No. COA11-199 JUDICIAL DISTRICT 10

NORTH CAROLINA COURT OF APPEALS

****

MCCRACKEN AND AMICK, INCORPORATED d/b/a THE NEW VEMCO MUSIC CO. and RALPH AMICK,	)	
Appellants,	)	From: Wake County 10 CvS 3520
vs.	)	
BEVERLY EAVES PERDUE, in her Official capacity as Governor of North Carolina,	)	
Appellee.	)	

****

PLAINTIFFS-APPELLANTS' BRIEF

****

INDEX

TABLE OF CASES & AUTHORITIES iv

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF THE GROUNDS FOR REVIEW 3

STANDARD OF REVIEW OF ORDER GRANTING MOTION TO DISMISS 3

PLAINTIFFS-APPELLANTS' STATEMENT OF FACTS 4

ARGUMENT 10

I. THE PLAINTIFFS HAVE STANDING TO CHALLENGE THE GOVERNOR'S AUTHORITY TO NEGOTIATE, APPROVE AND EXECUTE TRIBAL-STATE COMPACTS AND/OR AMENDMENTS TO SUCH COMPACTS 10

A. The plaintiffs have a direct, personal stake in an actual controversy with the State 12

B. The plaintiffs possess a personal stake in an actual and immediate controversy with the State .. 13

C. If the plaintiffs are not permitted to challenge the Governor's authority to negotiate tribal/state compacts the separation of powers doctrine will effectively be rendered a nullity 14

II. THE PLAINTIFFS CONCEDE THAT THEIR CLAIM DIRECTED TO N.C. GEN. STAT. §147-12(14) IS TIME-BARRED WITH RESPECT TO THE EXISTING COMPACT 16

III. THE TRIAL COURT ERRED BY DISMISSING THE PLAINTIFFS' COMPLAINT ON "RIPENESS" GROUNDS 19

IV. THE TRIAL COURT ERRED BY DISMISSING THE PLAINTIFF'S COMPLAINT PURSUANT TO RULE 12(b)(7) BECAUSE THE TRIBE IS NEITHER A NECESSARY NOR AN INDISPENSABLE PARTY TO THIS ACTION. 20

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. 22

1. Interpretation of the North Carolina Rule 25

2. Interpretation of the Federal Rule 26

B. The plaintiffs' claim may proceed despite the fact that the Tribe cannot be joined, because the Tribe's rights and privileges will not be affected by the outcome 28

CONCLUSION 30

CERTIFICATE OF SERVICE 31

TABLE OF CASES & AUTHORITIES

Cases

Bailey v. Handee Hugo's, Inc., 173 N.C. App. 723, 620 S.E.2d 312 (2005). 4, 21

Begley v. Employment Security Commission, 50 N.C. App. 432,438, 274 S.E.2d 370, 375 (1981 26

Behr v. Behr, 46 N.C. App. 694, 266 S.E.2d 393 (1980); 25

Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978). 21

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed.2d 244 (1987). 6

Carlisle v. CSX Tranportation, Inc., 193 N.C. App. 509, 517, 668 S.E.2d 98, 105 (2008). 18

Equitable Life Assurance Society of United States v. Basnight, 234 N.C. 347, 67 S.E.2d 390 (1951). 25, 26

Florida House of Representatives v. Crist, 990 So.2d 1035 (2008). 29

Gaither Corp. v. Skinner, 238 N.C. 254, 256, 77 S.E.2d 659, 661 (1953). 23

Goldston v. State, 361 N.C. 26, 30, 637 S.E.2d 876, 879 (2006) 12,13, 14

Howell v. Fisher, 49 N.C.App. 488, 491, 272 S.E.2d 19, 22, *cert. denied*, 302 N.C. 218, 277 S.E.2d 69 (1981). 21

In re Foreclosure of a lien by Hunters Creek Townhouse Homeowners Ass'n, Inc., ___ N.C. App. ___, 683 S.E.2d 450, 453 (2009 26

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998). 20

Narragansett Indian Tribe of R.I. v. Rhode Island, 667 A.2d 280 (R.I.1995), ... 28

Page v. Lexington Ins. Co., 177 N.C. App. 246, ----, 628 S.E.2d 427, 428 (2006) 3

Pickelsimer v. Pickelsimer, 255 N.C. 408, 121 S.E.2d 586 (1961)

.....25

Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962). 12

Republic of Philippines v. Pimentel, 553 U.S. 851, 128 S. Ct. 2180 (2008) 23,26, 27

Saratoga County Chamber of Commerce v. Pataki, 798 N.E.2d 1047 (N.Y. 2003) 14,15,28,29

