

NORTH CAROLINA COURT OF APPEALS

DELMA BLINSON; JERRY R.)
JOHNSON; KELLIENE FISHER;)
DONALD R. REID; BRIAN)
GOSSAGE; WILFORD R. DOWE; and)
KENT MISEGADES,)
Plaintiffs,)

From Wake County

v.)

STATE OF NORTH CAROLINA;)
JAMES T. FAIN, III, Secretary of the)
N.C. Department of Commerce, in his)
official capacity; CITY OF WINSTON-)
SALEM, North Carolina and ALLEN)
JOINES, Mayor of Winston-Salem, in)
his official capacity; FORSYTH)
COUNTY, North Carolina and)
GLORIA D. WHISENHUNT,)
Chairperson of the Board of)
Commissioners of Forsyth County, in)
her official capacity; THE)
MILLENNIUM FUND; WINSTON-)
SALEM BUSINESS, INC.; THE)
WINSTON-SALEM ALLIANCE; and)
DELL, INC.,)
Defendants.)

BRIEF FOR STATE DEFENDANT-APPELLEES

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WINSTON-SALEM, North Carolina)
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and GLORIA D. WHISENHUNT,)
Chairperson of the Board of)
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MILLENNIUM FUND; WINSTON-)
SALEM BUSINESS, INC.; THE)
WINSTON-SALEM ALLIANCE; and)
DELL, INC.,)
Respondent-Appellees.)

BRIEF FOR STATE DEFENDANT-APPELLEES

QUESTIONS PRESENTED

- I. DID THE TRIAL COURT ERR IN DISMISSING PLAINTIFFS' CLAIMS FOR LACK OF STANDING?**
- II. DID THE TRIAL COURT ERR IN DISMISSING PLAINTIFFS' CLAIMS THAT THE INCENTIVES PROVIDED TO DELL VIOLATE THE PUBLIC PURPOSE CLAUSE OF THE CONSTITUTION OF NORTH CAROLINA?**
- III. DID THE TRIAL COURT ERR IN DISMISSING PLAINTIFFS' CLAIM THAT THE INCENTIVES PROVIDED TO DELL ARE UNCONSTITUTIONAL EXCLUSIVE EMOLUMENTS?**
- IV. DID THE TRIAL COURT ERR IN DISMISSING PLAINTIFFS' CLAIM THAT THE LOCAL SUBSIDIES AT ISSUE ARE NOT AUTHORIZED BY N.C.G.S. § 158-7.1?**
- V. DID THE TRIAL COURT ERR IN DISMISSING PLAINTIFFS' CLAIM THAT THE TAX REFUNDS OR CREDITS GRANTED PURSUANT TO CHAPTER 204 ARE NOT UNIFORMLY APPLICABLE?**
- VI. DID THE TRIAL COURT ERR IN CONCLUDING THAT THE COMMERCE CLAUSE DOES NOT PROHIBIT THE ECONOMIC INCENTIVES AT ISSUE IN THIS CASE?**

STATEMENT OF THE CASE

This matter is before the Court on plaintiffs-appellants' (hereafter "plaintiffs") appeal from the 10 May 2006 Order of the Wake County Superior Court, the Honorable Robert H. Hobgood, Superior Court Judge presiding, dismissing plaintiffs' action. (R pp. 1, 194-209) The matter was heard pursuant to motions to dismiss

filed by all defendants. (R pp. 147-53, 154-58, 159-72) Each of plaintiffs' twenty-two claims was dismissed based on N.C.G.S. § 1A-1, Rule 12(b)(1) of the Rules of Civil Procedure because plaintiffs lacked standing or based on N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief may be granted or, in most instances, on both grounds. (R pp. 194-209) The matter was designated by the Chief Justice of North Carolina as an "exceptional" case pursuant to Rule 2.1 of the General Rules of Practice and assigned to the Honorable Robert H. Hobgood, Superior Court Judge. (R pp. 173-75)

