NO. COA11 -199 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

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

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BRIEF FOR DEFENDANT-APPELLEE

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BRIEF FOR DEFENDANT-APPELLEE

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ISSUE PRESENTED

I. DID THE TRIAL COURT ERR IN DISMISSING PLAINTIFFS' CLAIMS PURSUANT TO N.C.G.S. §1A-1, RULE 12(b)(1), (6), AND (7) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE?

STATEMENT OF THE CASE

Plaintiffs brought this action against the Governor of North Carolina, in her official capacity (hereafter "the State"), seeking a declaratory judgment declaring invalid the State of North Carolina's Compact, as amended, with the Eastern Band of Cherokee Indians (hereafter "the Cherokee Tribe" or "the Tribe") authorizing certain types of gambling activities on the lands of the Cherokee Tribe. Specifically, plaintiffs sought a declaration that the Constitution of North Carolina reserves to the General Assembly the authority to negotiate, approve and execute compacts between the State and the Cherokee Tribe and that the General Assembly cannot delegate this power to the Governor. Plaintiffs further requested injunctive relief prohibiting the Governor and her successors from negotiating, executing, or amending the existing compacts or any future amendments. (R pp. 6-7, 11-12) The State filed a motion to dismiss the complaint pursuant to Rules 12(b)(1), (6) and (7), of the North Carolina Rules of Civil Procedure on the grounds that plaintiffs lacked standing to bring this claim, that plaintiffs' claims were time-barred and barred by laches as to the statutory approval of the existing Compact and amendments, that plaintiffs' claims lacked ripeness as to potential future Compact provisions, and on the grounds of failure to join a necessary party, specifically, the Eastern Band of Cherokees. (R pp. 57-58)

On 29 November 2010, the Honorable Paul G. Gessner entered an order granting the State's motion to dismiss with prejudice. (R p. 59) Plaintiffs subsequently filed a timely notice of appeal. (R p. 60)

The Record on Appeal was settled by the parties by stipulation on 11 February 2011. (R p. 63) The Record was filed in the Court of Appeals on 11 February 2011 and was docketed on 18 February 2011. (R p. 1)

STATEMENT OF THE FACTS

Plaintiffs are a corporation that owns and operates video games and vending and amusement devices, and the president of the same corporation. (R p. 1) Plaintiffs owned and operated video poker machines in North Carolina prior to their being outlawed in 2007. (R p. 10)

Pursuant to North Carolina General Statute § 71A-8 , only federally recognized Indian tribes are currently permitted to conduct gaming activities in this state. A tribe may do so only if its gaming activities are in accordance with a valid tribal-state compact executed by the Governor pursuant to N.C.G.S. § 147-12(14) and consistent with the federal Indian Gaming Regulatory Act (hereafter "IGRA"). N.C.G.S. § 71A-8. In N.C.G.S. § 147-12(14), the Governor is authorized "[t]o 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." That provision, enacted originally in 2001, also requires the Governor to "report any gaming compact, or amendment thereto, to the Joint Legislative Commission on Governmental Operations."

IGRA authorizes a tribe to request that the State in which it is located enter into negotiations with it concerning a gaming compact. Upon receiving such a request, the State is *required* to enter into good faith negotiations. 25 U.S.C. § 2710(d)(3)(A). IGRA also provides that a tribe may sue a State which fails to do so. 25 U.S.C. § 2710(d)(7)(A)(I). IGRA sets out three different categories of wagering games, and it is Class III, the category for most gaming activities, which applies to video poker games. 25 U.S.C. § 2703 (6)-(8); *see also* R p. 7.

The State does indeed have a Compact with the Cherokee Tribe. Specifically, in 1994, Governor James Hunt, on behalf of the State of North Carolina, entered into a tribal-state gaming compact (hereafter "the Compact") with the Eastern Band of Cherokee Indians. The Compact set out the terms upon which the Cherokee Tribe could operate various types of gaming activities on its tribal land. (R pp. 8, 15-34) Two amendments to the Compact were executed by the Tribe and Governor Hunt, in 1996 and in 2000. The 2000 amendment

extended the effective period of the Compact until thirty years from the approval of that amendment. (R pp. 35-50) A subsequent amendment to the Compact executed by the Cherokee Tribe and Governor Mike Easley in 2002 specified that the Tribe was authorized to conduct electronic bingo and raffle games as defined in N.C.G.S. §§ 14-309.6 and 14-309.15(b), respectively, under the Compact. (R pp. 8, 51-52)

Prior to 1 July 2007, video poker, other than that conducted under the Compact, was generally permitted in North Carolina on a restricted basis pursuant to former N.C.G.S. § 14-306.1. (R p. 10) In 2006, the North Carolina General Assembly enacted 2006 N.C. SESS. LAWS 6 (S.L. 2006-6) which established a staggered phase-out of video gaming machines on non-tribal lands in North Carolina, by amending and repealing prior statutory provisions governing video gaming. Pursuant to S.L. 2006-6, non-tribal video gaming became illegal statewide effective 1 July 2007. (S.L. 2006-6, s. 1-4).[1] *See also* R. p. 10.

Session Law 2006-6, however, contained clear provisions banning video gaming effective 1 July 2007 except for the Cherokee Tribe, which was expressly authorized to continue operating video gaming machines pursuant to the Compact.

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[1] A copy of S.L. 2006-6 is contained in the Appendix to this brief.

Specifically, S.L. 2006-6 created a new law - codified at N.C.G.S. § 14-306.1A - which states in pertinent part as follows:

> (a) Ban on Machines. -- It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation any video gaming machine as defined in subsection (b) of this section, except for the exemption for a federally recognized Indian tribe under subsection (e) of this section for whom it shall be lawful to operate and possess machines as listed in subsection (b) of this section if conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe, as provided in G.S. 147-12(14) and G.S. 71A-8.
>
> * * *
>
> (e) Exemption for Activities Under IGRA. -- Notwithstanding any other prohibitions in State law, the form of Class III gaming otherwise prohibited by subsections (a) through (d) of this section may be legally conducted on Indian lands which are held in trust by the United States government for and on behalf of federally recognized Indian tribes if conducted in accordance with an approved Class III Tribal-State Gaming Compact applicable to that tribe as provided in G.S. 147-12(14) and G.S. 71A-8.

N.C.G.S. § 14-306.1A(a), (e) (2009) (emphasis added).

The Cherokee Tribe currently conducts gaming activities pursuant to the Compact, including video poker games, at its casino. (R p. 10) In prior litigation, plaintiffs in this case challenged the validity under IGRA of the Compact's allowing the Cherokee Tribe a "gaming monopoly." The Court of Appeals ruled

against plaintiffs and upheld S.L. 2006-6 and its granting of exclusive gaming rights to the Cherokee Tribe. *McCracken & Amick, Inc. v. Perdue*, ___ N.C. App. ___, 687 S.E.2d 690 (2009), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 400 (2010) ("*McCracken I*"). In *McCracken I*, plaintiffs originally sought the same declaration they sought in the present case – a declaration that the Governor lacks the power to execute tribal-state gaming compacts. Plaintiffs subsequently took a voluntary dismissal of that claim and later re-filed it in the present action.