State ex rel. Clark v. Johnson, 120 N.M. 562, 904 P.2d 11 (1995); 15, 28

State ex rel. Stephan v. Finney, 251 Kan. 559, 836 P.2d 1169 (1992); 28

Strickland v. Hughes, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968); 25

Thomas v. Thomas, 43 N.C. App. 638, 643, 260 S.E.2d 163, 167 (1979). 26

Vann v. Kempthorne, 534 F.3d 741, 745 (C.A. D.C., 2008) 23

Wall v. Sneed, 13 N.C. App. 719, 187 S.E.2d 454 (1972); 25

Welch Contracting, Inc. v. North Carolina Dept. of Transportation, 175 N.C. App. 45, 50, 622 S.E.2d 691, 694 (2005) 3

White v. Pate, 308 N.C. 759, 764, 304 S.E.2d 199, 202 (1983) ..21

Statutes

2001 N.C. Sess. Laws 512 § 29(c) 16, 17

2001 N.C. Sess. Laws 513 § 29(a). 16,17

2006 N.C. Sess. Laws 6 . . . . . 5, 11

25 U.S.C. § 2701(5). 6

25 U.S.C. § 2702 6

25 U.S.C. § 2703(6) 6

25 U.S.C. § 2703(7). 7

25 U.S.C. § 2703(8). 7

25 U.S.C. § 2710(d)(1)(B) 7

N.C. Gen. Stat. § 14-306(b) 9

N.C. Gen. Stat. § 14-306.1 ..... 5, 9, 10, 11

N.C. Gen. Stat. § 14-306.1A 5, 11

N.C. Gen. Stat. § 14-306.1A(a) 5

N.C. Gen. Stat. § 14-306.1A(e) 5

N.C. Gen. Stat. § 14-309(b) 5

N.C. Gen. Stat. § 147-12(14) 14, 16, 17

N.C. Gen. Stat. § 1-73 22

N.C. Gen. Stat. § 7A-27(b) 3

Other Authorities

http://www.ashevillenc.com/local_scoop/2010/09/03/harrahs-cherokee-casino-and-hotel-opens-dynamic-new-event-center 8

http://www.harrahscherokee.com 6

Rules

Fed. R. Civ. P. 19(a) 23, 24

Fed. R. Civ. P. 19(b) 22,23,24

N.C. R. Civ. P. 12(b)(1) 3, 10

N.C. R. Civ. P. 12(b)(6) 3, 10, 21

N.C. R. Civ. P. 12(b)(7) 3, 4, 10, 19

N.C. R. Civ. P. 19 28

N.C. R. Civ. P. 19(b) 22

N.C. R. Civ. P. 19(c) 25

N.C. R. Civ. P. 19(d) 25

Treatises

Wilson, *North Carolina Civil Procedure* § 19-1 23

McIntosh, *Morth Carolina Practice and Procedure*. 23

Constitutional Provisions

N.C.CONST. art. I, § 6 . . . . . .2, 9, 28

No. COA11-199 JUDICIAL DISTRICT 10

NORTH CAROLINA COURT OF APPEALS

****

MCCRACKEN AND AMRICK, INCORPORATED d/b/a THE NEW VEMCO MUSIC CO. and RALPH AMICK,	)	
Appellants,	)	From: Wake County
vs.	)	10-CvS 3520
BEVERLY EAVES PERDUE, in her official capacity as Governor of North Carolina,	)	
Appellee.	)	

****

QUESTION PRESENTED

DID THE TRIAL COURT ERR BY ALLOWING THE DEFENDANT-APPELLEE'S MOTION TO DISMISS THE PLAINTIFFS-APPELLANTS' COMPLAINT PURSUANT TO RULES 12(b)(1), 12(b)(6) and 12(b)(7) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE?

STATEMENT OF THE CASE

The plaintiffs' complaint (R pp. 6-55) seeks a declaratory judgment as to whether the Governor of North Carolina is authorized by the North Carolina Constitution to negotiate and execute compacts and amendments to compacts between the State and the Eastern Band of Cherokee Indians or whether, as the plaintiffs allege, that authority lies exclusively with the General Assembly pursuant to the Constitution's "separation of powers" clause (N.C.CONST. art. I, § 6).

The complaint alleges that the approval of compacts between the State of North Carolina and other sovereign entities, including the Eastern Band of the Cherokee Indians, is a core legislative function; therefore, by negotiating and executing the Compact and amendments thereto Governors Hunt and Easley violated the state constitution's "separation of power" clause. Likewise, the plaintiffs allege that any future modifications or amendments to the Compact that may be negotiated by the defendant or her successor(s) will violate the "separation of powers" clause unless their terms and conditions are subject to modification and approval by the General Assembly.

