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I. PLAINTIFFS HAVE STANDING, AND THIS COURT POSSESSES SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS.

The Executive Branch and the General Assembly, contrary to the 1989 Highway Trust Fund Act and the taxing acts that levied the taxes, acted contrary to North Carolina's Constitution. Plaintiffs have (1) direct, (2) derivative, and (3) constitutional/necessary standing as taxpayers, citizens, and residents of North Carolina to bring this action for injunctive and declaratory relief from the unlawful transfers. Any one of three grounds is sufficient.

The trial court granted "Defendants' Motion for Summary Judgment." (R. p. 54) It "merged its consideration of Defendants' Motion to Dismiss . . . within its ruling upon Defendants' Motion for Summary Judgment." (R. p. 53) Defendants imply that the trial court granted summary judgment based on standing and/or failure to state a claim. (Defendants' Brief, p. 8) The trial court, however, expressed no reason for granting summary judgment for Defendants. At the hearing on cross-motions for summary judgment, almost all of the time was spent arguing the merits of the case and not Defendants' Motion to Dismiss. Any suggestion that the trial court decided any standing or failure to state a claim issues should be summarily ignored.

A. Plaintiffs have Direct Standing

It has long been the rule in North Carolina that citizens and taxpayers may seek equitable relief when taxes are levied against them for one purpose but thereafter are disbursed by government officials for another purpose. See Generally, Lewis v. White, 287 N.C. 625, 644, 216 S.E.2d 134, 146 (1975) and numerous cases cited therein. "It is the rule with us that an individual has standing to contest an allegedly illegal diversion of public funds which will injuriously affect his rights individually or as a citizen and taxpayer." Styers v. Phillips, 277 N.C. 460, 474, 178 S.E.2d 583, 592 (1971) (emphasis added) (citing Teer v. Jordan, 232 N.C. 48, 59 S.E.2d 359 (1950); Freeman v. Madison County, 217 N.C. 209, 7 S.E.2d 354 (1940)).

An individual taxpayer has direct standing to bring a suit in the public interest and himself if he can satisfy any one of three conditions: (1) a tax levied upon him is for an unconstitutional, illegal or unauthorized purpose, see Wynn v. Trustees, 255 N.C. 594, 122 S.E.2d 404 (1961); (2) that the carrying out of a challenged provision will cause him to sustain personally, a direct and irreparable injury, see Nicholson v. State Educ. Assistance Auth., 275 N.C. 439, 448, 168 S.E.2d 401, 406 (1969); or (3) that he is a member of the class prejudiced by the operation of a statute, see Appeal of Martin, 286 N.C.

66, 209 S.E.2d 766 (1974); Fuller v. Easley, et al., 145 N.C. App. 391, 395-96, 553 S.E.2d 43, 46-47 (2001); Texfi Indus., Inc. v. City of Fayetteville, 44 N.C. App. 268, 270, 261 S.E.2d 21, 23 (1979).

The taxes levied against Plaintiffs in support of the Trust Fund were used for purposes not authorized according to the special objects set forth in the Highway Trust Fund Act and the taxing acts levying the tax when the taxes were collected. The Executive Branch's and General Assembly's use of the taxes collected directly violates the tax laws and, consequently, the Executive Branch violated Article III, 5(3) and Article V, § 5 and the General Assembly violated Article V, § 5 of the our Constitution. The Executive Branch and General Assembly spending Highway Trust Fund taxes to fund unlawful purposes creates a justiciable controversy between Defendants and Plaintiffs, which may only be resolved by the Judicial Branch.

As citizens and taxpayers, Plaintiffs have direct standing on behalf of themselves and others similarly situated to maintain the present lawsuit against Defendants. It is the "allegation" in the Complaint that establishes standing, not the ultimate merits or the merits as slanted by Defendants in their brief. Obviously, the Executive Branch and the General Assembly are not going to sue themselves. They could have sought an

"advisory opinion" but did not. See In re Separation of Powers, 305 NC 767, 295 S.E.2d 589 (1982).

