "contract of insurance itself must contain an express and unequivocal waiver of sovereign immunity as to the claims covered by the policy," *id.* at 42, or, in other words, that the insurance policy itself must always contain a separate waiver of sovereign immunity with respect to a plaintiff's "tort claims." In my view, the trial court's determination was based on a misreading of our dicta in *Blankenship*, in which we were attempting to clarify confusion caused by our earlier dicta in *Teesateskie v. Eastern Band of Cherokee Indians Minors Fund*, 13 Am. Tribal Law 180 (E. Cherokee Sup. Ct. 2015) (per curiam).[2]

Importantly, the claims at issue in *Teesateskie* contained a superseding statute that trumped or negated the limited waiver of tribal sovereign immunity stemming from the application of C.C. § 1-2(g)(3) and the Tribe's maintenance of the liability insurance policy that allegedly covered the claims there. *Teesateskie*, 13 Am. Tribal Law at 186 (concluding that "[C.C. §] 16C-5(l)(13) is explicit and clear," and that "[b]y its terms, it supersedes other Cherokee Code provisions," like C.C. § 1-2(g)(3), "that could be interpreted as a waiver of tribal sovereign immunity when the cause of action is one related to per capita payment distribution under Chapter 16C"). Hence, a separate waiver of sovereign immunity in the policy was required in *Teesateskie* because C.C. § 16C-5(l)(3) operated to block or rescind the limited waiver of

[2] In my opinion, the dicta in *Blankenship* attempted to clarify confusion caused by our dicta in *Teesateskie*. Unfortunately, our dicta in *Blankenship* also resulted in confusion and did not reflect my interpretation of C.C. § 1-2(g)(3). Both Justice Pipestem and I participated in the Court's decisions in *Teesateskie* and *Blankenship*. Chief Justice Saunooke was not a member of the panel that heard either case.

sovereign immunity stemming from the grant of jurisdiction to the Cherokee courts over actions against the Tribe seeking damages for "tort claims" under C.C. § 1-2(g)(3) even though the Tribe maintained a liability insurance policy that potentially covered the plaintiff's claims. The instant matter is materially distinguishable from *Teesateskie* because it does not involve a statute like C.C. § 16C-5(l)(3) that negates the application of C.C. § 1-2(g)(3). Therefore, in my view, no separate waiver is required in the insurance policy here so long as Plaintiff's claims are covered thereunder.

The majority recognizes that our statements in *Blankenship* are nonbinding dicta, that the second purported *Blankenship* requirement is not based on the plain language of C.C. § 1-2(g)(3), and that Tribal Council's failure to use the terms "waiver" and "sovereign immunity" is not fatal to a determination that Tribal Council waived sovereign immunity, three points with which I agree. However, notably, on appeal, the Tribe principally relied on the lower court's interpretation that Plaintiff failed to meet the second part of the purported *Blankenship* test. The Tribe did not argue that the grants of jurisdiction in C.C. § 1-2(g)(1)–(g)(3) are insufficient to waive sovereign immunity. Nor did the Tribe argue that C.C. § 1-2(g)(1)–(g)(3) requires an additional waiver provision to effectuate a waiver.[3] Yet, relying on the mandate in former C.C. § 7-13 (2020) (stating that the Cherokee Court must dismiss any action or claim against the Tribe "unless the complaining party demonstrates that the Cherokee Tribal Council . . . has expressly

[3] The issue of subject matter jurisdiction is always before the Court, and thus, our review of this question is proper. *See E. Band of Cherokee Indians ex rel. Enrolled Members v. Lambert*, 15 Am. Tribal Law 55, 71 (E. Cherokee Sup. Ct. Feb. 8, 2018) (Pipestem, J., dissenting) (explaining that "threshold jurisdictional question of whether there was a waiver of tribal sovereign immunity" was raised *sua sponte* by the Court on appeal because "it is the duty of this Court to ensure that it has proper jurisdiction"); *4U Homes & Sales, Inc. v. McCoy*, 235 N.C. App. 427, 432, 762 S.E.2d 308, 312 (2014) ("[S]ubject matter jurisdiction may not be waived, and this Court has not only the power, but the duty to address the trial court's subject matter jurisdiction on its own motion or *ex mero motu*." (citation and quotation marks omitted)). The parties here have focused on *Blankenship* and the question of whether the Gemini Policy contains a waiver of sovereign immunity. They did not brief or argue the issue of whether C.C. § 1-2(g) itself effectuated a waiver of sovereign immunity. Once this Court determined that the question of whether C.C. § 1-2(g) effectuated a waiver was an issue that would decide this case, it would have been helpful if we had ordered that issue briefed.