The plaintiffs filed their complaint on February 25, 2010. The defendant accepted service through her general counsel and process agent on February 26, 2010. (R p. 56) On March 12, 2010 the defendant moved to dismiss the plaintiffs' complaint

pursuant to N.C. R. Civ. P. 12(b)(1), 12(b)(6) and 12(b)(7) of the North Carolina Rules of Civil Procedure. (R p. 57-58) The defendant's motion was heard by the Honorable Paul G. Gessner at the November 8, 2010 term of Wake County Superior Court. By an order dated November 29, 2010 and filed December 2, 2010, Judge Gessner allowed the defendant's Motion to Dismiss. (R p. 59-60) The plaintiffs gave Notice of Appeal on January 3, 2011. (R p. 60) The record on appeal was filed with this court on February 11, 2011 and docketed on February 18, 2011.

STATEMENT OF GROUNDS FOR REVIEW

This is an appeal from a final judgment of the Superior Court pursuant to N.C. Gen. Stat. § 7A-27(b) .

STATEMENT OF STANDARDS OF REVIEW

"The standard of review on a motion to dismiss under N.C. R. Civ. P. 12(b)(1) for lack of jurisdiction is *de novo.*" *Welch Contracting, Inc. v. North Carolina Dept. of Transportation*, 175 N.C. App. 45, 50, 622 S.E.2d 691, 694 (2005).

On appeal of a 12(b)(6) motion to dismiss, the appellate court "conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, ----, 628 S.E.2d 427, 428 (2006).

Insofar as plaintiffs can determine, North Carolina's appellate courts have never articulated the standard of review applicable to an appeal from a trial court's order dismissing an action with prejudice pursuant to N.C. R. Civ. P. 12(b)(7) for failure to join a necessary party. The plaintiffs believe, however, that the case law suggests that review of such an order is *de novo*. See, e.g., *Bailey v. Handee Hugo's, Inc.*, 173 N.C. App. 723, 620 S.E.2d 312 (2005).

PLAINTIFF-APPELLANTS' STATEMENT OF FACTS

The allegations in the complaint in this case, which must be taken as true for purposes of the defendant's Motion to Dismiss, show that the plaintiffs in this action are McCracken and Amick, Inc., a Fayetteville-based North Carolina corporation, and its principal owner, Ralph Amick. McCracken and Amick, which does business as The New Vemco Music Company ("New Vemco"), owns, distributes and operates video games, vending machines, and amusement devices such as juke boxes, pinball machines and pool tables. Prior to July 1, 2007, the plaintiffs' business included the sale, lease, distribution, operation and maintenance of video poker machines. The plaintiffs' video poker business was conducted in compliance with the law and was profitable.

Until July 1, 2007, video poker in North Carolina was legal but heavily regulated. In 2006, however, the General Assembly passed and Governor Easley signed Senate Bill 912, which thereby became Chapter 6 of the 2006 Session Laws. 2006 N.C. Sess. Laws 6. This legislation phased out the number of video poker machines permitted in the state and banned them altogether as of July 1, 2007. Among other things the legislation repealed N.C. Gen. Stat. § 14-306.1, which authorized and regulated video poker, and enacted N.C. Gen. Stat. § 14-306-1A, which bans video poker games and seven other varieties of video games. The legislation also made possession of five or more video poker machines a Class G felony. *See* N.C. Gen. Stat. § 14-309(b).

Although S. L. 2006-6 banned video poker elsewhere in North Carolina the General Assembly included language purporting to exempt "a federally recognized Indian tribe . . . for whom it shall be lawful to operate and possess [banned] machines . . . if conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe . . ." N.C. Gen. Stat. § 14-306.1A(a) and (e). This language applies only to the Eastern Band of the Cherokee Indians ("the Tribe"), which currently operates more than 850 video poker games and other gambling devices at its casino in Swain County pursuant to the "Tribal-State Compact Between the Eastern Band of Cherokee

Indians and the State of North Carolina" (the "Compact"). *See* http://www.harrahscherokee.com.

The Compact came into existence under the impetus of the federal Indian Gaming Regulatory Act ("IGRA"). In 1988 Congress enacted Congress enacted IGRA in response to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed.2d 244 (1987), in which the Court held that the states had little or no authority to enforce anti-gaming laws on tribal lands. IGRA declares that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5). IGRA provides statutory authorization for the establishment of Indian casinos, attempts to regulate the gaming so as to avoid "corrupting influences," and seeks to ensure that the Indian tribes are the primary beneficiaries of the gaming. See 25 U.S.C. § 2702.