In a letter dated 3 February 2010, plaintiffs wrote to defendant asserting that by repealing N.C.G.S. § 14-306.1, the General Assembly caused the Cherokee Tribe's video poker games to be unlawful under Section 4.C of the Compact. Plaintiffs demanded that the Governor notify the Tribe immediately to cease operation of video poker games and further demanded that the Governor refrain from any negotiations, revisions, or amendments to the Compact. By letter dated 16 February 2010, from the Governor's counsel, defendant rejected plaintiffs' demands. (R pp. 11, 54-55)

STANDARD OF REVIEW

The Court's "review of a trial court's decision denying or allowing a Rule 12(b)(1) motion is *de novo* except to the extent that the trial court resolves issues of fact and those findings are binding on the appellate court if supported by

competent evidence in the record." *Harper v. City of Asheville*, 160 N.C. App. 209, 215, 585 S.E.2d 240, 244 (2003) (citation and internal quotation marks omitted). *See also Blinson v. State*, 186 N.C. App. 328, 334, 651 S.E.2d 268, 273 (2007), *appeal dismissed* and *disc. review denied*, 362 N.C. 355, 661 S.E.2d 240, 241 (2008) ("We review de novo a trial court's decision to dismiss a case under N.C. R. Civ. P. 12(b)(1) for lack of standing.") In this case, there were no issues of fact resolved by the trial court in determining that the relevant claims were barred by plaintiffs' lack of standing. *See* R p. 59. Consequently, this Court reviews *de novo* the trial court's granting of defendant's motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1).

This Court also reviews "*de novo* the grant of a motion to dismiss" for failure to state a claim upon which relief may be granted. *Lea v. Grier*, 156 N.C. App. 503, 507, 577 S.E.2d 411, 414 (2003). *Accord Hayes v. Peters*, 184 N.C. App. 285, 287, 645 S.E.2d 846, 847 (2007).

The State, like plaintiffs, has not identified a North Carolina appellate court case addressing the standard of review for a motion to dismiss under Rule 12(b)(7) of the Rules of Civil Procedure. Like plaintiffs, however, defendant believes that the standard of review should be *de novo* on the 12(b)(7) motion as well as on the others. *See* Pl. Br. at 4.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS' CLAIMS PURSUANT TO N.C.G.S. §1A-1, RULE 12(b)(1), (6), AND (7) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE.

Plaintiffs contend that the trial court erred in granting defendant's motion to dismiss, which was based on N.C.G.S. § 1A-1, Rules 12(b)(1), (6), and (7) and raised questions of standing, statute of limitations, laches, ripeness, and failure to join a necessary party. (R p. 57) Plaintiffs are mistaken, for multiple reasons. Accordingly, this Court should reject all plaintiffs' arguments and affirm the trial court's decision.

A. PLAINTIFFS LACK STANDING TO BRING THIS ACTION.

The trial court properly dismissed plaintiffs' action in its entirety for lack of standing. Essential to a court's jurisdiction over *any claim*, including one brought for a declaratory judgment, is "an actual or real existing controversy between parties having adverse interests in the matter in dispute." *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d 294, 303 (1984). *See also Andrews v. Alamance County*, 132 N.C. App. 811, 813-14, 513 S.E.2d 349, 350 (1999); *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 583, 347 S.E.2d 25, 29 (1986) (actual controversy is a jurisdictional prerequisite for declaratory judgment action). If plaintiffs lack standing, the court lacks jurisdiction to hear

the case. *See Blinson*, 186 N.C. App. at 333-34, 651 S.E.2d at 273 (citing *Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16, *disc. review denied*, 359 N.C. 632, 613 S.E.2d 688 (2005)); *Marriott v. Chatham County*, 187 N.C. App. 491, 494, 654 S.E.2d 13, 16 (2007), *disc. review denied*, 362 N.C. 472, 666 S.E.2d 122 (2008) ("Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction.") (quoting *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002)). Significantly, "plaintiffs have the burden of proving that standing exists." *American Woodland Indus. v. Tolson*, 155 N.C. App. 624, 627, 574 S.E.2d 55, 57 (2002), *disc. review denied*, 357 N.C. 61, 579 S.E.2d 283 (2003). *See also Blinson*, 186 N.C. App. at 333, 651 S.E.2d at 273 (2007) ("As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing.") (citation omitted).

In order to survive the State's motion to dismiss, plaintiffs were required to articulate some manner in which they have suffered (or will suffer) an "'injury in fact' in light of the applicable statutes or caselaw." *Neuse River Found.*, *v. Smithfield Foods*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002) (citations omitted), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). This they could not do. Because plaintiffs cannot show they have "sustained an 'injury in

fact' as a direct result of" the challenged Tribal gaming activities, or the alleged invasion of the legislature's exclusive powers by the Governor, their claims must fail. *Dunn v. Pate,* 334 N.C. 115, 119, 431 S.E.2d 178, 181 (1993). *See also Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 444, 358 S.E.2d 372, 375 (1987) (plaintiffs in declaratory judgment action must show they have "sustained an injury or [are] in immediate danger of sustaining an injury as a result of" the challenged governmental action); *accord Andrews*, 132 N.C. App. at 814, 513 S.E.2d at 350.

As the North Carolina Supreme Court has explained, standing depends on

> 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 of issues 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) (quoting *Flast v. Cohen*, 392 U.S. 83, 99, 20 L. Ed. 2d 947, 961 (1968)). As further expounded by former Chief Justice Sharpe,

> Under our decisions "[o]nly those persons may call into question the validity of a statute who have been *injuriously affected thereby* in their persons, property or constitutional rights." *Canteen Service v. Johnson*, 256 N.C. 155, 166, 123 S.E. 2d 582, 589 (1962). *See also Nicholson v. Education Assistance Authority*, 275 N.C. 439, 168 S.E.

> 2d 401 (1969); *In Re Assessment of Sales Tax*, 259 N.C. 589, 131 S.E. 2d 441 (1963); *Carringer v. Alverson*, 254 N.C. 204, 118 S.E. 2d 408 (1961); *James v. Denny*, 214 N.C. 470, 199 S.E. 617 (1938). The rationale of this rule is that only one with a genuine grievance, *one personally injured by a statute,* can be trusted to battle the issue.

Stanley v. Dep't of Conservation & Dev., 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (emphasis added). *Accord Appeal of Martin*, 286 N.C. 66, 72-73, 209 S.E.2d 766, 771 (1974).