and unequivocally waived the Eastern Band's sovereign immunity for such a claim in a written ordinance, law, or contract") and the mandates in the formerly-applicable Law and Order Code, the majority concludes that the insurance contract must also contain an express and unequivocal waiver of sovereign immunity as to the specific tort claims covered by the policy, or alternatively, that an additional ordinance, law, or contract must apply in combination with C.C. § 1-2(g)(3) to effectuate the waiver. The majority also concludes that the language in C.C. § 1-2(g)(1) and (g)(2) is per se ineffective to waive sovereign immunity under those provisions without the application of another ordinance, law, or contract, despite the fact that neither of these provisions contains any conditions on its face. In my view, the majority's interpretation and construction is too strict and negates the legislative intent underlying C.C. § 1-2(g).

Also, unlike the majority, I do not view this Court's prior decisions in *Blankenship* and *Teesateskie* as foreclosing my (or Plaintiff's) contention that Tribal Council intended to waive sovereign immunity through the enactment of C.C. § 1-2(g)(3) and the maintenance of an insurance policy that covers the injured party's "tort claims" as an insurable risk or occurrence, or the contention that Tribal Council intended to waive sovereign immunity under C.C. § 1-2(g)(1) and (g)(2) directly through the language of those two statutory provisions alone. The majority even concedes that the latter contention finds support in the language of *Blankenship*, albeit the majority disavows my reading of *Blankenship* here and rejects this contention based on the current mandate found in former C.C. § 7-13 and the former mandates from the Law and Order Code that applied until the Tribe instituted the Cherokee Tribal Court in 2000.

Although the majority's discussion of the formerly-applicable Law and Order Code mandate requiring an explicit waiver of sovereign immunity in a tribal resolution or ordinance gives me pause, especially since it was the guiding legal framework at the time C.C. § 1-2(g) was

adopted, I do not believe this formerly-applicable mandate from the Law and Order Code or the applicable mandate found in former C.C. § 7-13, which admittedly impose a high bar to establish a waiver of sovereign immunity, compels the narrow reading advanced by the majority here. In my interpretation, C.C. § 1-2(g) does not violate the Law and Order Code provision requiring an explicit waiver of sovereign immunity since I contend that C.C. § 1-2(g) is a waiver of sovereign immunity in addition to being a grant of jurisdiction. Yes, Tribal Council could have used more explicit language when it enacted C.C. § 1-2(g). But Tribal Council clearly and explicitly articulated its intent to waive sovereign immunity via the language used therein, in Ordinance No. 168, in Ordinance No. 369, and in the legislative history and circumstances regarding the enactment of these provisions, most especially the aforementioned statements of intent regarding Tribal Council having waived sovereign immunity via the adoption of Ordinance No. 168 and the enactment of C.C. § 1-2(g) that were made in conjunction with the adoption of Ordinance No. 369 and the enactment of C.C. § 1-2(i) in 1996. Admittedly, these pronouncements of intent are technically not part of the ordinance themselves, but they clearly signal that Tribal Council indeed intended to waive tribal sovereign immunity when it adopted Ordinance No. 168 and enacted C.C. § 1-2(g)(1), (g)(2), and (g)(3) and that Tribal Council, by adopting Ordinance No. 369, was placing a limitation on the waiver of tribal sovereign immunity it previously had granted under C.C. § 1-2(g)(1) via Ordinance No. 168 in 1994.

I am not convinced that Tribal Council's clear and explicit articulation of its intent to waive tribal sovereign immunity under C.C. § 1-2(g)(3) did not comply with the formerly-applicable mandate in the Law and Order Code requiring an explicit waiver of tribal sovereign immunity, though I concede that I have found no case on point to that effect. However, even assuming, *arguendo*, that the clear and explicit language employed by Tribal Council expressing

its intent to waive sovereign immunity was not sufficient as a matter of law to waive tribal sovereign immunity in technical compliance with the Law and Order Code for actions brought under C.C. § 1-2(g)(3), such that the CFR Court, which was a court of limited jurisdiction managed by federal authorities, would have dismissed the action or claim, I do not agree that it automatically follows that the Cherokee Tribal Court, which is a court of broad, inherent jurisdiction (and a tribal institution) not subject to the same strictures, mandates, and parameters that the CFR Court was, must do the same, particularly when I find the legislative intent to waive immunity so clear. Accordingly, it is difficult for me to accept the majority's interpretation which essentially means that the Tribe has never issued an effective waiver of sovereign immunity under C.C. § 1-2(g)(3) even when the Tribe purchased a liability insurance policy that covers "tort claims."[4]