IGRA creates three classes of wagering games. Class I games are those "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6) Class II gaming includes

bingo and card games (excluding banking card games) that are operated in accordance with state law limits on the amount of wagers and hours of operation. See 25 U.S.C. § 2703(7). Pursuant to 25 U.S.C. § 2703(8), "Class III gaming" includes all other forms of gambling.

IGRA requires a compact between a tribe and the state before the tribe will be permitted to conduct "Class III" gaming, which includes the video poker machines that are the subject of the dispute between the plaintiffs and the defendant. When a tribe requests that a compact be negotiated, a state is required to do so in good faith. IGRA authorizes a compact only in a "State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B).

At the behest of the Tribe and under the stimulus and compulsion of IGRA former Governor James B. Hunt, Jr. -- who publicly announced that he was opposed to gambling of any kind -- negotiated the terms of the Compact with the Tribe and executed it on behalf of the State in August, 1994. Pursuant to the terms of the Compact the Tribe established and operates Harrah's Cherokee Casino at Cherokee, North Carolina. The Cherokee Casino attracts more than 3.5 million visitors each

year. In 2009 it produced gambling revenues in excess of $228,000,000.[1]

The Compact, which is attached to the plaintiffs' complaint as Exhibit A and incorporated in it by reference, authorizes the Tribe to conduct certain specifically defined "raffles" and "video games" together with "such other Class III gaming which *[sic]* may be authorized" in writing by the Governor. An amendment executed by former Governor Michael F. Easley in 2000 extended the Compact's original seven-year term to the year 2030.

Neither the original Compact negotiated and executed by Governor Hunt nor the amendments negotiated and executed by Governor Easley were contemporaneously reviewed, approved or codified by the General Assembly. North Carolina is a party to more than twenty interstate compacts. Unlike the Tribal-State

---

[1] "Cherokee Casino Bets on More Glitz," *The Winston-Salem Journal*, August 25, 2010. The casino is currently undergoing a $633 million expansion, which is the largest hospitality development project underway in the Southeast and one of the largest in the U.S. Upon completion in 2012, the 56-acre property will have added a third hotel tower, 3,000-plus seat Events Center, entertainment and VIP lounges, 18,000-square-foot spa, state-of-the-art digital poker room, Asian gaming room, retail outlets and new restaurants (Paula Deen's Kitchen, Ruth's Chris Steakhouse, BRIO Tuscan Grille). Sequoyah National Golf Club is an 18-hole, par 72 championship course offering privileged hotel guest access. The property is also doubling the size of its casino floor to 195,000 square feet while increasing video and table game capacity. *See* *http://www.ashevillenc.com/local_scoop/2010/09/03/harrahs-cherokee-casino-and-hotel-opens-dynamic-new-event-center*

Compact, the terms and conditions of each of these interstate compacts were approved and codified by the General Assembly.

The "separation of powers" clause of the North Carolina Constitution (N.C. CONST. art. I,§ 6) provides that "the legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."

The Compact amendment that Governor Easley negotiated and signed in 2000 amended Section 3.(H) of the Compact. As amended, that section defines "video games" allowed to be operated by the Tribe as those permitted for operation by N.C. Gen. Stat. § 14-306(b) and N.C. Gen. Stat. § 14-306.1. N.C. Gen. Stat. § 14-306(b), which permits the operation of video games, pinball machines and similar devices that are operated and played only for amusement, is still in effect. On the other hand N.C. Gen. Stat. § 14-306.1, which authorized and regulated video poker, was repealed in 2006, thereby eliminating the statutory authority for Tribal video poker referenced by the Compact. Although no new or amended Compact has been adopted or ratified by the General Assembly since the repeal of N.C. Gen. Stat. § 14-306.1, the Tribe continues to operate video poker games at the Cherokee Casino.

By letter dated 3 February 2010 (Exhibit B to the Complaint), the plaintiffs notified Governor Perdue that by

repealing N.C. Gen. Stat. § 14-306.1 the General Assembly had rendered the Tribe's video poker games unlawful pursuant to Section 4.C of the Compact and demanded that she notify the Tribe immediately that it must terminate its operation of any video poker games. By the same letter the plaintiffs demanded that Governor Perdue "refrain from engaging in any and all future negotiations, revisions or amendments to the Compact with the Cherokees to avoid further violation of North Carolina's Constitution." By letter dated 16 February 2010 (Exhibit C to the complaint) Governor Perdue declined the plaintiffs' requests.

ARGUMENT

The trial court's dismissal order does not articulate the specific grounds on which the dismissal was allowed, but the order cites N.C. R. Civ. P. 12(b)(1), N.C. R. Civ. P. 12(b)(6) and N.C. R. Civ. P. 12(b)(7) Therefore, the plaintiffs' argument will address the grounds for dismissal asserted to the trial court by the defendant pursuant to each of those rules.

