No. COA08-812 TENTH DISTRICT

****

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA, ex. rel. ROY COOPER, Attorney General of North Carolina, Plaintiff, v. SENECA-CAYUGA TOBACCO COMPANY, an unincorporated arm of The Seneca-Cayuga Tribe of Oklahoma, and SENECA-CAYUGA TRIBAL TOBACCO CORPORATION, a successor in interest to the Seneca-Cayuga Tobacco Company, Defendants.	)	FROM WAKE COUNTY

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PLAINTIFF-STATE'S BRIEF

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PLAINTIFF-STATE'S BRIEF

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QUESTIONS PRESENTED

I. **DID THE TRIAL COURT ERR WHEN IT DISMISSED WITH PREJUDICE THE STATE'S COMPLAINT ALLEGING THAT DEFENDANTS WAIVED ANY DEFENSE OF TRIBAL SOVEREIGN IMMUNITY?**

II. **DID THE TRIAL COURT ERR IN ALLOWING DEFENDANTS' MOTION TO DISMISS BASED ON N.C.R.CIV. P. 12(b)(6) WHERE THE ALLEGATIONS IN THE COMPLAINT ARE SUFFICIENT TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED?**

STATEMENT OF THE CASE

The State filed its Complaint on 12 October 2007. (R pp. 2-11) Defendants were granted an extension of time to answer the State's complaint and respond to the State's Request for Admissions, and thereafter, on 13 December 2007, filed their motion to dismiss pursuant to N.C.R.Civ.P. 12(b)(1), lack of subject matter jurisdiction, and 12(b)(6), failure to state a claim upon which relief may be granted.(R pp. 55-56)

On 6 March 2008, a hearing was held on defendants' motion to dismiss. Prior to any ruling by the court, the State made an oral motion to amend its complaint to add an affirmative allegation that defendants had waived any defense of tribal sovereign immunity. (R p. 102) Both the State and defendants were allowed to

submit evidence pertaining to defendants' Rule 12(b)(1) motion to dismiss. The State introduced documents supporting its contention that the Tribe had waived its sovereign immunity in this matter. (R pp. 58-90) Defendants submitted documents addressing the procedure whereby the Tribe could waive its immunity. (R pp. 91-101)

The trial court subsequently denied the State's motion to amend its complaint and allowed defendants' motion to dismiss, both without explanation. (R pp. 102-103) The trial court's order was filed on 4 April 2008 and served on the State by defendants on 7 April 2008. (R p. 104) The State filed a timely notice of appeal on 5 May 2008. (R pp. 105-107)

BACKGROUND

In November 1998, forty-six states, including North Carolina, the District of Columbia and five U.S. territories signed a Master Settlement Agreement ("MSA") with four major tobacco manufacturers - a "landmark agreement" as described by the U.S. Supreme Court in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 150 L. Ed. 2d 532 (2001). The MSA provided that (1) the signing tobacco companies would pay a certain amount to the settling states to compensate those states for past, present and future health care costs caused by smokers, and (2) signing companies would agree

to numerous restrictions including limitations on their right to advertise, particularly to children and youth.

Thereafter, in July 1999, the North Carolina General Assembly enacted a group of statutes titled Tobacco Reserve Fund and Escrow Compliance, otherwise known as this State's escrow statutes. *See* N.C.G.S. Chapter 66, art. 37. These statutes require that any tobacco manufacturer who is not a signatory to the MSA, otherwise known as a "Nonparticipating Manufacturer" or "NPM," must deposit certain funds in escrow for sales of cigarettes made directly or indirectly through distributors into North Carolina each year to serve as a source of recovery in the event North Carolina obtains a judgment for reimbursement of its medical costs against that NPM due to North Carolina citizens being harmed by that tobacco manufacturer's cigarettes. See N.C.G.S. §66-291(b).

