No. COA 09-431 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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McCRACKEN AND AMICK, INCORPORATED d/b/a THE NEW VEMCO MUSIC CO. and RALPH AMICK,	)	
Plaintiff-Appellees,	)	
v.	)	From Wake County
BEVERLY EAVES PERDUE, in her official capacity as Governor of North Carolina,	)	
Defendant-Appellant.	)	

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PLAINTIFFS-APPELLEES' REPLY TO THE BRIEF OF *AMICI CURIAE* EASTERN BAND OF CHEROKEE INDIANS OF NORTH CAROLINA, NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN GAMING ASSOCIATION, UNITED SOUTH AND EASTERN TRIBES, ARIZONA INDIAN GAMING ASSOCIATION

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NORTH CAROLINA COURT OF APPEALS

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McCRACKEN AND AMICK, INCORPORATED d/b/a THE NEW VEMCO MUSIC CO. and RALPH AMICK,	)	
Plaintiff-Appellees,	)	
v.	)	From Wake County
BEVERLY EAVES PERDUE, in her official capacity as Governor of North Carolina,	)	
Defendant-Appellant.	)	

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ARGUMENT

Amici curiae assert that the Eastern Band of Cherokee Indians of North Carolina (the "Tribe") is a necessary party to this action. This court should not consider *amici curiae's* argument on this point because it addresses an issue that is not presented to the court in this appeal; to the contrary, the defendant raised the "necessary party" issue in its pleadings but did not actively pursue it before the trial court and abandoned it on appeal. Moreover, *amici's* arguments would be unavailing even if the court were to consider the issue, because the outcome of this proceeding will have no effect on the Tribe's rights and privileges pursuant to the Tribal-State Compact.

I. THE QUESTION OF WHETHER THE TRIBE IS A NECESSARY PARTY IS NOT PROPERLY BEFORE THE COURT.

The question of whether the Tribe is a necessary party is not properly before this court for consideration. The defendant failed to assign error concerning this issue, thereby rendering the issue outside the scope of this appeal. Rule 10(a) of the Rules of Appellate Procedure provides that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." N.C. R. App. P. 10(a)

When faced with a similar situation in which an *amicus curiae* brief presented an argument that neither of the parties had raised on appeal, the North Carolina Supreme Court determined that "appellate review is limited to the arguments upon which the *parties* rely in their briefs." *Crockett v. First Federal Sav. and Loan Ass'n of Charlotte,* 289 N.C. 620, 632, 224 S.E.2d 580, 588 (1976) (emphasis added). The *Crockett* court went on to observe that the *amicus curiae* argued only one side and did not fully present the evidence necessary for determination of the issue; thus, the issue raised by the *amicus curiae* "is not properly presented for consideration." *Id.*

The Rules of Appellate Procedure may be suspended only "to prevent manifest injustice to a *party.*" N.C. R. App. P. 2 (emphasis added). The Tribe is not a party, and it voluntarily

eschewed the opportunity to attempt to become a party by moving to intervene in this action.[1] As demonstrated by the attached Affidavit of Michael J. Tadych, plaintiffs' counsel sought to engage the Tribe in dialogue before filing this action and provided the Tribe with a courtesy copy of the filed complaint. (Affidavit of Michael J. Tadych, App. p. 1-3). Having steered clear of the opportunity to move to intervene in order to raise the "necessary party" issue, the Tribe should not be heard to claim the benefit of Rule 2 expressly reserved only for parties.

II. THE TRIBE IS NOT A NECESSARY PARTY TO THIS ACTION.

Amici curiae contend that the Tribe is a necessary party to the plaintiffs' claims and that the trial court should not have issued a judgment in the Tribe's absence (*Amici Curiae* Br. p. 2). If this court were to entertain this argument, which it should not, *amici* are incorrect because neither any rights conferred upon the Tribe by IGRA nor any privileges granted to the Tribe pursuant to the Tribal-State Compact will be affected by the outcome of this action.