I. THE PLAINTIFFS HAVE STANDING TO CHALLENGE THE GOVERNOR'S AUTHORITY TO NEGOTIATE, APPROVE AND EXECUTE TRIBAL-STATE COMPACTS AND/OR AMENDMENTS TO SUCH COMPACTS.

The defendant's motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(1) was grounded in the assertion that the trial court did not have jurisdiction over the subject matter of this action because the plaintiffs lacked standing to challenge the

governor's authority to execute or amend tribal-state compacts. Despite the State's arguments to the contrary, the plaintiffs have standing because they have a personal stake in the outcome of this controversy. The plaintiffs have been injuriously affected by N.C. Gen. Stat. § 14-306.1A and by the Governor's refusal to demand that the Tribe cease operating its video poker games, which the Compact no longer authorizes owing to the repeal of former N.C. Gen. Stat. § 14-306.1. As the direct consequence of the General Assembly's action and the Governor's inaction, the plaintiffs - whose video games and amusements compete with the Tribe for the public's entertainment dollars - have been placed at a competitive disadvantage. Moreover, as the complaint alleges, the defendant is on record as having indicated her willingness to discuss amendments to the Compact with the Tribe - including the possibility of granting them the right to conduct full-scale casino gambling. Accordingly, there is a substantial likelihood that the plaintiffs' injuries will be perpetuated should the Governor seek to exercise the power purportedly delegated to her by the General Assembly in an attempt to remediate the fundamental conflict between the Tribal-State Compact and S.L. 2006-6. As a practical matter, if the plaintiffs are not allowed to vindicate their rights in this forum, the result would be to effectively insulate this and future abdications of legislative authority from review. Such

an outcome would render the plaintiffs' injuries without redress and allow the executive and legislative branches to continue to collude as they see fit to circumvent the state constitution without meaningful oversight from an acquiescent judiciary.

A. The plaintiffs have a direct, personal stake in an actual controversy with the State.

The North Carolina Supreme Court has stated that "'[t]he gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness upon which the court so largely depends for illumination of difficult constitutional questions.'" *Goldston v. State*, 361 N.C. 26, 30, 637 S.E.2d 876, 879 (2006) (*quoting Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)). Here, the plaintiffs possess such a personal stake. North Carolina law requires that a party must be injuriously affected by a law in order to question its validity. *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962). As explained above, the plaintiffs allege that they are suffering continuing injury as the result of the Governor's refusal to enforce the Compact, and her threatened usurpation of the General Assembly's constitutional prerogatives is likely to cause them further financial injury going forward.

B. The plaintiffs possess a personal stake in an actual and immediate controversy with the State.

By their letter dated 3 February 2010, the plaintiffs communicated to the Governor their concerns regarding the validity of her authority to engage in future negotiations of the existing and future Tribal-State Compacts. In light of the Governor's rejection of the plaintiffs' concerns, and considering their significant property interest at stake, the plaintiffs were compelled to file this action to prevent further damage to their interests.

The plaintiffs are not required to prove that a "traditional cause of action" exists in order to establish an actual controversy. *Goldston*, 361 N.C. 26, 33, 637 S.E.2d 876, 881 (2006)(citation omitted). Instead, the plaintiffs need only show that a declaratory judgment would serve a useful purpose and that it would afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Id.* As the *Goldston* court observed, "in some instances the simple declaratory adjudication of the illegality of the act complained of [is] the most assured and effective remedy available." *Id.* at 34, 637 S.E.2d at 882 (citation omitted). Such a declaration would redress the plaintiffs' concerns, as a declaratory

judgment is often "as effective [on government officials] as a command to perform it or an injunction not to transgress." *Id.*

C. If the Plaintiffs Are Not Permitted to Challenge the Governor's Authority to Negotiate Tribal/State Compacts the Separation of Powers Doctrine Will Effectively Be Rendered a Nullity.

The plaintiffs are among a select community of potential plaintiffs who have standing to obtain a declaration of the Governor's authority in regard to the negotiation and amendment of Tribal-State Compacts. Ordinarily, the legislative branch would be the natural party with standing to challenge an *ultra vires* act by the Governor. In this case, however, the General Assembly has already abdicated its constitutional responsibilities relative to the negotiation of this and any other tribal-state compacts. *See* N.C. Gen. Stat. § 147-12(14). Therefore, as persons who have been directly injured by the video poker ban the plaintiffs must carry alone the burden of bringing the actions of the executive and legislative branches before the judiciary for review.