Also, beginning in January 2003, the legislation required manufacturers and their brands to be included on a directory approved by the Attorney General for sale into North Carolina. The statute empowers the Attorney General to sue any NPM which fails to deposit the required funds into escrow for sales in this State. N.C.G.S. §66-291(c). Additionally, a distributor cannot legally distribute for sale in North Carolina any brands that are not on the approved directory. See N.C.G.S. §66-293.

The Attorney General is also empowered to assess penalties against anyone who violates this statute. *Id.*

STATEMENT OF THE FACTS

As early as 2001, brands manufactured by defendant Seneca Cayuga Tobacco Corporation ("SCTC") were sold to consumers within the State. Effective 1 January 2003, tobacco manufacturers not participating in the Master Settlement Agreement were required to submit certification applications to the State and deposit specific funds into qualified escrow accounts for sales of cigarettes into this State. N.C.G. S. §66-290, *et seq*. Defendant SCTC applied to the State for certification to sell certain brands of cigarettes in North Carolina and initially complied with the escrow deposit requirements.

On 30 April 2004, SCTC submitted a Certification of Compliance in accordance with N.C.G.S. §§66-294(b) and (c) specifically acknowledging that it was the tobacco product manufacturer of the brands listed in the Certification; that it accepted responsibility for all of its listed brands; and that a process agent had been appointed to accept service of any enforcement action. (R pp. 58-76) The Tribal Business Committee had previously acknowledged the Tribe's intent to continue to comply with the State's escrow statute and authorized Bob R. Jones, Controller, to execute the above Certification. (R pp. 74-76) The Certification, which included the

2 December 2003 authorization by the Business Committee of the Tribe, complies with a tribal Resolution dated 3 December 2003 which called for the consent of the Business Committee for a waiver of sovereign immunity. (R p. 77)

Defendant SCTC did in fact comply with the statutory escrow requirements for sales made through the year 2004. In April 2004, defendant SCTC deposited $1,863,015.30 into North Carolina's escrow account for the 2003 sales of 95,562,280 cigarettes in North Carolina. (R p. 63) Additionally, defendant SCTC complied with the statutory escrow requirements for its 2004 sales.

On 17 April 2006, defendant owed $725,739.01 to the State of North Carolina escrow account for 2005 sales of 34,861,800 cigarettes in North Carolina. (R p. 4 ¶9, R pp. 40-42) Defendant failed to deposit any funds for escrow on or before 17 April 2006. (R p. 4 ¶10) Defendant SCTC continued to sell cigarettes into North Carolina, selling another 4,244,000 and thereby owing on 16 April 2007 an additional $91,000.27 to the North Carolina escrow account for its 2006 sales. (R p. 4 ¶11, R pp. 40-42) Defendant SCTC failed to deposit the escrow owed for its 2006 sales into North Carolina. (R p. 5 ¶12)

On 10 June 2006, defendant Seneca Cayuga Tribal Tobacco Corporation ("SCTTC") was incorporated according to tribal ordinance and became a successor in interest to SCTC. (R pp. 81-83)

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

This is an appeal from the trial court's order granting defendants' motion to dismiss all claims pursuant to NC.R.Civ.P. 12(b)(1) or (6). Jurisdiction is vested in the Court of Appeals to hear this appeal pursuant to N.C.G.S. § 1-277(a) as the dismissal of all claims against defendants affects a substantial right of plaintiff State of North Carolina. N.C. G.S. § 1-277 (2006); *see also Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E. 2d 182 (1982).

ARGUMENT

The trial court granted defendants' motion to dismiss brought under N.C. R. Civ.P. 12(b)(1) and 12(b)(6). (R pp. 102-03) The order of the trial court does not specify on what basis the dismissal was granted. The State will therefore address both possible bases for the ruling, i.e., the trial court having 1) allowed the dismissal under 12(b)(1), or 2) denied the 12(b)(1) motion and allowed the motion under 12(b)(6).

I. THE TRIAL COURT ERRED WHEN IT DISMISSED WITH PREJUDICE THE STATE'S COMPLAINT ALLEGING THAT DEFENDANTS WAIVED ANY DEFENSE OF TRIBAL SOVEREIGN IMMUNITY.

