

COURT OF APPEALS OF NORTH CAROLINA

CHARLES HEATHERLY; THOMAS SPAMPINATO; W. EDWARD GOODALL, JR.; PAUL STAM; WAKE COUNTY TAXPAYERS ASSOCIATION; and THE NORTH CAROLINA FAMILY POLICY COUNCIL

Plaintiffs,

WILLIS WILLIAMS; and NORTH CAROLINA COMMON SENSE FOUNDATION,

Plaintiff-Intervenors

v.

STATE OF NORTH CAROLINA; CHARLES A. SANDERS, BRYAN E. BEATTY, LINDA CARLISLE, ROBERT A. FARRIS, JR., JOHN R. MCARTHUR, JIM WOODWARD, and ROBERT W. APPLETON, Members of the North Carolina Lottery Commission, in their official capacity; NORTH CAROLINA LOTTERY COMMISSION; THOMAS N. SHAHEEN, Executive Director of the North Carolina Education Lottery, in his official capacity; MICHAEL F. EASLEY, Governor of the State of North Carolina, in his official capacity; RICHARD H. MOORE, Treasurer of the State of North Carolina, in his official capacity,

Defendants.

FROM WAKE COUNTY

PLAINTIFF APPELLANTS' REPLY BRIEF

Appellants, pursuant to Rule 28(h)(2) of North Carolina Rules of Appellate Procedure, submit this Reply Brief regarding Appellees' assertion of the defense of laches, a new or additional question not raised in Appellants' opening brief. Appellants reincorporate by reference the Statement of the Case and Statement of Facts previously included in their initial appellate brief.

ARGUMENT

APPELLANTS' LAWSUIT IS NOT BARRED BY LACHES.

(Plaintiff-Appellants' Assignments of Error Nos. 3-8; R pp. 468-469)

Although Appellees have withdrawn their cross-appeal, they have raised the defense of laches in their appellate brief (pp. 31-35), arguing that Appellants had supposedly waited an unreasonable length of time before filing this lawsuit, resulting in prejudice to the defendants and warranting dismissal of Appellants' lawsuit. Appellees' argument is without merit and should be rejected.

The Lottery Act was signed into law on 31 August 2005, the day after it passed the Senate. Because the basis of this lawsuit is the unconstitutional manner by which the statute was enacted, plaintiffs could not have begun work on the instant action until the questionable process had fully transpired. Promptly upon the passage and enactment of the Lottery Act, plaintiffs

undertook the painstaking process of challenging the bill. By letters dated 17 November 2005, less than three months after enactment, counsel for plaintiffs delivered letters to defendants Sanders and Moore and to Attorney General Cooper, informing them of plaintiffs' position that the passage of the Lottery Act was void as unconstitutional, and demanding that defendants each refrain from carrying out the Lottery Act. R pp. 102, 104, 106, 409.

Plaintiffs then waited in vain for defendants either to respond or to comply with the request. Less than one month later, when plaintiffs determined that defendants were moving forward with the establishment of a lottery pursuant to the Lottery Act, plaintiffs filed this lawsuit. The Complaint was filed on 15 December 2005—only three and a half months after the Lottery Act was enacted by the state legislature and signed into law by Governor Easley.

Laches may occur as a bar to a claim if a party has failed to assert an equitable right for such time as materially prejudices the adverse party. Harris & Gurganus, Inc. v. Williams, 37 N.C. App. 585, 590, 246 S.E.2d 791 (1978). The doctrine of laches, however, is not based upon the mere passage of time; it will not bar a claim unless the delay (1) is “unreasonable” and (2) causes “disadvantage, injury or prejudice” to the party asserting the defense. Taylor v. City of Raleigh, 290 N.C. 608, 622-23, 227 S.E.2d 576,

584-85 (1976). Accordingly, the mere passage of years does not in itself entitle a party to the bar of laches. Cieszko v. Clark, 92 N.C. App. 290, 297, 374 S.E.2d 456, 460 (1988). Rather, an *unreasonable* length of time *resulting in prejudice* to the opposing party must be shown in order to successfully assert such a defense. McRorie v. Query, 32 N.C. App. 311, 323, 232 S.E. 2d 312, 320 (1977).

The passage of time in this case is a matter of months, not years as tends to typify laches cases. It is worth noting that all the cases cited by Appellees in their Brief concerned periods of time consisting of from more than a year's delay to as many as six years. Our Supreme Court has previously considered as "reasonable," a period of time similar to that in the instant case. See Taylor v. Raleigh, 290 N.C. at 623. The three and a half month time span here is minimal considering the complexity of the issues involved. Rushing to file a lawsuit is not only not in the best interests of the parties, but also would have been a disservice to the court and the public. Plaintiff-Appellants and their counsel needed an opportunity to research the law, develop their theory, as well as provide defendants with the opportunity to avoid unconstitutional endeavors by the sending of demand letters. This is not a simple case. It involves multiple issues of constitutional interpretation and construction. Thus, in light of the brevity of the time lapse and the

complexity of the case, any time lapse is entirely reasonable. Given the obvious complexity of both the facts and the law involved in such a legal challenge, any immediate filing would have posed a potential violation of counsel's duty under Rule 11 of the North Carolina Rules of Civil Procedure.