When faced with a similar separation of powers question regarding its governor's actions in signing a tribal compact, the New York Court of Appeals observed: "Were we to agree with the State and deny standing as to all plaintiffs in this action, an important constitutional issue would be effectively insulated from judicial review . . ." *Saratoga County Chamber of Commerce*

v. Pataki, 798 N.E.2d 1047, 1052 (N.Y. 2003). The court went on to note that as a beneficiary of the compact, the tribe was an unlikely plaintiff, and that others who may have been harmed were likely too remotely impacted to obtain judicial relief. *Id.* The New York court concluded: "Thus, where a denial of standing would pose 'in effect an impenetrable barrier to any judicial scrutiny of legislative action,' our duty is to open rather than close the door to the courthouse." *Id.* at 1054 (*citing Boryszewski v. Brydges*, 334 N.E.2d 579 (N.Y. 1975); *State ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995)).

As in *Saratoga County*, the result of denying standing to these plaintiffs would be to effectively insulate the Governor's actions from judicial review. One glaring difference, however, makes the instant case even more egregious and the need for judicial review even more pressing: here the General Assembly has purported to delegate away its constitutional responsibilities and ratify, *ex post facto*, Governor Hunt's and Governor Easley's unconstitutional actions. In 2001 the General Assembly included language in an obscure end-of-session "technical corrections" bill purporting to authorize the governor "To negotiate and enter into Class III Tribal-State gaming compacts, and amendments thereto, on behalf of the State consistent with State law and the Indian Gaming Regulatory Act, Public Law 100-497, as necessary to allow a federally recognized

Indian tribe to operate gaming activities in this State as permitted under federal law." 2001 N.C. Sess. Laws 513 § 29(a), codified as N.C. Gen. Stat. § 147-12(14). The legislation also stated that "This section is effective August 1, 1994, and applies to compacts and amendments thereto executed on or after that date." 2001 N.C. Sess. Laws 512 § 29(c).

With both the executive and legislative branches having acted in concert in utter disregard of the state constitution's "separation of powers" clause, it falls to the judiciary to reestablish the system of checks and balances as set forth in the North Carolina Constitution. If this Court were to affirm the trial court's determination that these plaintiffs standing to obtain a declaratory judgment in this matter, the end result would not only perpetuate the harm already suffered by the plaintiffs, but would also further undermine the viability of the separation of powers doctrine.

II. THE PLAINTIFFS CONCEDE THAT THEIR CLAIM DIRECTED TO N.C. GEN. STAT. § 147-12(14) IS TIME-BARRED WITH RESPECT TO THE EXISTING COMPACT

As noted above, in 2001 the General Assembly enacted legislation purporting to ratify Governor Hunt's and Governor Easley's prior actions in negotiating and executing the original Compact and the various amendments to it. N.C. Gen. Stat. § 147-12(14), which was included in the 2001 "technical

corrections" bill, states that the governor's powers include the authority

> To negotiate and enter into Class III Tribal-State gaming compacts, and amendments thereto, on behalf of the State consistent with State law and the Indian Gaming Regulatory Act, Public Law 100-497, as necessary to allow a federally recognized Indian tribe to operate gaming activities in this State as permitted under federal law.

2001 N. C. Sess. Laws 513 § 29(a), codified as N.C. Gen. Stat. § 147-12(14). The legislation also stated that "This section is effective August 1, 1994, and applies to compacts and amendments thereto executed on or after that date." 2001 N.C. Sess. Laws 512 § 29(c).

The defendant argued below, correctly, that any claim directed against the validity of the Compact as originally negotiated and executed by Governor Hunt, the 2000 amendments to the Compact negotiated and executed by Governor Easley, or the General Assembly's purported ratification of those actions via N.C. Gen. Stat. § 147-12(14) are time-barred. The fact that the statute of limitations may have run with respect to these actions, however, does not alter the fact that both former governors usurped the General Assembly's constitutional authority and thereby violated the separation of powers doctrine, or that the General Assembly also violated the doctrine by purporting to ratify the violations *ex post facto*. The primary purpose of statutes of limitations is to provide a

degree of stability and security to human affairs. *See, e.g., Carlisle v. CSX Tranportation, Inc.*, 193 N.C. App. 509, 517, 668 S.E.2d 98, 105 (2008). In this case the running of the applicable statute of limitations means that time has rendered the original Compact and the 2000 amendments immune from legal attack, but it has not rendered constitutional the actions of Governor Hunt, Governor Easley or the General Assembly. The plaintiffs acknowledge that the Tribe and the public have relied on the assumption that the Compact, as amended, was properly negotiated and executed, and that this court may not and should not undo its existing terms and conditions. On the other hand, the court may not and should not permit the defendant to repeat or perpetuate her predecessor's unconstitutional actions. If the plaintiffs' claim is allowed to proceed, and they demonstrate that the negotiation, approval and execution of compacts between North Carolina and other sovereign entities is a core, non-delegable legislative function, the trial court may and should enter a judgment declaring that neither the current nor any future governor may usurp the legislature's exclusive authority, and that the General Assembly may neither delegate its authority away nor ratify the governor's usurpation of it.