Before addressing the merits and demerits of *amici curiae's* necessary party argument, however, we invite the court's attention to its potential consequences. *Amici* argue that the plaintiffs' claims cannot be adjudicated in the Tribe's absence,

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[1] Owing to the Tribe's sovereign status, the plaintiffs could not have made the Tribe a party without its consent even if they had deemed it appropriate to do so.

thereby implying that the Tribe's absence is a simple procedural defect that can be cured by making the Tribe a party. In truth, however, *amici curiae's* necessary party argument is a tactic for attempting to prevent this or any other court from considering the plaintiffs' claims on their merits.

The Tribe cannot be made a party to this action involuntarily because "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). If this court were to accept *amici curiae's* characterization of the Tribe as a necessary party, therefore, the Tribe presumably would decline to waive its sovereign immunity and the plaintiffs' claims would be effectively foreclosed. No such Draconian outcome is appropriate here, however, because as explained below, the Tribe's presence is not necessary to this action.

A. Rule 19 of the Rules of Civil Procedure and its federal counterpart establish the criteria for determining whether a claim may proceed in the absence of a particular person or entity.

Rule 19(b) of the North Carolina Rules of Civil Procedure provides that a court "may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court." As explained below,

this court may resolve this matter without prejudice to the Tribe's rights; therefore, *amici's* necessary party argument would not prevail even if this court were to consider it. Moreover, *amici's* characterization of the Tribe, or any absent party, as "necessary" or "indispensable" is inappropriate to the determination of whether a suit may proceed in the absence of a particular person or entity.

Amici curiae's brief reflects the fact that most of the cases in which courts have addressed the issue of whether an Indian tribe is an "indispensable party" are federal cases decided pursuant to Rule 19(b) of the Federal Rules of Civil Procedure, which until recently included a reference to such a concept. North Carolina's Rule 19(b), which essentially is a recodification of former N.C. Gen. Stat. § 1-73, has never included such a reference. The Official Comment to our state rule points out that Rule 19(b) expresses the concept of a "necessary party" in terms of "fairness and judicial economy" and "involves rejection of the more sophisticated federal rules approach, which posits the more refined categories of 'indispensable' and 'conditionally necessary' parties." *See also* G. Gray Wilson, *North Carolina Civil Procedure* § 19-1.

After the Comment to the state rule was written, the federal rule itself was amended and now, like our state rule, makes no reference to "necessary" or "indispensable" parties;

rather, it speaks in terms of whether a potential party is "required" in order for a claim or suit to proceed. *See Republic of Philippines v. Pimentel*, ___ U.S. ___, __ 128 S. Ct. 2180, 2188-89 (2008).[2] In other words, the rigid concept of an

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[2] Federal Rule 19(a) and (b) now provide as follows:

"**Rule 19. Required Joinder of Parties.**

(a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) Joinder by Court Order. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) Venue. If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

"indispensable party" has never been compatible with our state rule,[3] and the recent amendment to the federal rule has rendered it obsolete in the federal system as well. *See Vann v. Kempthorne,* 534 F.3d 741, 745 (C.A.D.C. 2008). Instead, both state and federal case law make it clear that the determination of whether a claim or suit should proceed in the absence of a particular entity that cannot be joined is complex and must be

---

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder."

See also Rule 19(c) (imposing pleading requirements) and Rule 19(d) (creating exception for class actions

[3] Like our Rule 19, North Carolina's appellate courts generally have avoided the term "indispensable party." Plaintiffs' counsel have found a few cases in which our courts have made casual reference to "necessary and indispensable parties" in contexts that suggest that the court deemed the two adjectives to be interchangeable. Such references appear to be attributable in large measure to our courts' habit of citing McIntosh's *North Carolina Practice and Procedure,* which employed such usage. *See, e.g., Gaither Corp. v. Skinner,* 238 N.C. 254, 256, 77 S.E.2d 659, 661 (1953).

case-specific, fact-intensive and guided by considerations of equity and fairness.