In the present case, plaintiffs cannot begin to show that they possess standing. They are not parties to the Compact and never will be parties to the Compact. They are not affiliated in any way with the Cherokee Tribe. They have no personal stake in the issue of whether the Governor possesses the authority to enter into future compacts with the Cherokee Tribe. Their mere status as former video gaming operators, or vendors of other types of amusement, does not give them standing to challenge whether the Executive or Legislative branch of State government is vested with the authority to execute tribal-state compacts.

Plaintiffs argue that they have standing because they are harmed by N.C.G.S. § 14-306.1A and the Governor's refusal to demand that the Cherokee Tribe stop conducting video poker games. According to plaintiffs, the Compact

no longer authorizes such games due to the repeal of former N.C.G.S. § 14-306.1.[2] In their brief, they base their claims of injury on the theory that they have been placed at a "competitive disadvantage" vis-a-vis the Cherokee Tribe in competing "for the public's entertainment dollars." (Pl. Br. at 11) Presumably, this argument is based on the allegation in their complaint 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." (Compl. ¶ 23, R p. 11) The very language of this allegation demonstrates that it is logically and demonstrably false. Plaintiffs' gaming rights are governed not by the Compact but, rather, by the North Carolina General Statutes. Thus, it was the enactment of S.L. 2006-6 that ended plaintiffs' ability to receive income from video gaming. Their loss of gaming income did not arise from the Governor's signing of the Compact, or the continued recognition of the Compact – which is designed solely to address tribal gaming rights rather than the gaming rights of non-tribal persons such as plaintiffs. Their

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[2] Plaintiffs' view about the continued validity of the tribal gaming requires that one ignore, or interpret in a strained manner, the language in N.C.G.S. 14-306.1A which explicitly excepts from its prohibitions, and effectively authorizes, gaming operations conducted pursuant to a Tribal-State compact. *See* N.C.G.S. 14-306.1A(a), (b), (c), and (e). It also requires that one ignore, or at least interpret extremely narrowly, the decision of the Court of Appeals in *McCracken I*.

"competitive disadvantage" is no more, legally, than the position of any person or entity that would like to have something someone else has. The mere fact that the Tribe has gaming rights, while they do not, does not cause them to be injured in fact by the existence of the Compact.

Plaintiffs tried – and failed – in *McCracken I* to convince the Court of Appeals that federal law prohibited the General Assembly in Session Law 2006-6 from prohibiting video gaming statewide except on tribal land. *See McCracken I*, 687 S.E.2d 690 (2009). Thus, having failed in their challenge to the legislative enactment that actually impacted them, plaintiffs are now impermissibly attempting to challenge an act by the Governor that does not affect their legal rights in any respect and, in fact, does not even apply to them. Under basic principles of standing, they are not permitted to do so.

Plaintiffs seek to avoid the problems that those basic principles of standing create for them by arguing that they "are not required to prove that a 'traditional cause of action' exists in order to establish an actual controversy." (Pl. Br. at 13) (citing *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881). They quote *Goldston* for the proposition that a declaratory judgment may be "'the most assured and effective remedy available.'" (Pl. Br. at 13) (quoting *Goldston*, 361 N.C. at 34, 637 S.E.2d at 882). Further, they reiterate *Goldston's* language that a declaration of

government officials' duty can be "as effective as a command to perform it or an injunction not to transgress." *Goldston*, 361 N.C. at 34, 637 S.E.2d at 882 (citation omitted). *See also* Pl. Br. at 14. But, in making these statements, *Goldston* was discussing whether a declaratory judgment was an appropriate remedy in that case *after the Court had already determined that standing existed*. Specifically, the Court in *Goldston* held that "our cases demonstrate that a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds. Accordingly, plaintiffs were properly before the trial court." *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881. Thus, *Goldston* addresses taxpayer standing for wrongful use of public moneys. Only then did the Court "consider the form of relief sought by plaintiffs, who filed a declaratory judgment action under the North Carolina Uniform Declaratory Judgment Act" and proceed with the discussion from which plaintiffs quote freely in their efforts to bootstrap their standing argument. *Id.* Plaintiffs, who have not brought a taxpayer action and have not challenged alleged misuse of public funds, clearly cannot rely on taxpayer standing principles. *See Fuller v. Easley*, 145 N.C. App. 391, 396-97, 553 S.E.2d 43, 47 (2001) (plaintiff could not pursue taxpayer standing theory where he failed to make allegations in complaint that would show existence of such standing). Moreover, they cannot simply skip over the standing

determination in *Goldston* to rely on the *Goldston* opinion's discussion of whether a declaratory judgment was appropriate in a case in which the Court had already determined that the plaintiffs did indeed have standing to bring their taxpayer action.

Contrary to plaintiffs' theory, *Goldston* did not extend standing principles in North Carolina jurisprudence to unchartered waters that would include cases such as theirs. Indeed, this Court has recently noted that while *Goldston* allows a taxpayer to bring an action regarding the alleged misuse of public funds, "[a] taxpayer, as such, does not have standing to attack the constitutionality of any and all legislation." *Munger v. State*, __ N.C. App. __, 689 S.E.2d 230, 236 (2010). Moreover, the Court rejected the argument of the plaintiffs in *Munger* that *Goldston* substantially modified standing requirements to bring litigation in North Carolina.

> The fundamental difficulty with this aspect of Plaintiffs' argument is that it treats *Goldston* as having worked a fundamental change in North Carolina standing jurisprudence. A careful reading of *Goldston* provides no indication that the Supreme Court intended such a result. On the contrary, by stating that "our cases demonstrate that a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds," *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881, the Supreme Court clearly indicated that it viewed its standing decision in that case as nothing more than a restatement of established law.

Munger, 689 S.E.2d at 239.

Plaintiffs further argue that they must be adjudged to have standing or their asserted violation of the constitutional requirement of separation of powers may go unchallenged. Plaintiffs acknowledge that the General Assembly would be the logical entity to complain of the Governor invading its legislative powers, but plaintiffs contend the General Assembly has abdicated its responsibility when it authorized the Governor to execute gaming compacts in N.C.G.S. § 147-12(14). *See* Pl. Br. at 14. Plaintiffs failed to cite any North Carolina case law supporting the idea that the jurisdictional necessity of standing can be cavalierly dispensed with any time a plaintiff purports to base its claim on the Constitution. Such a proposition is at odds with the well-entrenched body of law from North Carolina courts dating back over a century holding that subject matter jurisdiction exists over a case *only* where the parties possess standing. *See, e.g., Peacock v. Stott*, 104 N.C. 154, 156, 10 S.E. 456, 457 (1889).