III. THE TRIAL COURT ERRED BY DISMISSING THE PLAINTIFFS' COMPLAINT ON "RIPENESS" GROUNDS.

The defendant argued below that the plaintiffs' complaint should be dismissed because they "have failed to show with any degree of certainty" that she intends to negotiate or execute an amendment to the Compact. The problem with this argument, of course, is that any such amendment invariably is negotiated behind closed doors and disclosed only when it has become a *fait accompli*. In other words, the Governor's "ripeness" argument essentially is a "catch me if you can" defense. Moreover, in their letter of 10 February (Exhibit B to the complaint) the plaintiffs specifically asked Governor Perdue to "refrain from engaging in any and all future negotiations, revisions or amendments to the Compact with the Cherokees in order to avoid further violation of North Carolina's Constitution." In her response (Exhibit C) Governor Perdue declined this request and characterized the plaintiffs' "separation of powers" analysis as a "theory" that she deemed "not viable." Therefore, the only reasonable inference that this court should draw from the record before it is that the Governor is likely to negotiate and execute an amendment to the Compact in violation of the state constitution unless and until the courts declare that such actions violate the "separation of powers" clause.

IV. THE TRIAL COURT ERRED BY DISMISSING THE PLAINTIFF'S COMPLAINT PURSUANT TO N.C. R. Civ. P. 12(b)(7) BECAUSE THE

TRIBE IS NEITHER A NECESSARY NOR AN INDISPENSABLE PARTY TO THIS ACTION.

The defendant contended below that the Tribe is an "indispensable" party to the plaintiffs' claim, and that this action should be dismissed in its absence. As explained below, this argument is incorrect, because neither any rights conferred on the Tribe by IGRA nor any privileges granted to the Tribe pursuant to the Compact will be affected by the outcome of this lawsuit.

Before addressing the merits and demerits of the State's "indispensable party" argument, however, we invite the court's attention to its potential consequences. The State argues that the plaintiffs' claims "cannot be adjudicated in the Tribe's absence," 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, the State's "indispensable party" defense is a tactic for attempting to prevent the courts 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 the State's

characterization of the Tribe as an "indispensable" party, therefore, the Tribe presumably would decline to waive its sovereign immunity and the plaintiffs' claims would be effectively foreclosed before this court could even assess the propriety of their allegations in light of Rule 12(b)(6).[2] No such Draconian outcome is appropriate here, however, because as explained below, the Tribe's presence is not "indispensable" to this action. Indeed, the very concept of an "indispensable" party is outmoded and inapt.

Finally, the court may take notice that the Tribe believed that its interests were at stake in this proceeding it could have moved to intervene, but it has elected to remain a bystander.

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.

---

[2] The absence of parties who are deemed necessary parties under Rule 19 ordinarily does not merit dismissal of the action; rather, the court should decline to deal with the merits of the action unless and until the necessary parties are brought into it. *White v. Pate*, 308 N.C. 759, 764, 304 S.E.2d 199, 202 (1983); *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978). Dismissal under Rule 12(b)(7)is proper only when the defect cannot be cured. *Bailey v. Handee Hugo's, Inc.*,173 N.C.App. 723, 728, 620 S.E.2d 312,316 (2005), citing *Howell v. Fisher*, 49 N.C.App. 488, 491, 272 S.E.2d 19, 22, *cert. denied*, 302 N.C. 218, 277 S.E.2d 69 (1981). The plaintiffs acknowledge that in this case an order requiring the plaintiffs to bring the Tribe in as a party would be futile because the Tribe almost surely would exercise its right as a sovereign entity to refuse.

N.C. R. Civ. P. 19(b) 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, the trial court could determine the plaintiffs' claims without prejudice to the Tribe's rights; therefore, the trial court should have rejected the State's "indispensable party" argument and allowed this action to proceed. Moreover, this court should eschew the State's invitation to define the Tribe, or any absent party, as "necessary" or "indispensable," because neither term is appropriate to the determination whether a suit may proceed in the absence of a particular person or entity.

Not surprisingly, 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. Fed. R. Civ. P. 19(b) N.C. R. Civ. P. 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 § (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 Wilson, *North Carolina Civil Procedure* § 19-1.

After the Comment to the state rule was written the federal rule 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*, 553 U.S. 851, 862-63, 128 S. Ct. 2180, 2188-89 (2008). In other words, the rigid concept an "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).[4] Instead, both

---

[3] Like our Rule 19, North Carolina's appellate courts generally have eschewed 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).