Again, our goal is to interpret C.C. § 1-2(g)(3) in accordance with that intent, not in an overly restrictive manner that frustrates intent.[5] Under my interpretation, the 1994 enactment of Ordinance No. 168 and the creation of C.C. § 1-2(g)(1)–(3) (enacting all three of these

[4] In view of the majority's determination here, I am curious to know whether the Tribe has ever used a tribal liability insurance policy to pay any "tort claims" brought against it and under what theory of liability it did so. It certainly would have been fruitful and helpful to the Court if the parties had provided information for the record regarding whether the Tribe has historically paid any damages for "tort claims" under any applicable liability insurance policies. Assuming Tribal Council did pay damages on such claims under such a policy in the past, it would be unclear to me why Tribal Council would have done so unless Tribal Council intended to waive sovereign immunity via ordinance and the statutory language found in C.C. § 1-2(g)(3) when the Tribe maintains an insurance policy that covers such claims.

[5] The *Warn* case mentioned by the majority does not materially alter my analysis with respect to intent. In addition to that case primarily involving breach of contract actions against the Tribe, which is not the case here, that case involved a litigation dispute that originated prior to the enactment of C.C. § 1-2(g). *Warn v. E. Band of Cherokee Indians*, 858 F. Supp. 524, 525-27 (W.D.N.C. 1994). Thus, while it is true that the federal district court concluded that the Tribe had not waived sovereign immunity with respect to the plaintiffs' Indian Civil Rights Act (ICRA) claims in *Warn*, the waivers that Tribal Council effectuated via Ordinance No. 168 and the enactment of C.C. § 1-2(g) did not exist at the time the underlying dispute occurred, and the decision was issued less than two weeks after Ordinance No. 168 was enacted. *Id.* at 525-28. Hence, I find *Warn* distinguishable and do not read that case as suggesting that Tribal Council only intended to vest the Cherokee Court with subject matter jurisdiction (and nothing more) when it enacted C.C. § 1-2(g), as opposed to also indicating its intent to waive tribal sovereign immunity pursuant to the grant of jurisdiction in C.C. § 1-2(g)(1).

provisions at the same time as part of the same statute via the same ordinance using substantially similar language that has never been changed), the 1996 enactment of Ordinance No. 369 and the creation of C.C. § 1-2(i), and the legislative history and circumstances surrounding the enactment of these specific tribal ordinances and laws sufficiently demonstrate Tribal Council's express and unequivocal intent to waive sovereign immunity as to all of C.C. § 1-2(g). Additionally, although trial court opinions are not binding on this Court, I think *Jacobson v. E. Band of Cherokee Indians*, No. CV 05-101, 2005 WL 6438040, at *1 (E. Cherokee Ct. May 27, 2005) is helpful here. In *Jacobson*, Judge Matthew Martin concluded that C.C. § 1-2(g)(1) was an "express and unequivocal" waiver of the Tribe's sovereign immunity with respect to claims for declaratory judgment alleging a violation of individual rights guaranteed by the ICRA. *See Jacobson*, 2005 WL 6438040, at *2 (citing C.C. § 7-13). The Tribe did not appeal that decision, nor, in the almost 20 years since that case, has Tribal Council amended C.C. § 1-2(g) or otherwise indicated any disapproval of the *Jacobson* court's straightforward reading of the statute. As such, I find the majority's discussion of how C.C. § 1-2(g)(1) and (g)(2) became limited waivers of sovereign immunity based on the application of the language found in additional EBCI tribal ordinances codified in the Cherokee Code and/or found in EBCI Charter provisions to be unnecessary.

Additionally, there are important favorable tribal policy considerations stemming from the benefits of allowing tribal members and invitees allegedly injured by tortious acts or omissions committed by the Tribe on tribal lands to seek damages for "tort claims" covered by the Tribe's liability insurance policy with recovery capped at the limits thereof. On the flip side, significant drawbacks, such as frustration from tribal members or loss of business and tourism revenue from invitees, potentially stem from the Tribe declining to waive sovereign immunity

and leaving injured parties without recourse for tortious acts or omissions allegedly committed by the Tribe (at a minimum for the tort of negligence).