Plaintiffs brought this action initially as seven individual taxpayers, two of whom are residents of Forsyth County and one of whom is a resident of Winston-Salem; the remaining plaintiffs are from other counties. (Compl. ¶¶ 4-10, R pp. 44-46) The original complaint was filed on 23 June 2005 challenging on federal and state constitutional grounds the enactment by the North Carolina General Assembly of Session Law 2004-204 Extra Session (hereafter "Chapter 204"), relating to tax incentives for major computer manufacturing businesses. Plaintiffs' complaint also challenged, under federal and state constitutional provisions as well as N.C.G.S. § 158-7.1, local incentives granted by Forsyth County and the City of Winston-Salem. (R pp. 2, 5-34) The defendants include the State of North Carolina and the Secretary of the North Carolina Department of Commerce (hereafter the "State defendants"), Forsyth County, the City of Winston-Salem, and local non-profit organizations

(hereafter the “local defendants”), plus Dell, Inc. (hereafter “Dell”). (Compl. ¶¶ 11-12, 14-21, R pp. 47-49) The initial pleading filed on 23 June 2005 was superseded by an “Amended Complaint and Petition for Declaratory Judgment” (hereafter referred to as the “Complaint”) filed on 9 September 2005. (R pp. 43-146)

On 23 May 2006 plaintiffs filed their Notice of Appeal. (R pp. 210-13) Plaintiffs obtained from the Superior Court an extension of time until 27 July 2006 to serve the proposed record on appeal. (R p. 218) The proposed record on appeal was served on 27 July 2006. The record, which was settled by stipulation, was filed in the Court of Appeals on 19 September 2006 and docketed on 29 September 2006. (R p. 1) On 16 October 2006, plaintiffs filed a PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. 7A-31(B) AND APPELLATE RULE 15 for determination by the Supreme Court of North Carolina prior to determination by the Court of Appeals. The Supreme Court has not yet ruled upon the petition.

STATEMENT OF THE FACTS

Plaintiffs brought this action to assert various constitutional challenges to the economic incentives and tax credits granted to major computer manufacturing facilities as provided in Chapter 204. Additionally, actions by the City of Winston-Salem and Forsyth County to provide economic development incentives and tax benefits to encourage Dell to locate, construct and operate a computer manufacturing facility in Winston-Salem were challenged as violative of the North

Carolina Constitution. (R pp. 43-75)

The reasons for creating the “Tax Incentives for Major Computer Manufacturing Facilities” established in Chapter 204 are delineated in N.C.G.S. § 105-129.60, where the General Assembly found that it is the policy of the State to stimulate economic activity and to create and maintain sustainable jobs for citizens of the State in strategically important industries. The General Assembly noted that manufacturing employment has been disproportionately affected by national trade policies and global economic trends, resulting in the loss of many jobs in the State’s industrial workforce, and that the computer manufacturing and distribution industry will remain a vital part of the future international, national and State economies as society becomes more dependent on advanced technology. The General Assembly also declared that “[i]t is the intent of the State to encourage the sustainability of this industry cluster in this State and to encourage the maintenance and growth of computer manufacturing and distribution employment in the State through tax policies, investments in training capacity, and other policies and programs.” N.C.G.S. § 105-129.60(6) (2005).

Plaintiffs allege that their action arises from the General Assembly’s enactment of Chapter 204. (Compl. ¶ 2, R p. 44) Section 1 of that legislation added a new Article 3G to Chapter 105 of the General Statutes entitled “Tax Incentives for Major Computer Manufacturing Facilities.” (Compl. Ex. A, R pp. 76-83) The legislation

allowed tax credits against corporate franchise taxes and corporate income taxes for an eligible taxpayer that is found by the Secretary of Commerce to expect to invest at least \$100,000,000 to construct a computer manufacturing and distribution facility over a five-year period and that expects to have an increased employment level at such facility of at least 1,200 within five years after the facility is first put into use. (Compl. Ex. A p. 3 (§ 105-129.62(a)), R p. 78)