Without any North Carolina authority to support the notion that standing principles may be discarded in constitutional challenges, plaintiffs argue that the New York Court of Appeals found that standing did exist in a similar situation in the case of *Saratoga County Chamber of Commerce v. Pataki, Inc.*, 100 N.Y.2d 801, 798 N.E.2d 1047, *cert. denied*, 540 U.S. 1017, 157 L. Ed. 2d 430 (2003). In

Saratoga County, the New York Court of Appeals did note that, absent a finding of standing, important constitutional issues might not be adjudicated. However, it also noted that plaintiffs were taxpayers who had alleged the unlawful expenditure of State funds in connection with their challenge to the tribal-state compact in question. Accordingly, and in light of a specific state statute that authorized taxpayer suits against illegal spending, the plaintiffs could bring a taxpayer suit to determine the validity of the compact. *Id.* at 814, 798 N.E.2d at 1053. In this case, plaintiffs have not brought their action as a taxpayer suit and have alleged no unlawful spending; nor do they have a specific statutory standing provision on which to rely.

Other courts have found a lack of standing in suits brought by individuals to challenge tribal-state compacts. In *Sears v. Hull*, 192 Ariz. 65, 961 P.2d 1013 (Ariz. 1998), for example, the plaintiffs, who lived in the vicinity of a proposed tribal gaming establishment, sought to enjoin the Arizona governor from entering into any gaming compacts with a local tribe. The plaintiffs alleged that they possessed standing because they lived in close proximity to the proposed establishment and claimed that they would suffer a number of harms from the secondary effects of the gaming activities. *Id*. at 67-70, 961 P.2d at 1015-18. The Arizona Supreme Court rejected this argument, holding that, even taking those

allegations as true, the harm alleged was too generalized to confer standing upon them to litigate the constitutional issue they sought to raise. *Id*. at 69-70, 961 P.2d at 1017-18.

A similar result was reached in *Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136 (D. Or. 2005). In that case, a group of landowners sued the governor of Oregon, other state officials, and several Indian tribes located in the state, seeking – among other things – a declaration that a tribal-state gaming compact had been unlawfully executed by the Governor. The plaintiffs alleged that they possessed standing to assert this claim because the gaming activities to be engaged in by the tribe would harm them in the form of higher taxes, lower property values, increased traffic and pollution, and a detrimental effect on their businesses. *Id*. at 1143. The court held that the plaintiffs lacked standing, ruling that none of these claimed injuries were sufficiently "concrete or particularized" to satisfy standing requirements. *Id*. The court reasoned that the alleged injuries, even if true, were not personal to the plaintiffs since they would be shared by many others. *Id*. at 1142-45. *See also State ex rel. Coll v. Johnson*, 128 N.M. 154, 990 P.2d 1277 (1999) (holding that five New Mexico citizens, four individual state legislators, and a non-profit corporation lacked standing to bring a mandamus action to

challenge the validity of tribal-state gaming compacts following legislative action to authorize the gaming compacts).

For all of these reasons, dismissal of the present lawsuit by the trial court was proper because the courts lack subject matter jurisdiction as a result of plaintiffs' absence of standing. *See Wilkes v. North Carolina State Bd. of Alcoholic Control*, 44 N.C. App. 495, 496-97, 261 S.E.2d 205, 206-07 (1980) (trial court correctly determined that plaintiffs lacked standing where they alleged statute was unconstitutional on a number of grounds but failed to allege any resulting direct injury); *Spencer v. Spencer*, 37 N.C. App. 481, 489, 246 S.E.2d 805, 811 (defendant did not possess standing to challenge constitutionality of statute where he lacked "personal and concrete stake"), *cert. denied*, 296 N.C. 106, 249 S.E.2d 804 (1978); *Green v. Eure*, 27 N.C. App. 605, 608-610, 220 S.E.2d 102, 105-06 (1975) (standing was lacking where party challenging constitutionality of statute merely had same general interest common to other members of public), *cert. denied and appeal dismissed*, 289 N.C. 297, 222 S.E.2d 696 (1976). Accordingly, this Court should affirm the trial court's dismissal pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) for lack of jurisdiction in view of plaintiffs' lack of standing.

B. PLAINTIFFS HAVE ABANDONED THEIR CLAIM RELATING TO N.C.G.S. § 147-12(14) BY CONCEDING THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS.

Plaintiffs acknowledge that the trial court properly granted the defendant's motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) on the grounds that their claims against the existing Compact are time-barred. They recognize that the General Assembly in 2001 authorized the Governor to negotiate and enter into compacts when it enacted 2001 N.C. SESS. LAWS 513 § 29(a), eventually codified as N.C.G.S. § 147-12(14). In Section 29(c) of that legislation, the General Assembly made all of Section 29 of Chapter 513 effective as of 1 August 1994 and applicable "to compacts and amendments thereto executed on or after that date." Consequently, as plaintiffs themselves admit, any claim against the Compact or the 2000 amendment or the ratification of the Compact and its amendments is now time-barred. *See* Pl. Br. at 17.

Despite acknowledging that any challenge of the existing Compact, as amended, or its ratification is barred by the statute of limitations, plaintiffs make an argument that somehow the alleged invalidity of the Compact should be considered by the Court. Plaintiffs, by conceding the statute of limitations barrier, have abandoned any arguments as to the existing Compact, as amended, and its ratification. Their further, superfluous, arguments under this heading should

therefore be ignored. Accordingly, the trial court's dismissal of their complaint, insofar as it related to the existing Compact, as amended, and legislative ratification of the Compact and amendments, should be affirmed by this Court.

C. PLAINTIFFS HAVE ABANDONED THEIR CLAIM RELATING TO N.C.G.S. § 147-12(14) BY FAILING TO ARGUE THAT LACHES DID NOT BAR THEIR SUIT.

Defendant also raised the defense of laches in their motion to dismiss. (R p. 57) Because the trial court did not specify the grounds for its ruling, the general presumption must be that it based its ruling on any and all of the grounds asserted by defendant. *See Fuller*, 145 N.C. App. at 394, 553 S.E.2d at 46. *See also Snipes v. Jackson*, 69 N.C. App. 64, 67, 316 S.E.2d 657, 659 (1984) ("Since the trial court did not specify the grounds upon which defendants' motions for summary judgment were granted, this Court must examine every basis for the rulings."), *appeal dismissed, disc. review denied*, 312 N.C. 85, 321 S.E.2d 899 (1984); *Ballenger v. Crowell*, 38 N.C. App. 50, 54, 247 S.E.2d 287, 291 (1978) (where the trial court did not specify the grounds on which it granted a summary judgment motion, "every possible basis for the court's ruling must be examined in order to determine whether the motion was properly granted").