1. Interpretation and Application of the North Carolina Rule.

Our appellate courts have stated that a "necessary party" is one who "is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence," *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968); one whose presence is required for a complete determination of the claim, *Behr v. Behr*, 46 N.C. App. 694, 266 S.E.2d 393 (1980); one whose interest is such that no decree can be rendered without affecting the party, *Pickelsimer v. Pickelsimer*, 255 N.C. 408, 121 S.E.2d 586 (1961), *Wall v. Sneed*, 13 N.C. App. 719, 187 S.E.2d 454 (1972); and as one whose interest will be directly affected by the outcome of the litigation. *Equitable Life Assurance Society of United States v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951). As this court has said, "the heart of the Rule lies in the proposition that all parties should be joined whose presence is necessary to a complete determination of the controversy." *Thomas v. Thomas*, 43 N.C. App. 638, 643, 260 S.E.2d 163, 167 (1979).

2. Interpretation and Application of the Federal Rule.

The U.S. Supreme Court's recent (June, 2008) decision in *Republic of Philippines v. Pimentel,* ___ U.S. ___, 128 S. Ct. 2180, explains that the inability to join even a "required party" does not automatically result in dismissal of a claim or suit. "Where joinder is not feasible," the Court said, "the question whether the action should proceed . . . will turn upon factors that are case specific, which is consistent with a Rule based on equitable considerations." *Id.* at 2188. This also is consistent, the Court said

> . . . with the fact that the determination of who may, or must be parties to a suit has consequences for the persons and entities affected by the judgment; for the judicial system and its interest in the integrity of its processes and the respect accorded to its decrees; and for the society and its concern for the fair and prompt resolution of disputes. (Citation omitted.) For these reasons, the issue of joinder can be complex, and determinations are case specific.

Id.

Justice Kennedy's opinion also explained why courts should not classify potential but absent parties as "indispensable:"

> Under the earlier Rules the term "indispensable party" might have implied a certain rigidity that would be in tension with [the] case-specific approach. The word "indispensable" had an unforgiving connotation that did not fit easily with a system that permits actions to proceed even when some persons who otherwise should be parties to the action cannot be joined. As the Court noted in [*Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968)] the use of "indispensable" in Rule 19 created the "verbal anomaly" of an "indispensable person who turns out to

> be dispensable after all." (Citation omitted.) Though the text has changed, the new Rule 19 has the same design and, to some extent, the same tension. Required persons may turn out not to be required for the action to proceed after all.

Id. at 2188-89. "In all events," Justice Kennedy concluded, "it is clear that multiple factors must bear on the decision whether to proceed without a required person. This decision 'must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests.'" *Id.* at 2189 (citation omitted).

B. The Trial Court Properly Permitted Plaintiffs' Claims to Proceed in the Tribe's Absence, Because the Tribe's Rights and Privileges Will Not be Affected by the Outcome of this Action.

The criteria outlined in the state and federal cases interpreting and applying Rule 19 make it plain that this action may proceed without the presence of the Tribe because the Tribe's rights and privileges will not be affected even if the plaintiffs prevail. The plaintiffs assert that by prohibiting and criminalizing video poker the State of North Carolina has rendered the Tribe's video poker games unlawful pursuant to Section 4.C of the Compact. At first blush it would appear that the Tribe necessarily must have a direct and vital stake in the outcome of such a claim, but it does not, because S.L. 2006-6 includes the following self-executing veto clause:

> If a final Order by a court of competent jurisdiction prohibits possession or operation of video gaming machines by a federally recognized Indian tribe because that activity is not allowed elsewhere in this State, this act is void.

2006 N.C. Sess. Laws 6, § 12.

By this extraordinary provision, which *amici curiae* fail to address or to even acknowledge, the General Assembly chose to immunize the Tribe from any adverse consequences of its decision to ban video poker in North Carolina. If this court determines that S.L. 2006-6 abrogates the Compact, the legislation automatically self-destructs, thereby leaving the Compact's terms unaffected. In other words, the General Assembly has placed the Tribe in a "win-win" position vis-à-vis the plaintiffs' claim. Therefore, the Tribe has no interest in the outcome of the claim sufficient to require its presence in order for this matter to be resolved; indeed, it has no stake in the outcome at all.

CONCLUSION

For the reasons set forth above, this court should not consider the *amici curiae's* argument that the Eastern Band of Cherokee Indians is a necessary party to this action. If for any reason the court should choose to consider *amici's* argument it should reject it because the Tribe is not a necessary party to this action as a matter of law.

Respectfully submitted, this the 15th day of June, 2009.