Section 2 of Chapter 204 provided that a taxpayer eligible for the tax credits established in Section 1 is also eligible under the Bill Lee Act for specific “major computer facility enhancements.” (Compl. Ex. A pp. 8-9 (§ 105-129.4(b7)), R pp. 83-84) These “major computer facility enhancements” include the inapplicability of the wage standard requirement, an increased credit for creating jobs, and preferred credits for investment in machinery, equipment, worker training and substantial investment in other property. (*Id.*)

Section 3 of Chapter 204 amended the eligibility for sales and use tax refunds to include computer manufacturing facilities at which the manufacture or assembly of peripheral equipment [such as storage devices, printers, monitors and terminals] occurs at “a facility or campus at which the taxpayer also manufactures or assembles electronic computers.” (Compl. Ex. A p. 10 (§ 105-164.14(j)(3)(d)), R p. 85)

Plaintiffs further allege that their action arises from the decisions of the City of Winston-Salem and Forsyth County to provide economic development incentives

and other assistance to “entice” Dell to locate a computer manufacturing facility in Winston-Salem. (Compl. ¶ 3, R p. 44) Specifically, Forsyth County and the City of Winston-Salem each adopted resolutions authorizing economic development incentives to Dell contingent on the expected capital investments and job creation by Dell. (Compl. Exs. D&E, R pp. 90-110) Additionally, the local defendants entered into an Agreement by which Dell agreed to locate a computer manufacturing and distribution facility on a specified industrial park site to be purchased from the City for \$7,000,000 while the local defendants agreed to site preparation work, roadway infrastructure improvements, and annual cash incentive grants. (Compl. Ex. H pp. 1-9, R pp. 114-22) The resolutions of the local governments recited the goals or purposes of the incentives offered to Dell as being to “stimulate the local economy, promote business, create new full-time jobs in the County, increase the property tax base and revenues and increase business prospects.” (Compl. Ex. G, R p. 112; *see also* Exs. F & H at ¶¶ A-E, R pp. 90, 114-15)

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS’ CLAIMS FOR LACK OF STANDING.

Assignments of Error Nos. 12-16, 23-26, 28-29, 33-35, 40-41, 45, 48, 61
(R pp. 199-207, 231-45)

Plaintiffs contend that they, as taxpayers not directly affected by the major computer manufacturing credits, Bill Lee Act, and other provisions of Chapter 204,

are nevertheless entitled to challenge the State's granting of incentives through the tax provisions of Chapter 204 as well as the local government incentives offered to Dell. The trial court disagreed, ruling that plaintiffs lacked standing as to each of their substantive claims. (R pp. 199-208)¹ Plaintiffs now contend that the trial court erred in dismissing their claims on the grounds of lack of standing. Presumably, plaintiff standing arguments are directed to those claims which plaintiffs have also argued in their Brief as to the merits of the claims, or as to which the trial court granted defendants' motions to dismiss exclusively on the basis of standing (Counts 7-8, R pp. 200-01, 208).²

In their brief, plaintiffs treat standing as a single concept applicable to all claims. They fail to acknowledge that standing analysis differs based upon the different types of claims asserted. Their idea of standing would mean that a taxpayer

¹ Besides dismissing all but two claims pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), the trial court dismissed all but two claims for lack of standing: Count 6 of the Complaint, which cited 42 U.S.C. § 1983 to assert plaintiffs' federal claims that had been spelled out in other counts; and Count 22, which offered a generic declaratory judgment claim, encompassing all the other claims previously enumerated. (R pp. 201, 208)