Plaintiffs have made no reference to the laches issue in their brief and thus have abandoned any challenge to the ruling insofar as the dismissal was based in

part on laches. Seemingly, plaintiffs' acknowledgment that the challenge to the existing Compact, as amended, and the legislative ratification of the Compact is time-barred, negates any need for the Court to consider the laches question. Nevertheless, the doctrine of laches – which fully applies to declaratory judgment actions – is properly invoked where the plaintiff's delay in bringing an action is unreasonable and has served to disadvantage or prejudice the party raising this defense. *Taylor v. City of Raleigh*, 290 N.C. 608, 622-23, 227 S.E.2d 576, 584-85 (1976). Moreover, the doctrine of laches applies to challenges to actions by the State of North Carolina or any of its municipalities, and the fact that plaintiffs allege unconstitutional governmental action does not bar the applicability of laches to their claims. *Cannon v. City of Durham*, 120 N.C. App. 612, 463 S.E.2d 272 (1995), *disc. review denied*, 342 N.C. 653, 467 S.E.2d 708 (1996); *Franklin County v. Burdick*, 103 N.C. App. 496, 405 S.E.2d 783 (1991), *cert. denied*, 332 N.C. 147, 419 S.E.2d 570 (1992).

In reliance upon the validity of the Compact (and on the legitimacy of the General Assembly's conferral of authority upon the Governor to execute the Compact) during these intervening years, tribal hotels and casinos have been established in North Carolina and an entire infrastructure has been built that is premised on the validity of the Compact (and its amendments). If plaintiffs

desired to challenge either the Compact itself or the legislation authorizing the Governor to execute it on behalf of the State, basic principles of laches required that they not be dilatory in doing so. *See*, *e.g.*, *Save Our Schs. of Bladen County, Inc. v. Bladen County Bd. of Educ.*, 140 N.C. App. 233, 237-38, 535 S.E.2d 906, 909-10 (2000) (dismissing on laches grounds suit seeking to enjoin school board from proceeding with building plan where plaintiff made tactical decision to wait almost two years before filing action); *Capps v. City of Raleigh*, 35 N.C. App. 290, 298-99, 241 S.E.2d 527, 532 (1978) (where plaintiffs "did nothing" for approximately six years to indicate their displeasure with ordinance, their delay was unreasonable such that laches barred their claim).

Plaintiffs' claims against the existing Compact, as amended, and the legislative ratification of that Compact, are thus barred by laches, and this Court should affirm the trial court's dismissal in view of plaintiffs' failure to argue laches on appeal.

D. PLAINTIFFS' CHALLENGE TO FUTURE AMENDMENTS OR REVISIONS TO THE COMPACT WAS PROPERLY DISMISSED ON RIPENESS GROUNDS.

Defendant moved to dismiss plaintiffs' complaint, in part, on grounds of ripeness with regard to challenges to potential future amendments to the Compact. (R p. 57) The trial court's granting of defendant's motion to dismiss, with no

limitations on the grounds on which it ruled, presumably included a determination that plaintiffs' claim was barred by ripeness insofar as it challenged future amendments. The trial court was correct in granting the motion to dismiss on these grounds, and this Court should so hold.

In their complaint, plaintiffs sought an injunction barring the Governor from executing any future amendments to the Compact. However, the principal basis alleged in the complaint to support such a claim is their assertion that the Governor made a general statement in a speech suggesting that she was "open to the possibility" of expanding the Tribe's gaming options. (Compl. ¶ 24, R p. 11) The Governor's statement that she might be open to an amendment to the Compact if the occasion arose does not, without more, create any likelihood that an amendment will occur in view of the absence of any allegation by plaintiffs of proposals or requests for amendment from either party and especially considering that the current Compact is valid until 2030.

In their brief, plaintiffs point to the fact that the Governor rejected their letter demanding that she notify the Tribe to terminate video poker games and that she refrain from future negotiations or amendments to the Compact. *See* R pp. 53-54. Defendant, of course, responded by letter from her counsel rejecting plaintiffs' theories that the Compact is unlawful. (R p. 55) Plaintiffs try to twist her

rejection of their demands and legal theories into a basis for inferring "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." (Pl. Br. at 19) To the contrary, the letter merely reflects that the Governor did not subscribe to the theories put forward by plaintiffs and that the Governor did not agree to treat the Compact as invalid based purely on plaintiffs' letter. Plaintiffs have failed to allege that such an amendment to the Compact is imminent. As a result, plaintiffs' attempt to enjoin future Compact amendments is not currently ripe for review.

What plaintiffs are actually seeking is an impermissible advisory opinion from this Court as to whether any such future amendments would be legal. "It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter." *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942) (citation omitted). *Accord City of Greensboro v. Wall*, 247 N.C. 516, 519, 101 S.E.2d 413, 416 (1958). *See also Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 408, 584 S.E.2d 731, 740 (2003) (no decision rendered on provision "not an issue drawn

into focus by these proceedings" because "to reach this question would be to render an unnecessary advisory opinion"). Even "'the apparent broad terms of the [Declaratory Judgment Act] do not confer upon the court unlimited jurisdiction of a merely advisory nature to construe and declare the law.'" *Malloy v. Cooper*, 356 N.C. 113, 116, 565 S.E.2d 76, 78 (2002) (quoting *State ex rel. Edmisten*, 312 N.C. at 338, 323 S.E.2d at 303). *See also State v. Coltrane*, 188 N.C. App. 498, 508, 656 S.E.2d 322, 329, *disc. rev. denied and appeal dismissed*, 362 N.C. 476, 666 S.E.2d 760 (2008) ("courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, . . . deal with theoretical problems, give advisory opinions, . . . or give abstract opinions") (citation omitted).

Importantly, "the Declaratory Judgment Act does not 'require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise.'" *Nat'l Travel Servs. v. State ex rel. Cooper*, 153 N.C. App. 289, 292, 569 S.E.2d 667, 669 (2002). *See also Granville County Bd. of Comm'rs v. North Carolina Hazardous Waste Mgmt. Comm'n*, 329 N.C. 615, 625, 407 S.E.2d 785, 791 (1991) ("When no genuine controversy presently exists between the parties, the courts cannot and should not intervene. The rule applies with special force to prevent the premature litigation of constitutional issues.") (internal citations omitted). Plaintiffs are thus not entitled

to have this Court entertain their request for "premature litigation of constitutional issues" in order to obtain a declaratory judgment to "put on ice to be used if and when" there may be some possibility of an amendment to the Compact. Despite their efforts to create one, plaintiffs have not put forward, and cannot put forward, any "actual or real existing controversy between parties having adverse interests in the matter in dispute." *Lide v. Mears*, 231 N.C. 111, 118, 56 S.E.2d 404, 409 (1949). *Accord State of North Carolina ex. rel Utils. Comm'n v. Carolina Water Serv., Inc.*, 149 N.C. App. 656, 658, 562 S.E.2d 60, 62, (2002). For this reason, plaintiffs' request for injunctive relief as to possible future Compact amendments is not ripe and was properly dismissed by the trial court. *See Sterling v. Gil Soucy Trucking, Ltd.*, 146 N.C. App. 173, 182-83, 552 S.E.2d 674, 680 (2001) (party's claim was not ripe where it hinged on future occurrences that might not happen).