Defendants concede that Plaintiffs and other taxpayers paid motor fuel taxes, driver license fees, auto title certificate fees, vehicle registration fees, and other taxes which by law were required to be and were initially deposited in the Highway Trust Fund. (Defendants Brief, p. 15) These taxes had to be used for the special objects of the Highway Trust Fund pursuant to the taxing acts. The amounts in question were spent for special objects other than highways and urban loops. The allegation in paragraphs 5(a) and 8 of Plaintiffs' Complaint supports Plaintiffs' direct standing to pursue this constitutional challenge. (R. p. 9)

Although Defendants correctly note that "a taxpayer has no standing to challenge questions of general public interest that affect all taxpayers equally" (Defendants' Brief, p. 13), they neglect to mention that this general rule articulated in Green v. Eure, 27 N.C. App. 605, 220 S.E.2d 102 (1975) "does not apply where a taxpayer shows that the tax levied upon him is for an unconstitutional, illegal or unauthorized purpose." Texfi Industries, Inc, 44 N.C. App. at 270, 261 S.E.2d at 23 (emphasis added).

Plaintiffs possess direct standing to maintain the current lawsuit.

B. Plaintiffs have Derivative Standing

In addition to direct standing, Plaintiffs have "derivative standing." Citizens have derivative standing to bring a taxpayer action, not as individual taxpayers, but on behalf of a public agency or political subdivision, where proper authorities neglect or refuse to act. Fuller, 145 N.C. App. at 395-96, 553 S.E.2d at 46-47; Guilford County Bd. of Comrs. v. Trogdon, 124 N.C. App. 741, 747, 478 S.E.2d 643, 647 (1996). To establish standing to bring an action on behalf of public agencies and political divisions, a taxpayer must allege that he is a taxpayer of that particular public agency or political subdivision, and that either: "(1) there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the political agency or political subdivision;" or (2) "a demand on such authorities would be useless." Id.

Defendants' admit that (1) derivative standing exists if the state "wrongfully failed, neglected or refused to act and demand on such authorities to act was rendered useless;" (2) derivative standing may permit taxpayers to recover on behalf of governmental entities, tax funds those governmental entities have improperly disbursed; (3) taxpayers may have standing if

demand has been made; and 4) if there are circumstances to indicate affirmatively that such a demand would be unavailing, plaintiffs also have standing. (Defendants Brief, pp. 16-18)

Plaintiffs properly alleged in their Verified Complaint that they objected about Defendants' unlawful actions to Defendants and various state officials. Plaintiffs requested that corrective measures be taken. (Complaint, ¶ 5(a), 8, R. pp. 9-10) Plaintiffs further alleged under oath that:

Objections to defendants' actions have been made and requests that corrective action be taken have been wrongfully ignored by defendants and other state officials. No officer or agent of the State has made any positive response to the objections and requests. Further informal action to obtain proper compliance with the law and Constitution is futile."

(Complaint, ¶ 8, R. p. 10) Defendants ignore this paragraph of Plaintiffs' Complaint. Defendants disingenuously argue that Plaintiffs did not "proclaim that they made a request of anyone." (Defendants' Brief, pp. 17-18).

After Plaintiffs made their demand, the various state entities, including the State Treasurer and Office of the State Controller, wrongfully refused to take action to correct Defendants' unlawful actions. Plaintiffs thus have derivative standing to have their constitutional rights declared by the Court.

Plaintiffs assigned error when the trial court failed to consider the affidavit of Plaintiff Bill Goldston. (R. p. 58).

The affidavit specifically corroborates the Plaintiffs' verified assertion in the Complaint that corrective action was demanded. (R. p. 44) Even so, Defendants' own brief admits the futility of such a demand being made: "even if plaintiffs had made such a demand on the Attorney General and he refused, his refusal does not constitute the dereliction of duties that is mandatory before taxpayers would have standing to sue." (Defendants' Brief, p. 18). Although a demand was in fact made and alleged, any demand was an effort in futility. There is derivative standing under either theory.

C. Plaintiffs have Constitutional/Necessary Standing

Plaintiffs also have constitutional/necessary standing to maintain their present suit. Our Supreme Court has ruled that "[a] taxpayer in this State has standing to challenge the validity of an act which requires the expenditure of public funds on grounds that the act violates the North Carolina Constitution." Town of Emerald Isle By and Through Smith v. State, 320 N.C. 640, 647, 360 S.E.2d 756, 760-61 (1987) *failed to follow on other grounds by* Williams v. Blue Cross Blue Shield of North Carolina, 357 N.C. 170, 581 S.E.2d 415 (2003) (citing Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970); Mitchell v. Financing Authority, 273 N.C. 137, 159 S.E.2d 745 (1968); McIntyre v. Clarkson, 254 N.C. 510, 119

S.E.2d 888 (1961); Dennis v. Raleigh, 253 N.C. 400, 116 S.E.2d 923 (1960)).

