NO. COA11-199
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

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

v. Wake County
No. 10 CVS 3520

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

Appeal by plaintiffs from order entered 2 December 2010 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 1 September 2011.

Stevens Martin Vaughn & Tadych, PLLC, by Hugh Stevens and Michael J. Tadych, for plaintiffs-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell, for defendant-appellee.

GEER, Judge.

Plaintiffs McCracken and Amick, Incorporated and Ralph Amick appeal from the trial court's order granting the Governor's motion to dismiss pursuant to Rule 12(b)(1), (b)(6),

and (b)(7). Plaintiffs' lawsuit seeks a declaration that the separation of powers clause of the North Carolina Constitution mandates that only the General Assembly -- and not the Governor -- may negotiate, approve, and execute amendments to the existing Tribal-State compact between the Eastern Band of Cherokee Indians and the State of North Carolina ("the Compact") entered into under the federal Indian Gaming Regulatory Act ("IGRA") or any new IGRA compacts. We hold that plaintiffs have failed to demonstrate that they have standing to bring this action, and, therefore, we affirm the trial court's order granting the motion to dismiss.

Facts

Plaintiff McCracken and Amick, Incorporated is a North Carolina corporation doing business as The New Vemco Music Company. Mr. Amick is the president of McCracken and Amick. According to plaintiffs' complaint, New Vemco currently "owns and operates video games and vending and amusement devices such as juke boxes, pinball machines and pool tables." Prior to the legislature's prohibition of video poker, "the plaintiffs' business included the sale, lease, distribution, operation and maintenance of video poker machines." Plaintiffs allege that their "video poker business was conducted in compliance with the law and was profitable."

Initially, plaintiffs filed a declaratory judgment action on 10 November 2008, alleging that the State is not permitted under IGRA to grant the Eastern Band of Cherokee Indians ("the Tribe") a gaming "monopoly" within the State. *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 483, 687 S.E.2d 690, 692 (2009), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 400 (2010) (*McCracken I*). On appeal, this Court upheld the pertinent state legislation and its grant of exclusive gaming rights to the Tribe. *Id.* at 493, 687 S.E.2d at 698. This Court's opinion in that earlier appeal fully sets out the pertinent state and federal legislation.

This earlier lawsuit also originally included the separation of powers claim that is the basis for the current action. Plaintiffs, however, subsequently took a voluntary dismissal of the separation of powers claim. After *McCracken I*, plaintiffs refiled their separation of powers claim on 25 February 2010.

The complaint alleged that in August 1994, Governor James B. Hunt, Jr. negotiated the terms of the Compact and executed it on behalf of the State. Pursuant to that Compact, the Tribe has established and operated Harrah's Cherokee Casino in Cherokee, North Carolina. The Compact currently allows the Tribe to conduct, as the complaint alleges, "certain specifically defined

'raffles' and 'video games'." Subsequently, in 2000, Governor Michael F. Easley executed an amendment to the Compact extending its original seven-year term to 2030. According to the complaint, neither the original Compact nor the amendment was "contemporaneously reviewed, approved or codified by the General Assembly."

The complaint alleges that "[t]he 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" and, therefore, "by negotiating and executing the Compact and amendments thereto Governors Hunt and Easley violated the state constitution's 'separation of powers' clause." Further, "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."

In 2001, the General Assembly enacted legislation that authorized the Governor to "negotiate and enter into" Tribal-State gaming compacts and amendments to those compacts on behalf of the State "consistent with State law and [IGRA] . . . 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 ch. 513 § 29(a) (codified as N.C. Gen. Stat. § 147-12(14) (2011)). Although enacted in 2001, the legislation had an effective date of 1 August 1994 and applied to compacts and amendments executed on or after that date. 2001 N.C. Sess. Laws ch. 513 § 29(c).

The complaint alleges that "[t]his legislation is null, void and of no effect" for three reasons. First, "it purports [to] be effective retroactive to a date more than seven years prior to its enactment." Second, "it purports to ratify constitutionally impermissible actions by former Governors Hunt and Easley." Third, "it purports to delegate to the Governor a core, non-delegable duty and responsibility of the General Assembly."

In 2006, the General Assembly outlawed video poker games, although it allowed the Tribe to continue to advertise and operate video poker games at its casino pursuant to the Compact. *See* N.C. Gen. Stat. § 14-306.1A(a), (e) (2011). The complaint alleges that "[t]he General Assembly's prohibition and criminalization of the plaintiffs' video poker games, combined with the Tribe's continued operation of such games, has caused the plaintiffs to incur severe financial loss and injury."