EVERETT GASKINS HANCOCK & STEVENS, LLP

By: _____
Hugh Stevens
N.C. State Bar No. 4158

_____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the foregoing *Plaintiff-Appellee's Reply to Brief of Amici Curiae* was served on the following by depositing a true and complete copy thereof with the United States Postal Service, first-class postage prepaid, addressed to:

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Special Deputy Attorney General
N.C. Department of Justice
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Timothy Q. Evans
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Frank Ronald Lawrence
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633 West Fifth Street, 21st
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Los Angeles, CA 90071-2040

This the 15th day of June, 2009.

_____
Hugh Stevens

No. COA 09-431 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

McCRACKEN AND AMICK, INCORPORATED d/b/a THE NEW VEMCO MUSIC CO. and RALPH AMICK, Plaintiffs-Appellees, v. BEVERLY EAVES PERDUE, in her official capacity as Governor of North Carolina, Defendant-Appellant.	)	From Wake County

PLAINTIFFS-APPELLEES' REPLY TO THE BRIEF OF *AMICI CURIAE* EASTERN BAND OF CHEROKEE INDIANS OF NORTH CAROLINA, NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN GAMING ASSOCIATION, UNITED SOUTH AND EASTERN TRIBES, ARIZONA INDIAN GAMING ASSOCIATION

APPENDIX

No. COA 09-431 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

McCRACKEN AND AMICK, INCORPORATED d/b/a THE NEW VEMCO MUSIC CO. and RALPH AMICK, Plaintiffs-Appellees,	)	
v.	)	From Wake County
BEVERLY EAVES PERDUE, in her official capacity as Governor of North Carolina, Defendant-Appellant.	)	

****

AFFIDAVIT OF MICHAEL J. TADYCH

****

I, Michael J. Tadych, being duly sworn, depose and say:

1. I am over 18 years of age, and I have personal knowledge of the matters stated herein.

2. At all times since 1997 I have been an attorney duly licensed by the North Carolina State Bar to practice law in North Carolina.

3. My firm and I are counsel to plaintiffs-appellees in this action.

4. In connection with our representation, I contacted Cherokee Tribal Judge Matthew Martin on Thursday, October 2, 2008, seeking his assistance in identifying the proper representative of the Eastern Band of Cherokee Indians ("the Tribe") with whom to speak about potential litigation arising out of our clients' concerns and interests relating to the General Assembly's ban on video poker. Judge Martin suggested that I contact Mr. Patrick Lambert, whom he identified as the head of the Tribal Gaming Commission. Judge Martin provided me with the Tribal Gaming Commission's main switchboard number.

5. Upon completing my conversation with Judge Martin, I placed a call to Mr. Lambert. I was told that he was not available. I left a voice mail message for Mr. Lambert explaining who I was, providing him with a brief overview of the matters I wanted to discuss with him, and leaving my contact information.

6. When Mr. Lambert returned my call at 1:02 p.m. on Thursday, October 2, 2008 he left a voice mail message but did not provide a return telephone number.

7. I returned Mr. Lambert's call later that afternoon or the next morning. He was again unavailable. I left a voice mail message similar to the message I left for him on October 2, 2008. I specifically recall asking him to provide me with some times when he might be available to talk briefly.

8. Mr. Lambert returned my call on Friday, October 3, 2008, at 1:21 p.m. On this occasion he left his telephone number but no information as to when he would be available to speak with me.

9. I returned Mr. Lambert's call on Monday, October 6, 2008. I was again told that he was not available. I again left a voice mail message for Mr. Lambert explaining my desire to speak with him and again asking for times when he might be available to talk.

10. Mr. Lambert returned my call at 1:45 p.m. on Tuesday, October 7, 2008, while I was out of the office. Mr. Lambert left a voice mail message for me indicating that he would not call me back again and advising me to communicate with him only via regular mail or e-mail. He provided an e-mail address and post office box with which I was to communicate with him. Mr. Lambert seemed quite agitated or put-off that we were having trouble speaking with one another.

11. Per his request, I wrote to Mr. Lambert via e-mail on Tuesday, October 7, 2008. A true and accurate copy of my e-mail is attached as Exhibit 1. To date I have not received any reply from Mr. Lambert.