[4] Fed. R. Civ. P. 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:

(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

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

1. Interpretation 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)and *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.*

---

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

See also N.C. R. Civ. P. 19(c) (imposing pleading requirements) and N.C. R. Civ. P. 19(d) (creating exception for class actions)

Basnight, 234 N.C. 347, 67 S.E.2d 390 (1951). As the Court of Appeals 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). See also *Begley v. Employment Security Commission*, 50 N.C. App. 432,438, 274 S.E.2d 370, 375 (1981); *In re Foreclosure of a lien by Hunters Creek Townhouse Homeowners Ass'n, Inc.*, ___ N.C. App. ___, 683 S.E.2d 450, 453 (2009).

2. Interpretation of the Federal Rule.

The U.S. Supreme Court's June, 2008 decision in *Republic of Philippines v. Pimentel*, 553 U.S. 851, 128 S. Ct. 2180 (2008) 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 863, 128 S.Ct. 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 863, 128 S.Ct. 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.' (Citation omitted)." *Id.* at 863, 128 S.Ct. at 2189.

B. The plaintiffs' claim may proceed despite the fact that the Tribe cannot be joined, because the Tribe's rights and privileges will not be affected by the outcome.

The criteria outlined in the state and federal cases interpreting and applying N.C. R. Civ. P. 19 make it plain that the claim asserted by the plaintiffs in 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' claim, which is grounded in N.C. CONST. art. I, §6 of the North Carolina Constitution, does not attack the validity of the existing Compact between the Tribe and the State; rather, it merely asks the court to declare that any *future* amendments to the Compact be negotiated and executed by the General Assembly, rather than the Governor, on the grounds that the approval of compacts between the State and any other sovereign entity is a core legislative function that cannot be delegated to the Governor or to anyone else.[5]

---

[5] The issue of which branch or official of state government is authorized to negotiate and sign tribal-state compacts has been addressed by the highest courts of Florida, New Mexico, Kansas, Rhode Island, and New York, each of which has concluded that the legislative branch, rather than the governor, is empowered to enter into tribal-state compacts. See *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995); *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (1992); *Narragansett Indian Tribe of R.I. v. Rhode Island*, 667 A.2d 280 (R.I.1995), *certified question answered*, 667 A.2d 280 (R.I. 1995); *Saratoga County Chamber of Commerce v. Pataki*, 798 N.E.2d 1047 (N.Y.

IGRA guarantees the Tribe's right to negotiate a gaming compact with the State, but it does not specify which branch of state government or which specific state officials are to act on behalf of the State. The question of who has the authority to negotiate and execute compacts with the Tribe on behalf of the State must be resolved in accordance with the state constitution, but the resolution will not limit or otherwise affect the rights and privileges conferred on the Tribe by IGRA.

2003), *aff'd and modified*, 798 N.E.2d 1047, (N.Y. 2003), *cert. denied, Pataki v. Saratoga County Chamber of Commerce, Inc.*, 540 U.S. 1017 (2003); and *Florida House of Representatives v. Crist*, 990 So.2d 1035 (2008). None of these five states' constitutions contains a "separation of powers" provision as explicit or emphatic as North Carolina's. North Carolina currently is a party to more than 20 compacts with other states, each of which was approved by the General Assembly; the state-tribal compact with the Eastern Band of Cherokee Indians is the only one that was not approved and codified by the General Assembly.

CONCLUSION

For the reasons set forth above, this court should reverse the trial court's order dismissing the plaintiffs' complaint and remand this action to the Superior Court of Wake County for further proceedings.

Respectfully submitted this the 24th day of March, 2011.

STEVENS MARTIN VAUGHN & TADYCH, PLLC

Hugh Stevens
N.C. State Bar No. 4158

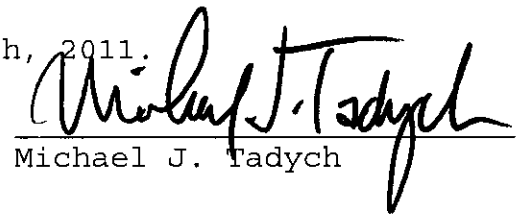
Michael J. Tadych
N.C. State Bar No. 24556
The Historic Pilot Mill
1101 Haynes Street, Suite 100
Raleigh, NC 27604-1455
919.582.2300
866.593.7695 (facsimile)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief was served by depositing a true and complete copy thereof with the United States Postal Service, first-class postage prepaid, addressed to:

Norma Harrell
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, N.C. 27602-0629

This the 24th day of March, 2011.



Michael J. Tadych