Moreover, defendants have not in any way been prejudiced by the alleged delay. Other than the fact of the hiring of Thomas Shaheen as Executive Director of the North Carolina Education Lottery on 17 November 2005, at the time defendants were notified by plaintiffs' demand letter in November 2005 that the constitutionality of the Lottery Act was in grave doubt, no employees had been hired, no contracts had been entered, and no monies had been expended. R. pp. 391-396 (Affidavit of Thomas Shaheen).

Finally, it is important to note that in determining whether a delay constitutes laches, the court must also consider whether the party asserting laches was itself aware, at some point prior to the actual initiation of litigation, of the claim it is now arguing was unreasonably delayed. See Cieszko v. Clark, 92 N.C. App. 290, 298, 374 S.E.2d 456, 461 (1988); Young v. Young, 43 N.C. App. 419, 425, 259 S.E. 348, 351 (1979). As of 17 November 2005, it is clear that Appellees were fully aware of Plaintiff-

Appellants' position that the Lottery Act was void as unconstitutional and that Plaintiffs-Appellants were actively considering legal action to challenge its implementation. Despite such express warning and notice of Plaintiff-Appellants' claim, Appellees chose to speed ahead with their expenditure of funds and hiring of staff. Therefore, any "injury" suffered by Appellees (assuming arguendo that any such injury has even occurred) was undertaken voluntarily by them with the express knowledge of potential ensuing litigation. In such a situation, their defense of laches must be rejected.

Appellees' final argument that the trial court's Findings of Fact Nos. 43-48 somehow establish laches and are conclusive in this appeal is incorrect. None of the trial court's findings of fact establish that any delay was *unreasonable*. In making any legal determination of laches in this case, the court must review the record *de novo*. In doing so, there is ample evidence in the record to show that there was no unreasonable delay and that Appellees incurred costs and entered into contracts of employment only *after* being expressly notified by Plaintiff-Appellants of their claim. In addition, the trial court's misnamed "Finding of fact" No. 49 is actually a mixed finding and conclusion of law, unsupported by the facts in the record, and contradicted by the facts in the record. This court in its *de novo* review is not bound by such a "finding."

CONCLUSION

For the foregoing reasons, plaintiffs-appellants respectfully request that the Appellants' renewed assertion of a laches defense be rejected and the decision of the Trial Court, in rejecting Appellants' laches defense, be affirmed.

This the _____ day of March, 2007.

Respectfully Submitted,

NORTH CAROLINA INSTITUTE FOR
CONSTITUTIONAL LAW
225 Hillsborough Street, Suite 280
Raleigh, NC 27619
Telephone: (919) 838-5313
Facsimile: (919) 838-5316

Robert F. Orr (N.C. Bar No. 6798)
orr@ncicl.org

Jeanette Doran Brooks (N.C. Bar No. 29127)
brooks@ncicl.org

Counsel for Plaintiffs Charles Heatherly, Thomas Spampinato; W. Edward Goodall, Jr.; Paul Stam; Wake County Taxpayers Association; and the North Carolina Family Policy Council

NORTH CAROLINA JUSTICE CENTER
P.O. Box 28068
Raleigh, NC 27611
Telephone: (919) 856-2165
Facsimile: (919) 856-2175

BY: _____
Jack Holtzman (NC Bar No. 13548)
jack@ncjustice.org

**Counsel for Plaintiff-Intervenors Willis Williams
and the North Carolina Common Sense Foundation**

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the appellant certifies that the foregoing brief, which is prepared using a proportional font, is less than 3,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance, and appendixes) as reported by the word processing software.

Jeanette Doran Brooks (N.C. Bar No. 29127)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing brief on counsel for the appellees by depositing a copy, contained in a first-class postage paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows, this _____ day of March 2007.

Norma S. Harrell, Esq.
Special Deputy Attorney General
Ronald M. Marquette, Esq.
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Counsels for the Defendants

Charles B. Neely, Jr., Esq.
Kevin W. Benedict, Esq.
Williams Mullen Maupin Taylor, P.A.
3200 Beechleaf Court, Suite 500
Post Office Drawer 19764
Raleigh, N.C. 27619
Counsel for Amicus Curiae, Tax Foundation

Jeanette Doran Brooks (N.C. Bar No. 29127)