The complaint alleges that in September 2009, Governor Beverly Eaves Perdue attended the opening of the Tribe's

Sequoyah National Gold Club where she indicated that she was open to negotiating expanded gaming with the Tribe. According to the complaint, "[t]herefore, the plaintiffs are informed and believe that unless this court declares that the North Carolina Constitution does not authorize the Governor to negotiate or execute Tribal-State compacts or amendments to them, the defendant will engage in such actions in violation of the North Carolina Constitution and in usurpation of the authority of the General Assembly."

The complaint sought a judgment declaring that "under the North Carolina Constitution the authority to negotiate, approve and execute tribal-state compacts or amendments to the existing Tribal-State [Compact] is reserved to the General Assembly and may not be delegated to the Governor[.]" The complaint further sought a declaration that N.C. Gen. Stat. § 147-12(14) "constitutes an unconstitutional attempt by the General Assembly to retroactively approve unconstitutional actions by former Governors Hunt and Easley and thus is null, void and of no effect[.]" Finally, the complaint asked the trial court to "[i]ssue an injunction prohibiting the defendant and her successors from negotiating, approving or executing tribal-state compacts or amendments to the existing Tribal-State compact[.]"

In a motion dated 12 March 2010, the Governor moved to dismiss the action pursuant to Rule 12(b)(1), (b)(6), and (b)(7) on the grounds that (1) plaintiffs lack standing to bring this action; (2) any claims challenging the constitutionality of N.C. Gen. Stat. § 147-12 are barred by the applicable statute of limitations and the doctrine of laches; (3) any claims challenging potential future amendments are barred by the doctrine of ripeness; and (4) the Tribe is a necessary party to this action. On 2 December 2010, the trial court granted the motion to dismiss, although it did not specify the basis for the dismissal. Plaintiffs timely appealed to this Court.

Discussion

We first address plaintiffs' standing to bring this action. We note that plaintiffs have conceded that any challenge to the existing Compact and its amendment is barred by the statute of limitations. At this stage, they have limited their contentions to any potential future compacts or amendments. We, therefore, must determine whether plaintiffs have standing to seek a declaration that the Governor is barred by the separation of powers clause from negotiating or executing on behalf of the State any future compacts or amendments.

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction" and is a question of

law for the court. *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002). "As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002). When, as here, the issue of standing is raised at the pleading stage, "'general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 364, 112 S. Ct. 2130, 2137 (1992)).[1]

Our Supreme Court has explained:

> "The rationale of [the standing rule] is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue. The 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 which sharpens the presentation[s] of issues upon which the court so largely depends for illumination of difficult constitutional questions."

Mangum v. Raleigh Bd. of Adjustment, 362 N.C. 640, 642, 669 S.E.2d 279, 282 (2008) (quoting *Stanley v. Dep't of Conservation*

[1]As plaintiffs have not articulated separate standing grounds for the individual plaintiff Ralph Amick, we have treated the plaintiffs together for standing purposes.

& Dev., 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)). A party does not have to "demonstrate that injury has already occurred"; instead, "a showing of 'immediate or threatened injury' will suffice for purposes of standing." *Id.* at 642-43, 669 S.E.2d at 282 (quoting *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990)).

In this case, plaintiffs sought both an injunction and a declaratory judgment.[2] In an action under the Declaratory Judgment Act, N.C. Gen. Stat. § 1-254 (2007), standing similarly

> "refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter. A party seeking standing has the burden of proving three necessary elements:
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> (1) 'injury in fact' -- an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Metcalf v. Black Dog Realty, LLC, 200 N.C. App. 619, 627-28, 684 S.E.2d 709, 716 (2009) (quoting *Beachcomber Properties, L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 823-24, 611 S.E.2d 191, 193-94 (2005)). Our Supreme Court has further held that "[i]t

[2] *See Neuse River Found.*, 155 N.C. App. at 114, 574 S.E.2d at 52 (stating that in determining a party's standing, "we must also examine the forms of relief sought").

is mandatory that a complaint brought pursuant to the Declaratory Judgment Act set forth all of the facts necessary to disclose the existence of an actual or real existing controversy between the parties to the action." *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 339, 323 S.E.2d 294, 303 (1984).

In this case, plaintiffs seek a declaration that under the separation of powers clause, only the General Assembly -- and not the Governor -- may negotiate, approve, and execute Tribal-State compacts or amendments to the existing Compact. Plaintiffs also seek an injunction prohibiting the Governor and her successors from negotiating, approving, or executing Tribal-State compacts or amendments to the existing Compact.

With respect to plaintiffs' standing to assert the separation of powers claim and to seek this relief, the complaint alleges:

> 21. Prior to July 1, 2007, the date on which the General Assembly's prohibition and criminalization of video poker became effective, 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.
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> 22. Pursuant to the authority putatively provided by N.C. Gen. Stat. § 14-306.1A(e), the Tribe has continued to advertise and operate video poker games at its casino, where the plaintiffs are informed and believe that patrons may play

more than 3000 video poker games. *See* http://www.harrahscherokee.com.