It is axiomatic that "[t]he proceeds of State tax levies appropriated by the General Assembly for one purpose may not lawfully be disbursed by State officers for a different purpose and a citizen and taxpayer of the State may sue to restrain such illegal diversion of public funds." Lewis, 287 N.C. at 643-44, 216 S.E.2d at 146 (emphasis added). While a taxpayer may not have standing to attack the constitutionality of any and all general legislation, see Nicholson v. State Education Assistance Auth., 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969), a taxpayer's standing to bring a suit to restrain a specific unauthorized use of public funds is well recognized. Lewis, 287 N.C. at 643-44, 216 S.E.2d at 146; Shaw v. City of Asheville, 269 N.C. 90, 95, 152 S.E.2d 139, 143 (1967) (where the governing authorities put public property to an unauthorized use, citizens and taxpayers may seek equitable relief); Wishart v. Lumberton, 254 N.C. 94, 96, 118 S.E.2d 35, 36 (1961) (stating that "[i]f the governing authorities were preparing to put public property to an unauthorized use, citizens and taxpayers had the right to seek equitable relief"); Teer, 232 N.C. 48, 59 S.E. 2d 359).

Plaintiffs are taxpayers of this State. They have constitutional standing to challenge the validity of the two

acts, one by the Executive Branch, which violated Article III, § 5(3) and Article V, § 5, and one by the Legislative Branch which violated Article V, § 5 of the North Carolina Constitution.

In summary, Plaintiffs have direct, derivative, and constitutional/necessary standing to maintain their suit against Defendants.

II. PLAINTIFFS STATE VALID CLAIMS FOR RELIEF.

The standard of review upon a motion to dismiss is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." Harris v. NCNB Nat'l Bank of N.C., 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). In ruling upon such a motion, the complaint is to be liberally construed, and the trial court should not dismiss the complaint "unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief." Meyer v. Walls, et al., 347 N.C. 97, 111-12, 489 S.E.2d 880, 888 (1997). Defendants failed to meet this standard.

Plaintiffs' Complaint sought declaratory and injunctive relief and set forth many valid claims for relief. (R. pp. 8-19) Plaintiffs' Complaint alleged that on 5 February 2002, the Governor, pursuant to Executive Order No. 19, caused the

transfer of \$80 million from the Highway Trust Fund to the General Fund. The Complaint alleged that this action exceeded the Governor's constitutional and statutory authority, violated the North Carolina Constitution, the North Carolina General Statutes, and established case law precedent, and resulted in harm to Plaintiffs and all others similarly situated. The Complaint further alleged that the General Assembly intended to transfer \$125 million from the Highway Trust Fund into the General Fund during the 2002 Special Session and sought injunctive relief. The \$125 million transfer by the General Assembly has in fact now occurred. The General Assembly transferred monies from the Highway Trust Fund to the General Fund in the form of a purported loan, without specific amendment of the Highway Trust Fund Act or any taxing statute. The Complaint alleged that these actions were in violation of the North Carolina Constitution. The Complaint requested the trial court to declare such actions by the Governor and the General Assembly unlawful and requested injunctive relief, as well as a return of the funds illegally transferred by Defendants.

Plaintiffs have alleged substantial facts entitling them to relief from the unlawful acts by Defendants. The relief requested is neither moot nor speculative. If the Governor and the State can remove monies from the Highway Trust Fund, they

can certainly return it. Despite Defendants' desperate contrary assertions, Plaintiffs state numerous claims for relief.

This is a declaratory judgment action in which the Plaintiffs seek a ruling that once and for all would require Executive and Legislative Branch Officials to comply with the people's law about taxation, the North Carolina Constitution, as interpreted by the Judicial Branch.

Plaintiffs are the two major architects of the laws that established the Highway Trust Fund in a bipartisan effort to insure the Constitution and the words "trust fund" have meaning. They filed this lawsuit to restrain and seek equitable relief from two specific instances of illegal diversion, first by the Executive Branch and thereafter by the General Assembly. This unlawful diversion creates a real and actual controversy affecting Plaintiffs' constitutional rights. This Court should declare Defendants' actions unlawful.

