

FILED

NORTH CAROLINA
WAKE COUNTY

2009 FEB 19 PM 6:56

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 019569

WAKE COUNTY, C.S.C.

McCRACKEN and AMICK, BY)
INCORPORATED d/b/a THE NEW)
VEMCO MUSIC CO. and RALPH AMICK,)

Plaintiffs,)

vs.)

MICHAEL F. EASLEY, in his official)
capacity as Governor of North Carolina,)

Defendant.)

ORDER

This matter came on for hearing before the undersigned at the February 16, 2009 session of the Superior Court of Wake County upon defendant's Motion to Dismiss plaintiff's Complaint pursuant to Rules 12(b)(6) and 12(b)(7). The defendant appeared through Mark A. Davis, Assistant North Carolina Attorney General. The plaintiffs appeared through Hugh Stevens and Michael J. Tadych of Everett Gaskins Hancock & Stevens, LLP.

The plaintiffs' complaint seeks declaratory judgment with respect to two claims. The first arises out of the interplay between and among the federal Indian Gaming Regulatory Act ("IGRA"); the Tribal-State Compact Between the Eastern Band of Cherokee Indians and the State of North Carolina (the "Compact"); and the State of North Carolina's criminalization and prohibition of video gaming machines via Chapter 6 of the 2006 Session Laws, which is codified as N.C. Gen. Stat. §14-306.1A. The plaintiffs allege that the State violated IGRA and unlawfully abrogated the terms of the Compact by banning the possession and operation of video poker machines and other video gaming machines within the State at large while permitting them on the Cherokees' tribal lands.

The plaintiffs' second claim asserts that under the "separation of powers" provisions of the North Carolina Constitution the authority to negotiate, approve and execute tribal-state compacts or amendments to the existing Compact is reserved to the General Assembly.

After reviewing the complaint, the extensive and thorough memoranda of law submitted by counsel, and hearing counsels' arguments, the court elected to consider not only the issue of whether defendant's Motion to Dismiss should be granted but also whether the plaintiffs were entitled to judgment on the pleadings pursuant to Rule 12(c). Counsel for the defendant did not object to the Court's decision to consider the issue of whether the plaintiffs were entitled to judgment on the pleadings on their first claim despite the absence of an express motion for judgment on the pleadings having been filed by the plaintiffs. Counsel for the defendant has agreed that on appeal the defendant will not challenge the procedural propriety of the court's having treated the defendant's motion to dismiss as a motion for judgment on the pleadings. Defendant remains free to assert any other arguments on his behalf in the appeal of this matter.

There being no just reason for delay with respect to a ruling on the merits of the plaintiff's first claim, the court concludes that the plaintiffs are entitled to judgment as to this claim and that the defendant's motion to dismiss this claim should be denied. IGRA does not permit a state to ban the possession and operation of video gaming machines elsewhere in the state while allowing their possession and operation on tribal lands.

Because its motion to dismiss the plaintiffs' separation of powers claim was grounded on procedural issues, the State elected not to brief the merits of this claim; accordingly, the court deferred any rulings with respect to this claim. On February 18, 2009 the plaintiffs filed a Notice of Dismissal of this claim, without prejudice, pursuant to Rule 41(a)(1).

WHEREFORE, it is ORDERED, JUDGED AND DECREED:

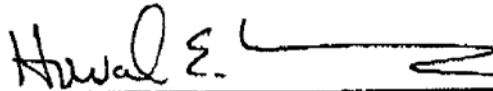
1. That the defendant's motion to dismiss the plaintiffs' claim with respect to Chapter 6 of the 2006 Session Laws is DENIED and that plaintiffs are entitled to judgment on the pleadings. Accordingly, the court declares that the State acted unlawfully in authorizing the

Eastern Band of the Cherokee Indians to possess and operate video gaming machines on tribal lands within North Carolina because that activity is not allowed elsewhere in this State; pursuant to Section 12 of SL 2006-6, this declaration renders G.S. § 14-306.1A null, void and of no effect.

2. The court informed the parties in open court that it would certify the rulings set out in paragraph 1 for immediate appeal pursuant to Rule 54(b) of the Rules of Civil Procedure, but the plaintiffs' subsequent voluntary dismissal of their separation of powers claim renders those rulings immediately appealable because the present judgment now operates as a final judgment as defined by N.C. Gen. Stat. § 1-277. As such, a certification pursuant to Rule 54(b) is now unnecessary.

3. Pursuant to Rule 62 and in the exercise of its discretion the court hereby STAYS the operation and effect of the rulings set out in paragraph 1 pending the resolution of the State's appeal.

SO ORDERED, this the 19th day of February, 2009.



Hon. Howard E. Manning, Jr.
Superior Court Judge Presiding