E. PLAINTIFFS' ACTION WAS PROPERLY DISMISSED PURSUANT TO RULE 12(b)(7) OF THE RULES OF CIVIL PROCEDURE FOR FAILURE TO JOIN A NECESSARY PARTY.

Plaintiffs contend that the trial court erred in dismissing their complaint based on defendant's motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(7) for failure to join a necessary party. Contrary to plaintiffs' argument, the trial court was correct, and its order below should be left undisturbed.

Under Rule 12(b)(7), an action may be dismissed for failure to join a necessary party to the litigation. Under N.C.G.S. § 1A-1, Rule 19(b), when a claim cannot be completely determined without joinder of another party or parties not united in interest with the parties before the court, the court must order the party to appear. North Carolina's appellate courts have emphasized that "[n]ecessary parties *must* be joined in an action." *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 438, 527 S.E.2d 40, 44 (2000) (emphasis added). Indeed, when a necessary party is not joined, the trial court must intervene *ex mero motu* to ensure that the matter does not proceed in the absence of a necessary party. *See In re Foreclosure of a Lien*, ___ N.C. App. ___, 683 S.E.2d 450 (2009) (holding that purchaser at a foreclosure sale was a necessary party to set aside and vacate the sale).

"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." *Karner*, 351 N.C. at 438-39, 527 S.E.2d at 44 (internal quotation marks and citation omitted). *See also Pickelsimer v. Pickelsimer*, 255 N.C. 408, 411, 121 S.E.2d 586, 588 (1961) ("'Necessary or indispensible parties are those whose interests are such that no

decree can be rendered which will not affect them, and therefore the Court cannot proceed until they are brought in.'") (citation omitted).

It cannot seriously be disputed that the Cherokee Tribe has a strong interest in this suit. For seventeen years, the Tribe has relied on the authority of the Governor to execute gaming compacts on behalf of North Carolina. A declaration that the current Compact is null and void or that the Cherokee Tribe cannot enter into future compacts with the Governor of North Carolina would directly affect the rights of the Cherokee Tribe. *See Hatcher v. Harrah's N.C. Casino Co., L.L.C.*, 169 N.C. App. 151, 157, 610 S.E.2d 210, 213-14 (2005) (holding that resolution of gaming-related dispute at casino owned by Tribe implicated tribal self-governance rights). The Tribe is, therefore, a necessary party to this action.

It is true that dismissal for lack of a necessary party is justified "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) (quoting *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)). However, the Tribe is immune from suit because it enjoys sovereign immunity. *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 140 L. Ed. 2d 981 (1998) ("As 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.") Because the Cherokee

Tribe is a necessary party to this litigation and cannot be joined in light of its sovereign immunity, dismissal of this action is warranted based on plaintiffs' failure to join it as a party.

Plaintiffs argue that the litigation should nevertheless be allowed to proceed despite the absence of the Tribe because otherwise the plaintiffs would be foreclosed from pursuing their claims and because plaintiffs suggest the Tribe is not a necessary party to their challenge to future Compact amendments. Courts in other jurisdictions have taken a different view. For example, in *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002), several racetrack owners brought a challenge to the authority of the governor of Arizona to negotiate new tribal gaming compacts or to extend existing compacts. The trial court entered an injunction prohibiting the governor from executing any new compacts. The Ninth Circuit reversed and held the trial court had abused its discretion in failing to find that the tribes were necessary parties to the litigation. *Id*. at 1024-25. The explanation of the court in that case includes language highly relevant to plaintiffs' argument that they seek only to address future extensions or amendments of the Compact:

> Although the district court enjoined only the execution of future compacts or the extension of existing ones, its order amounts to a declaratory judgment that the present gaming

> conducted by the tribes is unlawful. It is true that the tribes are not bound by this ruling under principles of res judicata or collateral estoppel because they are not parties, but their interests may well be affected as a practical matter by the judgment that its operations are illegal. *See Confederated Tribes of the Chehalis Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991) (amended opinion) (judgment against Secretary precluding continued recognition of non-party tribe would alter tribe's authority to govern reservation). The sovereign power of the tribes to negotiate compacts is impaired by the ruling. *See Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002). Moreover, enforcement authorities may consider themselves compelled to act against the tribes. That the tribes could litigate the issue of legality free of the constraints of res judicata or collateral estoppel does not by itself excuse their absence as necessary parties. Otherwise Rule 19(a) would become a nullity: a person's interests could never be impaired or impeded in the absence of joinder. *See Provident Tradesmens, 390 U.S. at 110*.

American Greyhound, 305 F.3d at 1024. The court proceeded to analyze the question of whether the tribes were indispensable parties under then Rule 19 of the Federal Rules of Civil Procedure. In concluding that they were, the court rejected the argument that the inability to join the tribes because of their sovereign immunity should result in allowing the action to proceed without them. Instead, the fact that "there is no adequate remedy available to [the plaintiffs] if this case is dismissed for lack of joinder of indispensable parties" "is a common consequence

of sovereign immunity, and the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims." *Id.* at 1025.

Similarly, in *Dewberry*, 406 F. Supp. 2d 1136, the court addressed the question of whether tribes who had entered into compacts with the state of Oregon were necessary parties to a lawsuit contesting the governor's authority to enter into such compacts. The plaintiffs claimed that the rights of the tribes would not be affected by the suit since no relief was being sought from them and that the litigation would, therefore, not impair the tribes' ability to protect their interests. *Id*. at 1146-47. The court refused to accept the plaintiffs' arguments, holding that the legal issues raised by the plaintiffs were matters as to which the tribes' interests were implicated, such that the tribes were necessary parties. *Id*. at 1147-50. The court also followed the precedent of *American Greyhound*, 305 F.3d at 1023 n.5, in concluding that the state did not, and could not, adequately represent the tribal interests. *Dewberry*, 406 F. Supp. at 1147. *See also State ex rel. Coll*, 128 N.M. at 156-57, 900 P.2d at 1879-80 (concluding that Native American Tribes were indispensable parties to litigation attacking legislation that authorized Indian gaming).

In this case, as well, the Cherokee Tribe is a necessary and indispensable party to the present action. Therefore, the trial court properly dismissed this case

based on the Tribe's absence. *See City of Raleigh v. Hudson Belk Co.,*114 N.C. App. 815, 816- 17, 443 S.E.2d 112, 113-14 (1994) (affirming trial court's dismissal based on petitioner's failure to join necessary party); *Brown v. Miller*, 63 N.C. App. 694, 698-99, 306 S.E.2d 502, 505-06 (1983) (motion to dismiss was properly granted where relief sought could not be granted without presence of necessary party), *appeal dismissed and disc. review denied*, 310 N.C. 476, 312 S.E.2d 882 (1984). The trial court's ruling should be affirmed by this Court.