Assignments of Error Nos. 1-8, R. pp. 108-109.

A. STANDARD OF REVIEW.

The standard of review for a motion to dismiss arising from the trial court's lack of jurisdiction is de novo review. *Country Club of Johnson County v. U.S. Fid. & Guar. Co.,* 150 N.C. App. 231, 563 S.E.2d 269 (2002). Matters outside the pleadings may be taken into consideration by the court in its evaluation of whether jurisdiction over the subject matter exists. *Harris v. Matthews*, 361 N.C. 265, 643 S.E.2d 566 (2007).

B. OVERVIEW ON TRIBAL SOVEREIGN IMMUNITY.

Indian tribes are generally shielded by sovereign immunity from actions seeking monetary remedies against them. *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 140 L. Ed. 981 (1998). However, such immunity is not absolute. It can be waived by the tribe's consent. Id. at 754. *See also, Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 24-25 (1st Cir. R.I. 2006) (*en banc*), *cert. denied*, __ U.S. __, 166 L. Ed. 2d 516 (2006).

Numerous courts across the U.S. have considered what types of statements are necessary in order for a waiver of tribal immunity to occur. "[T]here is no requirement that talismanic phrases be employed. Thus, an effective limitation on sovereign immunity need not use magic words." *Id. See also, Bldg. Inspector and Zoning Officer of Aquinnah v. Wampanoag*, 818 N.E.2d 1040, 2004 Mass. LEXIS

750 (2004) ("The use of . . . the words 'sovereign immunity' . . . are not needed to effectuate a valid waiver.") *Id.* at 1048, LEXIS at 20.

It appears this is a case of first impression as no appellate ruling has been found where a North Carolina court has considered tribal waiver language. In *Welch Contracting, Inc. v. N.C. Dept. of Transportation and the Eastern Band of Cherokee Indians*, 175 N.C. App. 45, 622 S.E.2d 691(2005), this Court acknowledged the ability of a tribe to waive its sovereign immunity; however, in that case no waiver was alleged. "[P]laintiff presents no argument that the contract included any language whereby the EBCI unequivocally expressed a waiver of tribal sovereign immunity." *Id.* at 55.

Courts in other jurisdictions have found a waiver of a tribe's sovereign immunity to exist as a result of the tribe's own voluntary actions under a variety of different circumstances. *See Marceau v Blackfeet Hous. Auth.*, 455 F.3d 974, 978-79 (9th Cir. 2006)(tribal housing authority waived sovereign immunity via sue and be sued clause); *Berrey v. Asarco, Inc.*, 439 F.3d 636 (10th Cir. Okla. 2006)(tribe filing suit thereby waived sovereign immunity as to counterclaims); *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560 (8th Cir. S.D. 1995)(arbitration clause in contract constituted waiver of sovereign immunity by tribe); *Rush Creek Solutions, Inc. v. Ute Mt. Ute Tribe*, 107 P.3d 402 (Colo. Ct. App. 2004)(waiver in contract signed by CFO

of tribe constituted waiver of tribal sovereign immunity); *Smith v. Hopland Band of Pomo Indians*, 115 Cal. Rptr. 2d 455 (Cal. App. 1st Dist. 2002)(tribal agreement to arbitration under Uniform Arbitration Act constituted waiver of sovereign immunity as Act contained language regarding jurisdiction for enforcement); *South Fork Band of the Te-Moak Tribe of W. Shoshone Indians of Nevada v. Sixth Judicial Dist. Court*, 7 P.3d 455 (2000)(per Humbolt Act, NY courts retain jurisdiction over matters arising out of administration of the Act, sovereign immunity of tribe waived when tribe purchased land covered by the Act); *Nenana Fuel Co. v. Native Village of Venetie*, 834 P.2d 1229 (Alaska 1992)(agreement to arbitrate disputes arising out of the contract constituted limited waiver of sovereign immunity); *McCarthy & Assoc. v. Jackpot Junction Bingo Hall*, 490 N.W.2d 156 (Minn. Ct. App. 1992)(tribal charter's sue and be sued clause constituted waiver of sovereign immunity); *Val/Del, Inc. v. Superior Court*, 703 P.2d 502 (Ariz. Ct. App. 1985)(tribe waived sovereign immunity where agreed to arbitration agreement which included mention of court of competent jurisdiction); *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska. 1983)(tribe waived sovereign immunity by virtue of arbitration agreement); *Duluth Lumber and Plywood Co. v. Delta Development, Inc.*, 281 N.W.2d 377 (Minn. 1979)(sue and be sued clause constituted waiver of sovereign immunity).