23. ***The General Assembly's prohibition and criminalization of the plaintiffs' video poker games, combined with the Tribe's continued operation of such games, has caused the plaintiffs to incur severe financial loss and injury.***

24. On or about September 1, 2009 Governor Perdue attended the grand opening of the Tribe's Sequoyah National Golf Club, where she stated publicly that she was open to the possibility of negotiating expanded Class III gaming with the Tribe. Therefore, the plaintiffs are informed and believe that unless this court declares that the North Carolina Constitution does not authorize the Governor to negotiate or execute Tribal-State compacts or amendments to them, the defendant will engage in such actions in violation of the North Carolina Constitution and in usurpation of the authority of the General Assembly.

25. By letter dated 3 February 2010, 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." Plaintiffs sent a copy of the letter to Attorney General Roy Cooper.

26. By letter dated 16 February 2010 . . ., Governor Perdue, through her general counsel, rejected the plaintiffs' requests;

> therefore, *she and the plaintiffs are parties to subsisting and genuine disputes as to the governor's authority to negotiate and execute a Tribal-State Compact on behalf of the state. The plaintiffs have a genuine, tangible stake in the outcomes of both disputes*.

(Emphasis added.)

In sum, the only injury to plaintiffs identified in these allegations is the injury suffered when the General Assembly prohibited plaintiffs from profiting from video poker games and both the General Assembly and the Governor allowed the Tribe to continue to operate those games. With respect to imminent or threatened injury, plaintiffs point only to the fact that the Tribe will be allowed to continue to operate video poker games and perhaps expand into other forms of gambling.

While these past and future injuries might provide standing to challenge N.C. Gen. Stat. § 14-306.1A -- claims already resolved in *McCracken I* -- plaintiffs do not explain how these injuries arise out of the dispute over who has authority, under the separation of powers clause, to negotiate and execute new Tribal-State compacts or amendments to the current Compact. We fail to see how plaintiffs' injury -- being precluded from the business of video poker while the Tribe is still allowed to profit from it -- is fairly traceable to the challenged action

of a Governor's negotiating or executing a Tribal-State compact or amendment rather than the General Assembly.

Further, plaintiffs have articulated no personal stake that they have in the resolution of this separation of powers issue. They have not shown that the declarations and injunction they seek will redress their injuries or, indeed, have any effect on them at all. They simply do not explain in what way they have an interest in who negotiates and executes Tribal-State compacts or amendments that is personal to them and not just a general interest in upholding the law.

In plaintiffs' brief on appeal, although not in their complaint, plaintiffs describe their injury as follows:

> 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. . . .
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> . . . .
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> . . . 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.

(Emphasis added.) Even assuming, without deciding, that we can consider this articulation of injury despite its omission from the complaint,[3] this injury still cannot be traced to and does not arise out of the challenged conduct: the alleged violation of the separation of powers clause in allowing the Governor to negotiate and execute Tribal-State compacts and amendments.

As the brief acknowledges, the injury arises out of the General Assembly's prohibition of video poker for everyone except the Tribe and the Governor's refusal to interpret the Compact as requiring that this prohibition apply to the Tribe as well. Indeed, plaintiffs' brief repeats this acknowledgement later: "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." (Emphasis added.) The injury cited by plaintiffs does not establish their standing to bring this action as opposed to an action challenging the video poker ban.

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[3] *See Wilkes v. N.C. State Bd. of Alcoholic Control*, 44 N.C. App. 495, 497, 261 S.E.2d 205, 207 (1980) (holding that direct injury identified in appellants' brief could not be considered because there was "no allegation of it in the complaint").

In short, plaintiffs have alleged no injury relating to the alleged violation of the separation of powers clause beyond their concern that the General Assembly and the Governor have not followed the law. As the United States Supreme Court pointed out in *Lance v. Coffman*, 549 U.S. 437, 442, 167 L. Ed. 2d 29, 34-35, 127 S. Ct. 1194, 1198 (2007) (per curiam), such an injury "is precisely the kind of undifferentiated, generalized grievance about the conduct of government" that does not support a finding of standing. *See also Charles Stores Co. v. Tucker*, 263 N.C. 710, 717, 140 S.E.2d 370, 375 (1965) ("Only one who is in immediate danger of sustaining a direct injury from legislative action may assail the validity of such action. It is not sufficient that he has merely a general interest common to all members of the public.").

Plaintiffs have not demonstrated that they have the required standing to seek the declaratory or injunctive relief that they request. We, therefore, hold that the trial court properly granted the motion to dismiss. Having concluded that the plaintiffs lack standing, we do not address the alternative grounds for dismissal asserted by defendant.

Affirmed.

Judges STROUD and THIGPEN concur.

Report per Rule 30(e).