F. PLAINTIFFS' ATTEMPT TO ARGUE THE VALIDITY OF THE GOVERNOR'S AUTHORITY TO ENTER INTO COMPACTS IS MISPLACED AND ERRONEOUS.

Plaintiffs attempt by a footnote to their brief, Pl. Br. at n.5, pp. 28-29, to advance their contention that the Governor lacks authority to negotiate tribal compacts, and that this position is supported by decisions from other jurisdictions. Not only is this argument inappropriate in view of the fact that this case involves a motion to dismiss that does not address the merits, but the argument is also erroneous. Significantly, the cases cited by plaintiffs generally present situations in which the legislatures of the respective states had not authorized the Governor to negotiate compacts or ratified the compacts. For example, in *Saratoga County*, the court noted that "[t]he Legislature has been free to ratify the compact but, as yet, has not done so." 100 N.Y.2d at 824, 766 N.Y.S.2d at 668, 798 N.E.2d at

1061. Similarly, in *Narragansett Indian Tribe of Rhode Island v. State of Rhode Island*, the Supreme Court of that state concluded that the Governor had no constitutional or statutory authority to negotiate compacts and that an argument made concerning an implied constitutional power must be rejected. 667 A.2d 280 (R.I. 1995). Following the same pattern, the Florida Supreme Court noted that the legislature had neither authorized the Governor to negotiate a compact or ratified the compact after it was signed. *Florida House of Representatives v. Crist*, 990 So. 2d 1035, 1038 (Fla. 2008). Nor is there any indication that the legislature had imposed any authority in the governor to negotiate and execute compacts or that the legislature had ratified existing compacts in the case of *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (1992). The significance of legislative authorization or ratification is illustrated by the decision of the Supreme Court of New Mexico when it rejected a lawsuit brought to challenge a tribal-state compact following the enactment of legislation codifying the compact. *See State ex rel. Coll*, 128 N.M. at 158, 900 P.2d at 1281, noting the contrasting circumstances as to its prior decision in *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995), cited by plaintiffs, as the result of the intervening legislation.

In this case, the General Assembly has enacted legislation authorizing the Governor to negotiate and execute tribal-state compacts, subsequent to the

execution of the existing Compact, and retroactive to the time of execution of the initial Compact. *See* N.C.G.S. § 147-12(14); 2001 N.C. SESS. LAWS 513 § 29(a), 29(c). The cases that have examined the issue of a governor's authority under similar circumstances have all concluded that the authority was proper or that plaintiffs were not entitled to bring litigation challenging that authority. *See Sears*, 192 Ariz. at 72, 961 P.2d at 1020 (noting that Arizona law authorized the Governor to enter into standard gaming compacts and distinguishing prior case law on that basis); *Dewberry*, 406 F. Supp. 2d at 1155-56 (concluding that statutory authorization for Governor to enter into agreements to ensure that state did not interfere with or infringe rights of Native Americans authorized execution of compacts); *Willis v. Fordice*, 850 F. Supp. 523, 532 (S.D. Miss. 1994), *aff'd without opinion*, 55 F.3d 633 (5th Cir. 1995) (concluding that state statutory authority for governor to transact state's business with other sovereigns provided authority to enter into compact). Therefore, plaintiffs' effort to argue the validity of the Governor's actions in executing the Compact is not only misplaced in this appeal, but it is wrong legally.

CONCLUSION

For all the reasons discussed above, the trial court properly granted defendant's motion to dismiss pursuant to N.C.G.S. § 1A-1, Rules 12 (b) (1), (6) and (7). This Court should reject each of plaintiffs' arguments and affirm the trial court's ruling for the defendant.

Respectfully submitted, this the 26th day of April, 2011.

Electronically submitted
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CERTIFICATE OF COMPLIANCE WITH APPELLATE RULE 28(J)(2)

The undersigned hereby certifies that the foregoing brief complies with Rule 28(j)(2)(A)2 of the Rules of Appellate Procedure in that, according to the word processing program used to produce this brief (WordPerfect X3), the document does not exceed 8750 words, exclusive of cover, index, table of authorities, certificate of compliance, certificate of service, and appendices.

This the 26th day of April, 2011.

Electronically Submitted
Norma S. Harrell
Special Deputy Attorney General

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **BRIEF FOR DEFENDANT-APPELLEE** in the above titled action upon all other parties to this cause by:

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

[ ] Transmitting a copy hereof to each said party via electronic mail; or

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

Hugh Stevens
Michael J. Tadych
Stevens Martin Vaughn & Tadych, PLLC
The Historic Pilot Mill
1101 Haynes Street, Suite 100
Raleigh, NC 27604

This the 26th day of April, 2011.

Electronically Submitted
Norma S. Harrell
Special Deputy Attorney General

CONTENTS OF APPENDIX

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

SESSION LAW 2006-6
SENATE BILL 912

AN ACT TO PHASE OUT THE POSSESSION OR OPERATION OF VIDEO GAMING MACHINES BY LIMITING THE NUMBER OF VIDEO GAMING MACHINES THAT MAY BE POSSESSED OR OPERATED TO TWO PER LOCATION ON OCTOBER 1, 2006, AND TO ONE PER LOCATION ON MARCH 1, 2007, AND TO PROHIBIT POSSESSION OR OPERATION OF VIDEO GAMING MACHINES AS OF JULY 1, 2007, EXCEPT PURSUANT TO A TRIBAL-STATE COMPACT.

The General Assembly of North Carolina enacts:

SECTION 1. Effective October 1, 2006, G.S. 14-306.1(b) reads as rewritten:

"(b) Prohibition of More Than ~~Three~~ Two Existing Video Gaming Machines at One Location. – It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation at one location more than ~~three~~ two video gaming machines as defined in subsection (c)."

SECTION 2. Effective March 1, 2007, G.S. 14-306.1(b), as amended by Section 1 of this act, reads as rewritten:

"(b) Prohibition of More Than ~~Two~~ One Existing Video Gaming ~~Machines~~ Machine at One Location. – It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation at one location more than ~~two~~ one video gaming ~~machines~~ machine as defined in subsection (c)."

SECTION 3. G.S. 14-306.1 is repealed.

SECTION 4. Part 1 of Article 37 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-306.1A. Types of machines and devices prohibited by law; penalties.**

(a) Ban on Machines. – It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation any video gaming machine as defined in subsection (b) of this section, except for the exemption for a federally recognized Indian tribe under subsection (e) of this section for whom it shall be lawful to operate and possess machines as listed in subsection (b) of this section if conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe, as provided in G.S. 147-12(14) and G.S. 71A-8.