C. THE STATE'S COMPLAINT CONTAINS SUFFICIENT LANGUAGE ALLEGING DEFENDANTS WAIVED SOVEREIGN IMMUNITY.

The State's complaint contains a sufficient allegation of defendants' waiver of their immunity, and such allegation should have been taken as true for purposes of defendants' motion to dismiss. Paragraph 3 of the Prayer For Relief in the State's complaint states as follows:

> WHEREFORE, the State prays that this Court:
>
> . . . .
>
> (3) Find and declare that Defendants are not entitled to sovereign immunity for sales off tribal lands or, in the alternative, that the Court declare that the Defendants **have waived any sovereign immunity** that might otherwise apply.

(R pp. 8-9) (emphasis supplied)

This language constitutes a sufficient allegation that defendants' sovereign immunity has been waived. Rule 8(a)(1) of the North Carolina Rules of Civil Procedure sets out the standard for notice pleading as a "short and plain statement" for the purposes of giving a party sufficient notice "to understand the nature and basis for the claim." *Henry v. Deen,* 310 N.C. 75, 85, 310 S.E.2d 326 (1984). There is no requirement that facts be provided to support each claim - only those needed to provide fair notice are required. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161

(1970)("under the 'notice theory' of pleading contemplated by Rule 8(a)(1), detailed fact pleading is no longer required"). *Id.* at 104, 176 S.E.2d at 167. Furthermore,

> "Mere vagueness or lack of detail is not ground for a motion to dismiss." Such a deficiency"should be attacked by a motion for a more definite statement." Moore § 12.08.

Sutton v. Duke, 277 N.C. 94, 102 , 176 S.E.2d 161, 165 (1970). The State has satisfied any pleading obligation that may be found to exist and therefore should be permitted to proceed with its case.

D. THE STATE MADE A TIMELY OFFER TO AMEND ITS COMPLAINT TO SUPPLEMENT THE ALLEGATION OF WAIVER TO THE EXTENT THE TRIAL COURT DEEMED IT NECESSARY.

At the hearing on defendants' motion to dismiss, prior to the trial judge ruling, and after submitting additional evidence in Exhibits 1-5, see Rpp. 58-90, the State made an oral motion to amend its complaint to allege in further detail that defendants waived any right to a defense of sovereign immunity. The State's motion was denied at the hearing. (R p. 102) To the extent that the trial court believed additional language was necessary to effectively plead a waiver, the State should have been permitted to amend its complaint for this purpose.

1. THE STATE HAD THE RIGHT TO AMEND ITS COMPLAINT.

Because no responsive pleading in the instant case had been filed, the trial court lacked authority to deny the State's oral motion to amend. It is well settled that

a motion to dismiss is not considered a responsive pleading under North Carolina law, and, therefore, the filing of a motion to dismiss does not affect a plaintiff's unconditional right to amend its complaint under Rule 15(a) of the North Carolina Rules of Civil Procedure. *Beck v. City of Durham*, 154 N.C. App. 221, 227, 573 S.E.2d 183, 188 (2002). Indeed, this Court has held that a complaint may be amended for the purpose of showing that jurisdiction exists. *Darnell v. Town of Franklin (In re Granting of a Variance)*, 131 N.C. App. 846, 850, 508 S.E.2d 841, 844 (1998). *Also see, St. John v. Moore*, 1998 U.S. App. LEXIS 2856, 3 (4th Cir. S.C. Feb. 23, 1998) ("because the defendants had not filed a responsive pleading, entitlement to amend was not a matter of the court's discretion.") *Id.* Therefore, the State's motion to amend its complaint to allege the defendants had waived the right of any sovereign immunity defense should be allowed.