This is not an action to test the general constitutionality of various and sundry legislation. Neither are Plaintiffs motivated by "whims, personal beliefs, or political motivations" as suggested by Defendants. (Defendants' Brief, p. 13) Plaintiffs have neither time nor resources to match the government's ability to litigate. Nor do common citizens care to indulge in frivolous litigation to resolve speculative or

fanciful questions regarding the constitutionality of general actions by Defendants. Rather, these Plaintiffs appropriately ask for judicial resolution regarding the legality of two specific acts by Defendants which diverted public tax monies to unauthorized special objects and purposes. Such actions personally impact and adversely affect the legal rights of Goldston and Harrington, and all other taxpayers similarly situated. There is indeed a real, concrete and constitutional controversy of first impression.

The ultimate question is: if present Plaintiffs, who are direct taxpayers and citizens, cannot challenge the constitutionality of the manner and the purposes for which their tax monies are spent, who is left to do so? The only possible answers are either (1) no one can; or (2) government officials who act unlawfully must challenge their own conduct. Plaintiff-taxpayers not only have standing, they are the real parties in interest. It is their tax money paid, deposited in the Highway Trust Fund, and then misspent. Taxpayers' monies must be used for the special objects set forth in the Highway Trust Fund Act and the specific tax laws that levied them.

**III. DEFENDANTS ARE PRECLUDED FROM SUMMARY JUDGMENT BECAUSE THEY
HAVE FAILED TO SHOW FROM WHICH TAXING ACT THEIR TRANSFERS
ORIGINATED.**

Defendants are precluded from summary judgment because there are disputed issues of fact that prevent judgment in Defendants' favor. They failed to show the trial court, or this Court, that there was a taxing act of the Highway Trust Fund program from which the two transfers originated.

Defendants continue to argue "standing" and "failure to state a claim" issues because they know that without a valid taxing statute they will lose on the merits as a matter of law. They seek to obfuscate and hide the dispositive issue. Defendants' brief barely touches on the merits of the case. It is almost silent about the Executive Branch's lack of constitutional authority to divert \$80 million from the Highway Trust Fund. Defendants obscure the fact that the Legislative Branch transfer did not amend, reference, or adjust any "taxing acts" or statutes of the Highway Trust Fund, and the Executive Branch cannot legislate new tax laws. That is specifically why both transfers violate Article V, § 5 of the North Carolina Constitution and are void. Defendants hide this dispositive point. The Executive Branch also violated Article III, § 5(3).

Defendants' assertions that (1) "the taxes imposed for fiscal years 2001-2002 and 2002-2003, including the \$125 million

transfer, were imposed pursuant to taxing acts that specified the purposes for which the money was collected and applied . . .” and (2) “the General Assembly effectively modified the existing taxing acts . . .” is simply not true. (Defendants’ Brief, p. 28,30) (emphasis added). The \$125 million transfer by the General Assembly and the \$80 transfer by the Executive Branch did not amend, effectively or otherwise, the basic taxing statutes or the Highway Trust Fund Act.¹

Defendants agree that Article V, § 5 applies to “every act of the General Assembly.” (Defendants’ Brief, p. 30). Stated precisely, it applies to “every act of the General Assembly levying a tax.”

What Defendants fail to tell this Court is that there are five (5) taxing statutes by which taxpayers who use the highways supply the Highway Trust Fund with tax revenue. Chapter 105, Subchapter V of the North Carolina General Statutes, contains three taxing statutes: (1) Article 36B (Out of State Gasoline Tax); (2) Article 36C (Gasoline Tax); and (3) Article 36D (Alternative Fuel). Chapter 105, Subchapter I of the North Carolina General Statutes contains one taxing statute; (4) Article 5A (Use Tax). The last taxing statute that supplies

¹ Plaintiffs anxiously await oral argument so that Defendants can show this Court which of the five “taxing acts” authorized the \$80 million transfer by the Executive Branch pursuant to Executive Order No. 19, and the \$125 Million transfer by the Legislative Branch pursuant to Section 2.2(g) of Session Law 2002-126.

revenue to the Trust Fund is (5) Chapter 20, Article 3 (Title and Registration Fees) of the North Carolina General Statutes.

All five taxing acts require a specific percentage of the money paid by taxpayers for deposit into the Highway Trust Fund. The only taxing act that authorizes a transfer from the Trust Fund to the General Fund is the "Use Tax" in Article 5A of Chapter 105, Subchapter I. The four other taxing acts do not authorize transfers from the Trust Fund to the General Fund. The original Highway Trust Fund Act did not contain authorization, and the General Assembly has never amended the four other taxing acts.