(b) Definitions. – As used in this section, a video gaming machine means a slot machine as defined in G.S. 14-306(a) and other forms of electrical, mechanical, or computer games such as, by way of illustration:

(1) A video poker game or any other kind of video playing card game.
(2) A video bingo game.
(3) A video craps game.
(4) A video keno game.
(5) A video lotto game.
(6) Eight liner.
(7) Pot-of-gold.
(8) A video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player.

For the purpose of this section, a video gaming machine is a video machine which requires deposit of any coin or token, or use of any credit card, debit card, or any other method that requires payment to activate play of any of the games listed in this subsection.

For the purpose of this section, a video gaming machine includes those that are within the scope of the exclusion provided in G.S. 14-306(b)(2) unless conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe as provided in G.S. 147-12(14) and G.S. 71A-8. For the purpose of this section, a video gaming machine does not include those that are within the scope of the exclusion provided in G.S. 14-306(b)(1).

(c) Exemption for Certain Machines. – This section shall not apply to:
(1) Assemblers, repairers, manufacturers, sellers, lessors, or transporters of video gaming machines who assemble, repair, manufacture, sell, lease, or transport them for use out-of-state, or
(2) Assemblers, repairers, manufacturers, sellers, lessors, or transporters of video gaming machines who assemble, repair, manufacture, sell, or lease video gaming machines for use only by a federally recognized Indian tribe if such machines may be lawfully used on Indian land under the Indian Gaming Regulatory Act.

To qualify for an exemption under this subsection, the machines must be disabled and not operable, unless the machines are located on Indian land where they may be lawfully operated under a Tribal-State Compact.

(d) Ban on Warehousing. – It is unlawful to warehouse any video gaming machine except in conjunction with the activities permitted under subsection (c) of this section.

(e) Exemption for Activities Under IGRA. – Notwithstanding any other prohibitions in State law, the form of Class III gaming otherwise prohibited by subsections (a) through (d) of this section may be legally conducted on Indian lands which are held in trust by the United States government for and on behalf of federally recognized Indian tribes if conducted in accordance with an approved Class III Tribal-State Gaming Compact applicable to that tribe as provided in G.S. 147-12(14) and G.S. 71A-8."

SECTION 5. G.S. 14-306.2 reads as rewritten:

"**§ 14-306.2. Violation of ~~G.S. 14-306.1~~ G.S. 14-306.1A a violation of the ABC laws.**

A violation of ~~G.S. 14-306.1~~ G.S. 14-306.1A is a violation of the gambling statutes for the purposes of G.S. 18B-1005(a)(3)."

SECTION 6. G.S. 147-12(14) reads as rewritten:

"(14) 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. The Governor shall report any gaming compact, or amendment thereto, to the Joint Legislative Commission on Governmental Operations."

SECTION 7. G.S. 14-306.1(i) reads as rewritten:

"(i) Registration With Sheriff. – No later than October 1, 2000, the owner of any video game which is regulated by this section shall register the machine with the Sheriff of the county in which the machine is located using a standardized registration form supplied by the Sheriff. The registration form shall be signed under oath by the owner of the machine. A material false statement in the registration form shall subject the owner to seizure of the machine under G.S. 14-298 in addition to any other punishment imposed by law. ~~At any time that the video gaming machine is moved to a different location, the owner shall reregister the machine with the Sheriff prior to its being placed in operation.~~ At a minimum, the registration form shall require that the registrant provide evidence of the date on which the machine was placed in operation, the serial number of the machine, the location of the facility at which the machine is operated, and the name of the owner of the facility at which the machine is operated. Each Sheriff shall report to the Joint Legislative Commission on Governmental Operations no later than November 1, 2000, on the total number of machines registered in that county, itemizing how many locations have one, two, or three machines. No machine may be moved from its registered location except in conjunction with the activities described in subsections (l) and (m) of this section."

SECTION 8. G.S. 14-306.1(l) reads as rewritten:

"~~(l) Exemption for Certain Machines. This section shall not apply to assemblers, manufacturers, and transporters of video gaming machines who assemble, manufacture, and transport them for sale in another state as long as the machines, while located in this State, cannot be used to play the prohibited games, and does not apply to those who assemble, manufacture, and sell such machines for the use only by a federally recognized Indian Tribe if such machines may be lawfully used on Indian Land under the Indian Gaming Regulatory Act.~~

(l) Exemption for Certain Machines. – This section shall not apply to:

(1) Assemblers, repairers, manufacturers, sellers, lessors, or transporters of video gaming machines who assemble, repair, manufacture, sell, lease, or transport them for use out-of-state, or

(2) Assemblers, repairers, manufacturers, sellers, lessors, or transporters of video gaming machines who assemble, repair, manufacture, sell, or lease video gaming machines for use only by a federally recognized

Indian tribe if such machines may be lawfully used on Indian land under the Indian Gaming Regulatory Act.

To qualify for an exemption under this subsection, the machines must be disabled and not operable, unless the machines are located on Indian land where they may be lawfully operated under a Tribal-State Compact."

SECTION 9. G.S. 14-306.1(m) reads as rewritten:

"(m) Ban on Warehousing. – It is unlawful to warehouse any video gaming machine except in conjunction with the ~~permitted assembly, manufacture, and transportation of such machines under subsection (l) of this section.~~ activities permitted under subsection (l) of this section."

SECTION 10. G.S. 105-256(d)(1) is repealed, but that repeal does not affect reports for activities prior to July 1, 2007.

SECTION 11. G.S. 14-309 reads as rewritten:

"**§ 14-309. Violation made criminal.**

(a) Any person who violates any provision of G.S. 14-304 through 14-309 is guilty of a Class 1 misdemeanor for the first offense, and is guilty of a Class ~~I~~ H felony for a second offense and a Class ~~H~~ G felony for a third or subsequent offense.

(b) Notwithstanding the provisions of subsection (a) of this section, any person violating the provisions of ~~G.S. 14-306.1~~ G.S. 14-306.1A involving the operation of five or more machines prohibited by that section is guilty of a Class G felony."

SECTION 12. Section 1 of this act becomes effective October 1, 2006, and applies to offenses committed on or after that date; Section 2 of this act becomes effective March 1, 2007, and applies to offenses committed on or after that date; and Sections 3 through 5, 10, and 11 become effective July 1, 2007, and apply to offenses committed on or after that date. The remainder of this act is effective when it becomes law. Prosecutions for offenses committed before the effective dates in this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. 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.

In the General Assembly read three times and ratified this the 6th day of June, 2006.

s/ Beverly E. Perdue
President of the Senate

s/ James B. Black
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 7:10 p.m. this 6th day of June, 2006