2. THE COURT SHOULD HAVE GRANTED PERMISSION TO AMEND.

In the alternative, where a party has lost its automatic right to amend, such party may yet be allowed to amend its complaint upon permission of the court and such permission "should be freely given when justice so requires." N.C.R.Civ.P. Rule 15(a) (2008). Failure by the trial court to give the grounds for denial constitutes an abuse of discretion.

> [T]he "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion. It is an abuse of discretion to deny leave to amend if the denial is not based on a valid ground.

Coffey v. Coffey, 94 N.C. App. 717, 722, 381 S.E.2d 467, 471(1989) (internal citations and quotation marks omitted).

In the present case, the trial court did not articulate any grounds for refusing to let the State amend its complaint. As such, the trial court's denial of the motion constituted an abuse of discretion and was in error. *See Coffey*, 94 N.C. App. at 723, 381 S.E.2d at 471 (reversing trial court's denial of motion to amend complaint where motion was not untimely, trial court failed to state reasons for denial, and defendant's grounds for opposing amendment were not persuasive).

E. THE STATE'S ALLEGATION THAT THE TRIBE WAIVED SOVEREIGN IMMUNITY HAS NOT BEEN CONTRADICTED BY DEFENDANTS.

Defendants submitted no affidavits or other evidence purporting to contradict the State's allegations that the tribe's Business Committee in fact authorized a waiver of its sovereign immunity in its communications with the State of North Carolina.

In order to sell cigarettes in North Carolina, defendants were required to receive authorization from the State. Defendants were notified in the Certification of Application form which they signed and submitted to North Carolina that:

> "North Carolina requires the entity or entities that control or own the manufacturing process and that control the Brand mark to apply and be responsible for Brand(s) approved for sale and for the escrow payments."

(R p. 59) Part 1, North Carolina Non-Participating Manufacturer's Application /Annual Certification.

As a part of this process, defendants submitted a certificate of compliance. (R pp. 58-76) Included in the certification pursuant to the Escrow Compliance Statutes set out in Chapter 66, Article 37 of the North Carolina General Statutes, were the following sworn representations by the authorized representative of the Tribe, Bob Jones. Jones set his initials by the following statements in the certification application on behalf of the defendants, thereby acknowledging affirmation on the part of the Tribe:

> "12. TPM (Tobacco Product Manufacturer) is the appropriate entity to pay escrow for the Brand(s) contained in this Application/Certification **and to defend any claims** that may arise related to the Brand(s). "

(R pp. 65-66). Part 6, North Carolina Non-Participating Manufacturer's Application/Annual Certification. (emphasis added) Additionally,

> "14. TPM **assumes responsibility** for all representations and Brands listed in this Application/Certification unless and until TPM provides written notification to the Attorney General and receives written notification that TPM is released from responsibility for the Brand(s) listed in the Application/Certification."

(R pp. 66). Part 6, North Carolina Non-Participating Manufacturer's Application/Annual Certification. (emphasis added)

Attached to the certificate of compliance was a resolution by the tribal Business Committee acknowledging the desire of defendants to comply with the escrow statutes (such as N.C.G.S. § 66-290 *et seq.*), affirmatively stating that compliance with said statutes was in the best interests of the Tribe, and expressly authorizing its agents to execute the requisite documents in order to comply with these statutes so as to continue to receive approval to sell defendants' cigarettes in North Carolina. (R pp. 74-76)