Defendants implicitly concede that in order for the two transfers, \$80 million and \$125 million, to be lawful and in compliance with Article V, § 5 the "taxing acts" of the Highway Trust Fund had to be amended. (Defendants' Brief, pp. 28, 30) In fact, all amendments to the Highway Trust Fund taxing acts since 1989 that increased the amount of tax monies transferred from the Trust Fund to the General Fund have expressly amended N.C. Gen. Stat. § 187.9, one of the five taxing acts, of the Highway Trust Fund. Defendants mistakenly claim, however, that the "taxing acts were effectively amended" regarding the two transfers of this case. They were not. Defendants cannot show

this Court that any one of the five taxing acts were amended during the time in question.

The two transfers occurred pursuant to Section 2.2(g) of Session Law 2002-126 and Executive Order 19, both of which are not "taxing acts." One is a section within a massive budget bill that does not even pretend to be part of any one of the five taxing acts of the Highway Trust Fund. It states:

There is transferred from the Highway Trust Fund to the General Fund the sum of one hundred twenty-five million dollars (\$125,000,000) for the 2002-2003 fiscal year. It is the intent of the General Assembly that the Highway Trust Fund shall be held harmless because of this transfer. The General Assembly shall transfer funds from the General Fund back to the Highway Trust Fund during fiscal years 2004-2005 through 2008-2009 including interest at the net rate of return generated by the State Treasurer's Short Term Investment Fund.

Session Law 2002-126 § 2.2(g). The other scheme is an Executive Order that transferred \$80 million dollars.

Session Law 2.2(g) and Executive Order 19 did not amend, reference, or even mention any one of the five "taxing acts," including N.C. Gen. Stat. § 187.9. Needless to say, Executive Orders from the Executive Branch cannot amend any law, or taxing act. The People have authorized only the Legislative Branch to make laws.

Article V, § 5 secures the tax revenue raised pursuant to the five taxing acts as written and amended at the time the tax money was levied from Plaintiffs. Collected tax revenue may be

spent only in accordance with the objects and purposes of the taxing acts of the Highway Trust Fund as those laws existed at the time the taxes were levied. This is not the case here.

The \$80 million and \$125 million were transferred contrary to the taxing acts of the Highway Trust Fund in contravention of Article V, § 5 of the North Carolina Constitution. The \$80 million transfer also violated Article III, 5(3). Thus, the transfers were unlawful and void.

The Executive Branch has no power to transfer money from the Highway Trust Fund regardless of the above analysis. (Plaintiffs' Brief, pp. 22-30). Defendants speciously argue that the Judicial Branch should not answer the question whether the Executive Branch has exceeded its lawful authority. (Defendants Brief, p. 34) Defendants' discussion of the doctrine of separation of powers is feckless. The doctrine empowers the Judicial Branch to determine whether the Legislative and Executive Branches are exercising their respective powers constitutionally. Defendants ask this Court to follow the "Wizard of Oz" movie: "Pay no attention to the man behind the curtain." The Judicial Branch should not turn its back on constitutional violations. The Judicial Branch has a duty to the people to declare what the law is. For the future

of good government in North Carolina it should not shirk this responsibility.

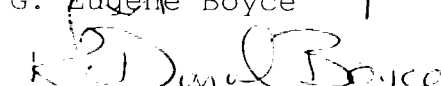
CONCLUSION

The trial court erred. Plaintiffs are entitled to Judgment as a matter of law. Defendants are precluded from summary judgment as a matter of law and there is a genuine disputed issue of fact precluding them from summary judgment.

Respectfully submitted this the 24th day of March 2005.

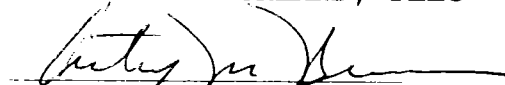
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CERTIFICATE OF COMPLIANCE WITH RULE 28

The undersigned certifies that the foregoing brief complies with Rule 28(j)(2)(A)2 of the North Carolina Rules of Appellate Procedure. According to Microsoft Word processing program used to produce this brief (XP MS Word), the document does not exceed 3750 words, excluding of cover, index, table of authorities, certificates of compliance, certificate of service, and appendices.

This the 24th day of March, 2005.

BRANNON STRICKLAND, PLLC



Anthony M. Brannon

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this day the foregoing **APPELLANTS' BRIEF** was served by placing copies in envelopes addressed to the persons named below, at the place and address stated below, which are their last known address, and by depositing said envelope in the United States Mail at Raleigh, North Carolina.

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