² Plaintiffs' citation to Assignments of Error for this Argument includes some, such as Assignment of Error No. 45, directed at Counts 14 and 15, that relate to claims that were dismissed on the basis of N.C.G.S. § 1A-1, Rule 12(b)(6) as well as Rule 12(b)(1), but as to which plaintiffs have not argued the 12(b)(6) dismissal was erroneous. Accordingly, plaintiffs' standing arguments are moot as to claims such as Counts 14 and 15 since the trial court's 12(b)(6) dismissals would result in the trial court's ruling remaining unchanged as to those claims even if this Court determined that the dismissals on the grounds of standing were improper.

with standing to raise any constitutional issue against Chapter 204 automatically has standing to raise all imaginable issues relating to the same legislation. Plaintiffs fail to differentiate the standing analysis called for in assessing their discrimination claims (such as the state equal protection and law of the land claims in Counts 7 and 8 of the Complaint, the uniformity of taxation claim of Count 12, and the Commerce Clause claims of Counts 1-3) from the standing questions raised by plaintiffs' public purpose, exclusive emoluments, and other general taxpayer claims asserting improper use of State funds. Plaintiffs' discrimination-type claims must be separated from their other claims and those discrimination-type claims, at the very least, were properly dismissed.

As the N.C. Supreme Court has recently observed, 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, No.328PA04-2, 2006 N.C. LEXIS 1300, at *8 (N.C. Dec. 15, 2006). That "sharpness of presentation" must be examined based on the particular issue before the court. Standing to raise one question does not establish standing in a plaintiff to raise any and all questions a plaintiff might wish, regardless of his lack of harm or relationship to such questions.

In *Goldston*, the Court concluded that taxpayers could sue to obtain a

declaratory judgment as to the validity of past transfers of funds from the Highway Trust Fund to the General Fund on the grounds that “a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds.” *Id.* at *14. The Court further concluded that “taxpayers have standing to seek equitable relief and a declaratory judgment when alleging government officials violated statutory or constitutional provisions by diverting tax levies appropriated for one purpose but disbursed for another.” *Id.* at *16.

Assuming *arguendo* that *Goldston* supports the idea that plaintiffs have standing to bring their public purpose and exclusive emoluments claims, *Goldston* does not provide plaintiffs with standing for all other types of claims, particularly those concerned with forms of discrimination. The *Goldston* Court quoted with approval its earlier statement that “[o]nly those persons may call into question the validity of a statute [sic] who have been injuriously affected thereby in their persons, property or constitutional rights.” *Goldston*, 2006 N.C. LEXIS 1300, at *19 (quoting *Piedmont Canteen Serv. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962)). When it comes to discrimination-type claims, such as equal protection, law of the land, uniformity of taxation, and the negative Commerce Clause, the action challenged by plaintiffs is constitutionally flawed only by reference to the differential treatment of groups of taxpayers or citizens that are alleged to be similarly situated

to each other. Discrimination-type claims are not concerned with the alleged “misappropriation or misuse of public funds” that was addressed in *Goldston*. Instead, a discrimination claim asserts that a constitutional defect flows from the disparity of one person or entity being treated unfairly in comparison to a second person or entity. Such claims are those of individual persons or entities not to be treated differently, in an unconstitutionally unfair manner, from persons similarly situated. Plaintiffs’ status as taxpayers does not entitle them under any theory of standing to assert the rights or claims of hypothetical manufacturers who might or might not be disadvantaged in comparison to Dell or any other entity availing itself of the benefits of Chapter 204.

Plaintiffs have attempted to advance a theory that other manufacturers allegedly suffer unconstitutional discrimination because they do not necessarily receive the same tax credits or refunds as a major computer manufacturer or because their employment pattern varies from that of Dell, thus triggering different tax credit results under Chapter 204. (*See* Compl. Counts 7-8, R pp. 65-66.) None of the plaintiffs is alleged to be a manufacturer or competitor of Dell. Furthermore, none of the plaintiffs allege that they have any direct connection to the tax credits and refunds at issue in Chapter 204 or that they even pay the types of taxes, such as corporate income or franchise taxes, addressed by Chapter 204. Nor is any plaintiff a business suffering from the alleged lack of uniformity in taxation between

businesses able to take advantage of the tax incentives under Chapter 204 and those not in a position to do so. (*See* Compl. Count 12, R p. 68.) Because no plaintiff is “a member of the class subject to the alleged discrimination,” the plaintiffs are “precluded from challenging” the actions they wish to contest in this litigation. *Appeal of Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 772 (1974) (holding that county did not have standing to challenge statutory provisions under Article V, Section 2 uniformity rule) (citation omitted).