> "WHEREAS, the Seneca-Cayuga Tobacco Company...continues to take action necessary **to remain or become compliant with the model escrow statutes** . . . in states in which the Company does business;
>
> WHEREAS, each of the Tobacco States historically has required the Company to file certificates of compliance by which the Company **must certify its compliance with Escrow Statutes** . . . ;
>
> WHEREAS, **the Company's filing of accurate Certificates of Compliance** and Certification Forms in the Tobacco States...**is necessary to the continued operation of the Company in compliance with the Escrow Statutes** . . . ;
>
> WHEREAS, **the continued operation of the Company in compliance** with the Escrow Statutes . . . **is in the best interest of the Company and the Tribe;**
>
> WHEREAS, the Certificates of Compliance, the Certification Forms...must be signed by a representative of the Company authorized

> by the governing body of the Company, and the Business Committee is the governing body of the Company;
>
> WHEREAS, this Business Committee desires to authorize . . . Bob R. Jones, Controller of the Company . . . **to execute and deliver the Certificates of Compliance and the Certification Forms on behalf of the Company and the Tribe** and LeRoy Howard, Chief of the Tribe . . . **as required by the Escrow Statutes.**"
>
> "[t]he authorized Officers are **hereby authorized and directed to execute and deliver the Certificates of Compliance** and the Certification Forms **on behalf of the Company and the Tribe** . . . as required by the Escrow Statutes."

(R pp 74-76). (emphasis added)

These documents reflect a repeated and express commitment by defendants to comply with North Carolina's escrow statutes and express acknowledgment that there were consequences if they did not. Moreover, defendants represented that they would appoint and maintain a process service agent within North Carolina (as required by N.C.G.S. § 66-294(b)(1)) to accept service of process on their behalf regarding legal actions asserted against them. (R p. 61) This constitutes a further express manifestation of the Tribe's willingness to be subject to suit in North Carolina courts. Based on these representations, North Carolina in good faith permitted defendants to sell their products in North Carolina. Defendant presented nothing to contradict the above evidence.

A similar situation is illustrated by this Court's decision in *Marlowe v. Piner*, 119 N.C. App. 125, 458 S.E.2d 220 (1995). In that case, this Court reversed the trial court's entry of summary judgment on sovereign immunity grounds entered in favor of a governmental official sued in his official capacity. The plaintiffs in *Marlowe* had alleged in their complaint that the defendant had waived his immunity through the purchase of liability insurance. In his answer, the defendant denied that the insurance policy actually provided coverage for the claim being asserted against him. In support of his summary judgment motion, the defendant argued that this denial shifted the burden to plaintiff at the summary judgment stage to produce the policy and show that it provided coverage so as to waive the defendants' immunity. *Id.* at 127, 458 S.E.2d at 222.

This Court held in *Marlowe* the trial court had committed reversible error in granting the defendant's motion on this issue. The Court held that on summary judgment the moving party bears the burden of showing the absence of any issue of disputed fact and that the defendant's mere assertions in his answer had failed to meet his burden of proving that his immunity had not been waived. *Id.* at 127-28, 458 S.E.2d at 222. ("Until the moving party makes a conclusive showing, the non-moving party has no burden to produce evidence.") *Id.* at 128, 458 S.E.2d at 222.

The trial court's ruling in the present case is even more demonstrably incorrect than was the case in *Marlowe*. While resolving factual disputes on summary judgment (as the trial judge did in *Marlowe*) is improper, it is also improper to do so on a motion to dismiss. *Hunt v. N.C. Dept. of Labor,* 348 N.C. 192, 194, 499 S.E.2d 747, 748 (1998). The State is entitled to proceed with litigation on this issue so as to definitively establish whether defendants have waived their immunity. See *Warburton/Buttner v. Sup. Ct. of San Diego County*, 127 Cal. Rptr. 2d 706, 722-23 (Cal. App. 2002) (holding that trial court erred in failing to allow plaintiff to conduct discovery on whether tribe had waived its sovereign immunity so as to confer subject matter jurisdiction on trial court).