While I understand the majority's concerns with respect to the tribal treasury, it is important to note that an injured plaintiff can only recover damages from the Tribe as an alleged tortfeasor if the Tribe chose to purchase liability insurance to cover the tortious actions or claims. Furthermore, any recoverable damages are capped at the policy limits, thereby limiting the Tribe's financial exposure to the insurance premium plus any applicable deductibles or other charges required by the policy.[6] Based on the record here, the only clear monetary cost the Tribe has sustained with respect to any "tort claims" is the policy premium it paid to secure liability coverage under the Gemini Policy.[7] Moving forward, if the premium increases or the Tribe becomes concerned about the burden on the tribal treasury, Tribal Council can change the applicable statute and/or any applicable insurance policy to either eliminate the waiver or define its scope more narrowly for future claims.[8]

Thus, in my opinion, as a matter of tribal policy, Tribal Council weighed the above benefits and costs and decided to waive tribal sovereign immunity for "tort claims" up to the

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[6] According to the record, the Tribe paid $143,994.00 to obtain liability insurance coverage under all the applicable Insuring Agreements listed in the Gemini Policy combined. According to Gemini's preliminary review, if any of Plaintiff's premises-based liability claims were covered under the policy, they were subject to a one million dollar per occurrence limit and a two million dollar annual aggregate limit, as well as a $2,500.00 deductible per each occurrence up to the limits set out in the policy. The Gemini Policy does list other costs potentially incurred by the Tribe associated with a potentially compensable claim, for example, "[f]ees, charges and expenses for third party 'claims' administration . . . [which] are to be paid by [the Tribe]."

[7] Although the Gemini Policy lists "[f]ees, charges and expenses for third party 'claims' administration" as costs that must be paid by the Tribe and this matter involves a third party administrator (American Claims Management), it is unclear from the record if the Tribe has generated any such costs in this matter.

[8] In light of the majority decision, at the very least, I would suggest that Tribal Council revisit C.C. § 1-2(g)(3) and its liability insurance policies to clarify the specific tort claims, if any, for which Tribal Council intends to waive tribal sovereign immunity through the maintenance of an insurance policy covering the claims. However, in view of this Court being divided on the issue of Tribal Council's intent with respect to C.C. § 1-2(g) and the meaning of the language found therein, I would further suggest that Tribal Council revisit all three subsections found in C.C. § 1-2(g) to clarify the foundation, source, and scope of those waivers, including whether the language granting jurisdiction to the Cherokee courts constitutes an express and unequivocal waiver of tribal sovereign immunity.

policy limits with the aim of providing reliable protection to tribal members and invitees who are harmed by certain kinds of tortious conduct committed by the Tribe on tribal lands. Otherwise, why would Tribal Council have purchased liability insurance that covered damages stemming from tortious acts or omissions committed by the Tribe on tribal lands, particularly when the only cost the Tribe paid to obtain these benefits was the premium it paid to Gemini for coverage (plus any deductible and other charges related to a claim) under the Gemini Policy? Moreover, in doing so, Tribal Council intended for the waiver of sovereign immunity under C.C. § 1-2(g)(3) to hinge solely on the Tribe's adoption of a liability insurance policy (presumably by Tribal Council) that covers the "tort claims." If Tribal Council wanted to further limit or define this term in the Cherokee Code or to enact a broader tort claims act further delineating the specific tort claims for which immunity has been waived and the resulting damages, Tribal Council would have done so. Instead, Tribal Council employed a different approach, which is its province to do. Specifically, Tribal Council used broad terminology, i.e., "tort claims" in the statute itself and elected to further delineate the specific tortious acts and omissions for which immunity was waived and the maximum monetary damages potentially resulting therefrom in the insurance policy based on coverage under the applicable policy and the policy limits.

Again, Gemini's preliminary position was that Plaintiff's premises liability claims were covered under Insuring Agreement A – General Liability Coverage, subject to a one million dollar per "occurrence" or "claim" limit, a two million dollar annual aggregate limit, and a $2,500.00 deductible per each "occurrence" or "claim" covered under the Gemini Policy. Specifically, under Insuring Agreement A, Gemini agreed to pay those monetary sums that the Tribe "shall be legally obligated to pay, by reason of liability imposed upon the [Tribe] by law or assumed by [the Tribe] under contract or agreement, for damages, direct or consequential, and

expenses, . . . on account of 'personal injuries' and/or 'property damage' . . . arising out of any 'occurrence,'" with "occurrence" further defined, in pertinent part, as "an accident or happening or event or a continuous or repeated exposure to conditions which an accident or happening or event first commences" when the policy is in effect that "causes 'personal injuries' and/or 'property damage' which is neither expected nor intended by the [Tribe]," which to me at the very least encompasses the tort of negligence.[9] Moreover, damages covered under the Gemini Policy include "bodily injury," defined as (1) "physical injury, sickness or disease, including death resulting from any of these; or the following when accompanied by physical injury, sickness or disease: mental anguish; shock; or emotional distress"; (2) "property damage," defined, in pertinent part, as "damage to or destruction or loss of use of tangible property of others"; and (3) "personal injuries," defined as:

> "bodily injury", mental injury, mental anguish, shock, sickness, disease, death, disability, false arrest, false imprisonment, wrongful entry or eviction, wrongful detention, malicious prosecution, discrimination, invasion of the right of private occupancy or a room, dwelling or premises that a person occupies committed by the [Tribe], libel, slander or defamation, piracy or misappropriation of ideas under an implied contract, infringement of copyright or of title or of slogan or of property, erroneous service of civil papers, violation of civil rights, assault and battery and disparagement of tangible property.

[9] Under the Gemini Policy, however, Gemini's obligations to do so are subject to additional limitations, terms, and conditions in the Gemini Policy, such as Exclusion Q for federal tort claims. As noted earlier, Gemini did specifically reserve its right to decline coverage in the event its investigation determined that the Federal Tort Claims Act was the sole and exclusive remedy for Plaintiff's claims, such that coverage for Plaintiff's claims was excluded pursuant to Exclusion Q, and Gemini generally reserved its rights under the Gemini Policy and applicable law to cite additional provisions that could further limit coverage for the claim(s), with "claim" being defined in the Gemini Policy as "any information that may give rise to damages covered by th[e] policy, including [law]suit(s) brought in connection therewith, which the [Tribe] becomes aware of and provides written notice of the same to [Gemini]."

Accordingly, in my view, the Gemini Policy further defines and delineates which "tort claims" are covered and for which sovereign immunity is waived, as well as the maximum recoverable damages, as contemplated by C.C. § 1-2(g)(3), which further evidences Tribal Council's intent.

Finally, while Tribal Council clearly has the power to waive its sovereign immunity as broadly or narrowly as it desires, or not at all, as well as to create conditions that must be met before tribal immunity is effectively waived, I do not read Paragraph T, Section V of the Gemini Policy as providing Tribal Council with the right to rescind the statutory waiver of sovereign immunity for "tort claims" found in C.C. § 1-2(g)(3), like the Tribe contends. This insurance policy provision simply provides that (1) Gemini agrees not to use the Tribe's sovereign immunity as a defense absent the Tribe providing written notice to Gemini authorizing Gemini to do so, and that any use of the defense only applies to the coverage and limits of the policy; (2) Gemini lacks the authority and power to waive or otherwise limit the Tribe's sovereign immunity outside or beyond the scope of coverage or the limits of the Gemini Policy; and (3) the Tribe, by accepting the Gemini Policy, agrees to release Gemini from any liability to the Tribe or tribal members due to Gemini's failure to raise sovereign immunity as a defense except if Gemini fails to raise the defense after the Tribe first sends written notice to Gemini no less than 10 days prior to the time required to answer suit. In my opinion, this Gemini Policy provision governs when there is a material and legitimate point of disagreement with the insurance carrier regarding whether sovereign immunity was waived by the Tribe for claims under the statute or the policy. It does not allow the Tribe to assert sovereign immunity on a case-by-case basis any time it wishes to do so – that is, to waive the defense regarding one claim but then to assert the defense with respect to another similar claim. Interpreting this insurance policy provision to allow the Tribe to do so when the tort claim is covered under an applicable liability insurance policy

purchased by the Tribe negates the statutory waiver of sovereign immunity effectuated by Tribal Council in C.C. § 1-2(g)(3) and could also raise equal protection concerns under the ICRA.

For the foregoing reasons, I would reverse the trial court's order with respect to the Rule 12(b)(1) ruling dismissing Plaintiff's premises liability-based claims against the Tribe based on sovereign immunity and would remand this matter to the trial court to review these claims to determine whether one or more of Plaintiff's claims against the Tribe constitute "tort claims" that are covered by the Gemini Policy, such that tribal sovereign immunity has been waived pursuant to C.C. § 1-2(g)(3). Accordingly, I dissent from the Court's decision to affirm the trial court's order on this issue.

Regarding the appeal in CSC-19-06, the opinion of the Court is delivered by Justice Brenda Toineeta Pipestem and joined by Chief Justice Kirk G. Saunooke.

Brenda Toineeta Pipestem — 8/7/2024

Justice Brenda Toineeta Pipestem — Date

Kirk G. Saunooke — 8/7/24

Chief Justice Kirk G. Saunooke — Date

The dissenting opinion delivered by Justice Robert C. Hunter.

Robert C. Hunter — 8/7/24

Justice Robert C. Hunter — Date