Similarly, because the Law of the Land clause tests whether a person’s due process rights have been violated, using a standard virtually identical to the equal protection rational-basis test, plaintiffs also lack standing to pursue their Law of the Land claims. They have no allegations that would, if proven, show *their* due process rights to have been violated or subjected to a classification or scheme which was not rationally-based. Instead, they complain about what constitutes, at most, alleged due process violations of other businesses that might compete in one way or another with Dell or other major computer manufacturing facilities. Consequently, they cannot show they have any basis for challenging the state statutory provisions or the local actions.

Importantly, “[t]he general rule is that ‘a person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute.’” *Jones v.*

Weyerhaeuser Co., 141 N.C. App. 482, 484, 539 S.E.2d 380, 301 (2000)(quoting *Appeal of Martin*, 286 N.C. at 75, 209 S.E.2d at 773)(addressing equal protection challenge), *disc. rev. denied*, 353 N.C. 525, 549 S.E.2d 858 (2001). As explained by our Supreme Court:

When the class which includes the party complaining is in no manner prejudiced, it is immaterial whether a law discriminates against other classes or denies to other persons equal protection of the law. 11 A.J. 757. He who seeks to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is discriminated against.

State v. Trantham, 230 N.C. 641, 644, 55 S.E.2d 198, 200-01 (1949) (denying defendant's standing to raise due process and equal protection claims with regard to Sunday closing laws since he sold no items that were exempt from the Sunday closing prohibitions when sold by other types of businesses). *Accord In re Appeal of Barbour*, 112 N.C. App. 368, 373, 436 S.E.2d 169, 173 (1993).

Barbour is noteworthy in that the plaintiff in that case raised challenges to certain property tax provisions on equal protection and uniformity grounds claiming discrimination against individual residential property holders and also against certain types of homes for the aged, sick and infirm. The Court, in an opinion written by then Judge Orr, considered only the challenges based on discrimination against general taxpayers like Barbour, while holding that he lacked standing to raise the same types of discrimination claims with regard to certain types of homes for the aged, sick, and

infirm, a group to which he did not belong. *Barbour*, 112 N.C. App. 368, 436 S.E.2d 169. Not even the right to raise equal protection and uniformity claims as to one group entitled him to raise such claims with regard to the same provisions as to a different group to which he did not belong. Similarly, plaintiffs have no harm or status entitling them to raise their equal protection, “law of the land,” and uniformity of taxation claims, and the trial court properly dismissed them pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1).

Plaintiffs’ negative or dormant Commerce Clause claims (Compl. Counts 1-3, R pp. 60-63) under the United States Constitution are similarly barred by lack of standing to raise those claims. “The negative or dormant implication of the Commerce Clause prohibits state taxation, or regulation, that discriminates against or unduly burdens interstate commerce and thereby imped[es] free private trade in the national marketplace.” *GMC v. Tracy*, 519 U.S. 278, 287, 136 L. Ed. 2d 761, 773 (1997) (citations and internal quotations omitted). In this context, “‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former *and burdens the latter*.” *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93, 99, 128 L. Ed. 2d 13, 21 (1994) (emphasis added). In other words, plaintiffs are attempting to raise a claim of discrimination as between in-state and out-of-state commerce with regard to whether major computer manufacturers or corporations are willing to invest in an in-state manufacturing

facility. Plaintiffs, who are all individual taxpayers, have no standing to raise this issue.