Defendants cited to the trial court a number of cases in support of their motion to dismiss which note the possession of sovereign immunity by federally recognized tribes. However, because none of those cases involve the specific issues raised in the present case, they lack any bearing on this appeal. *See Narragansett*, 449 F.3d at 29 (cases applying sovereign immunity relied upon by tribe "offer no insight" into question of whether immunity had been waived under specific circumstances at issue). Defendants primarily relied upon two cases - *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 112 L. Ed. 2d 1112 (1991) and *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 140 L. Ed. 981 (1998) in support of

their argument that their immunity has been preserved. However, neither of these cases rebuts the proposition that immunity can be waived or the State's allegations that defendants' actions in this case constitute a waiver of immunity.

For the reasons stated above, the State has properly alleged that defendants waived any defense of sovereign immunity which has not been rebutted by defendants and therefore the ruling of the trial court allowing defendants' motion to dismiss should be reversed.

II. THE TRIAL COURT ERRED IN ALLOWING DEFENDANTS' MOTION TO DISMISS BASED ON N.C. R. CIV. P. 12(b)(6) WHERE THE ALLEGATIONS ARE SUFFICIENT TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Assignment of Error No. 9, R p. 109.

A. STANDARD OF REVIEW.

The standard of review for a motion to dismiss pursuant to Rule 12(b)(6) is, viewing the complaint liberally, whether all of the allegations, taken as true, are sufficient to state a claim for which relief may be granted under some legal theory. *Country Club of Johnson County* at 238, 563 S.E.2d at 274.

B. REVIEW OF THE ALLEGATIONS AND CLAIMS FOR RELIEF.

The State has alleged that defendants were non-participating tobacco manufacturers, selling cigarettes either directly or indirectly into North Carolina and

therefore obligated under this State's escrow statute, N.C.G.S. §66-291(b) to deposit statutorily specified funds into a qualified escrow account for those sales. See R.pp. 3-5, ¶¶ 6-12. The State further alleged that defendants were put on notice in writing on multiple occasions in advance of their statutory obligations and failed to deposit the required funds for sales occurring during the years 2005 and 2006. See R.p. 3-5, ¶¶ 6-12.

The State's escrow statute empowers the Office of the Attorney General to bring this action against a tobacco manufacturer for failure to comply with the statutory requirements. N.C.G.S. §66-291(c)(2008) Considering the above allegations as true, the State has alleged sufficient facts in its complaint under which relief could be granted under some legal theory. (See Complaint, R pp. 2-11) Therefore, defendants' 12(b)(6) motion should have been denied.

CONCLUSION

The trial court fundamentally erred in dismissing this case at the pleadings stage on the theory that the State had not alleged a waiver of defendants' immunity when, in fact, such an allegation was clearly stated in the complaint. Alternatively, the trial court erred in not allowing the State's motion to amend its complaint to provide an additional explicit affirmative allegation that defendants had waived their sovereign immunity. Finally, the trial court erred in granting a dismissal where

allegations by the State were sufficient for a trier of fact to grant relief to the State under some legal theory.

Therefore, defendants' motion to dismiss should not have been allowed. This Court should reverse the trial court's ruling.

Respectfully submitted, this the 24th day of September, 2008.

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CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)(A)2.

The undersigned hereby certifies that the foregoing brief complies with Rule 28(j)(2)(A)2 of the Rules of Appellate Procedure in that, according to the word processing program used to produce this brief (WordPerfect 13), the document does not exceed 8750 words, exclusive of cover, index, table of authorities, certificate of compliance, certificate of service, and appendices.

This the 24th day of September, 2008.

Melissa L. Trippe
Special Deputy Attorney General

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing STATE'S BRIEF in the above titled action upon all other parties to this cause by:

[ ] Hand delivering a copy hereof to each said party or to the attorney thereof;

[ ] Transmitting a copy hereof to each said party via facsimile transmittal; or

[X] Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

Gary S. Parsons
Gavin B. Parsons
Troutman Sanders LLP
Post Office Drawer 1389
Raleigh, NC 27602-1389

This the 24th day of September, 2008.

Melissa L. Trippe
Special Deputy Attorney General