12. The Complaint in this matter was filed in Wake County Superior Court on November 10, 2008. Shortly after it was filed, I directed that a courtesy copy be mailed to Mr. Lambert at Post Office Box 2189, Cherokee, North Carolina 28719, the same post

office box address that he provided in his voice mail on Tuesday October 7, 2008.

13. Although the Tribe now asserts that it is a "necessary party" to this proceeding, the Tribe made no attempt to appear or participate in this action until it filed its "Motion for Leave to File *Amicus Curiae* Brief" in this court on May 18, 2009.

FURTHER YOUR AFFIANT SAYETH NOT.

Michael J. Tadych

State of North Carolina
County of Wake

Sworn to and subscribed before me this the 5th day of June, 2009.

Notary Public

OFFICIAL SEAL
NORTH CAROLINA - WAKE COUNTY
KATHRYN C. DUNPHY
NOTARY PUBLIC
My Commission Expires 7-15-2009.

My Commission Expires: 7-15-09

Mike Tadych

From: Mike Tadych
Sent: Tuesday, October 07, 2008 6:09 PM
To: patricklambert@hotmail.com
Subject: Calls regarding the Tribal Compact with North Carolina and video poker

Mr. Lambert:

I just picked-up your voice mail from 1:45 p.m. today. Thank you for returning my call from yesterday. It is unfortunate that I have not been in the office when you have returned my calls. I perceive from the tone of your messages that I have done something to annoy or offend you. I am particularly confused by today's message where you said that you would not return my call again but to communicate with you via mail or e-mail. If I have done something to irritate you, it was not my purpose and I regret whatever I may have done.

The purpose of my calls was to attempt to start a conversation with the Tribe regarding our client's positions on issues involving the operation of video poker games and the Compact with North Carolina. Having helped the Tribe develop open government legislation some years ago and owing to my wife's ongoing working relationship with Judge Matthew Martin, it was important to be upfront and open with the Tribe. Judge Martin provided me with your telephone number and suggested that you were the best point of contact.

Consistent with the information that I have left in messages on your voice mail, we represent a client (and former video poker distributor) who believes that the enactment of G.S. § 14-306.1A and the simultaneous repeal of G.S. § 14-306.1 withdrew the Cherokee's authority to operate video poker games because they are now unlawful and prohibited in North Carolina and because the statutory authorization required by the Compact between the Tribe and the State itself no longer exists. Our client also believes that two North Carolina governors have failed to uphold the separation of powers clause in the North Carolina Constitution by negotiating and entering into a tribal gaming compact with a federally recognized tribe despite the fact that such negotiations are a legislative function that cannot be delegated by North Carolina's General Assembly.

We understand that you and the Tribe may be uncomfortable with our client's beliefs or presume that our client is overtly hostile to the Tribe. We assure you our client is not hostile to the Tribe. That is why we are seeking to open a dialogue about our client's concerns and objectives. We remain interested in having those discussions. If you would rather we try and talk with the Tribe's legal counsel, its lobbyist Steve Metcalf or Chief Hicks himself, please let me know. Otherwise, I hope that you will reconsider a discussion and let me know when you are available to talk by telephone over the next few days.

Have a great evening!

Best regards,

Mike

Michael J. Tadych, Esq.
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EXHIBIT 1

EVERETT GASKINS HANCOCK & STEVENS LLP
Attorneys and Counselors at Law

www.ncmedialaw.com

NORTH CAROLINA COURT OF APPEALS

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From Wake
(08CVS19569)

No. COA09-431

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

V

BEVERLY EAVES PERDUE, in her official capacity as Governor of North Carolina,
Defendant.

ORDER

The following order was entered:

The motion filed in this cause on the 15th of June 2009 and designated 'Motion of Plaintiff-Appellees to Deem Reply to Brief of Amici Curiae Eastern Band of Cherokee Indians of North Carolina, Et Al., Timely Filed' is allowed. Reply brief is deemed timely filed.

By order of the Court this the 30th of June 2009.

Witness my hand and official seal this the 1st day of July 2009.

John H. Connell
Clerk, North Carolina Court Of Appeals

Hon. Nancy L. Freeman, Clerk of Superior Court