Plaintiffs have made no allegations, and cannot make any allegations, that would support their right to bring a negative Commerce Clause claim based on Chapter 204. Rather, they are asserting claims of discrimination against hypothetical or imaginary corporations whose interests may well be very different from theirs. Indeed, the reality that plaintiffs do not represent the interests of these hypothetical manufacturers is obvious from the fact that plaintiffs seek to have the credits of Chapter 204 invalidated whereas surely any manufacturers claiming discrimination under Chapter 204 would seek to have the benefits of those tax incentives extended to them.

The United States Supreme Court has held that individuals do not have standing as taxpayers to bring a negative Commerce Clause claim against state and local incentives granted to certain corporations. *DaimlerChrysler Corp. v. Cuno*, ___ U.S. ___, 164 L. Ed. 2d 589 (2006). In that case, the Supreme Court concluded that the taxpayers could not establish a “concrete and particularized” injury to them as taxpayers. *DaimlerChrysler*, 164 L. Ed. 2d at 603. Nor could they establish standing on the grounds that the tax incentives increased their tax burdens: (1) the point of the incentives was to increase revenues overall and thus it was not at all clear that the economic incentives in that case increased the tax burden on plaintiffs and other

taxpayers in view of the expected overall increase in tax revenues; and (2) even if the incentives were invalidated or terminated, there was no assurance whatsoever that the result would be to reduce taxes for plaintiffs because the State could simply spend the money elsewhere or choose to provide such incentives for a much broader range of manufacturers. *Id.* at 603-05.

While standing is determined in state courts by state law, the *DaimlerChrysler* case is instructive in that it demonstrates that standing in a negative Commerce Clause case cannot be lightly inferred. Moreover, the negative or dormant Commerce Clause is at its foundation simply a form of discrimination claim. Because plaintiffs have not alleged that *they* have suffered or will suffer from any discrimination prohibited by the Commerce Clause, they have no standing to pursue their negative or dormant Commerce Clause claims. The trial court therefore did not err in dismissing plaintiffs' claims, at least those grounded in discrimination theories, pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) based on plaintiffs' lack of standing.

II. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS' CLAIMS THAT THE INCENTIVES PROVIDED TO DELL VIOLATE THE PUBLIC PURPOSE CLAUSE OF THE CONSTITUTION OF NORTH CAROLINA.

Assignments of Error Nos. 1, 3-7, 36-39, 53-55, 60, 62
(R pp. 207-08, 231-32, 239-40, 243, 245)

Plaintiffs argue that the trial court erred in dismissing, pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), their "public purpose" claims. (Compl. Counts 11, 13, 18, & 20,

R pp. 67-68, 71, 72; *see also* R pp. 203-04, 207) Specifically, plaintiffs contend that Chapter 204, as well as the local resolutions and Agreement, violate the “public purpose” requirements of Article V, Sections 2(1) and 2(7) of the Constitution of North Carolina. Contrary to plaintiffs’ contentions, their public purpose claims are without merit.

Article V, Section 2(1) of the Constitution directs that “[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only” Further, Article V, Section 2(7) provides, “[t]he General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only.” In other words, taxes must be imposed for public purposes, and the State and local governments may provide money through contracts only for public purposes.

Plaintiffs contend that Chapter 204 and the local government resolutions are in fact for the benefit of Dell and its shareholders. In plaintiffs’ eyes, if Dell or any other major manufacturer benefits substantially from the incentives offered by government, then those same incentives necessarily violate the public purpose requirements. In fact, plaintiffs seemingly disagree with and dispute the economic advantages that are expected to flow from the investment by Dell or any other company that comes into the State pursuant to Chapter 204 or other economic

incentives. Plaintiffs' apparent objection to the underlying concept of such economic stimuli, and their skepticism about the advantages of attracting industry by such incentives, renders them unable to see anything except benefit to the investing corporation, in this case Dell, as a result of such incentives. Consequently, under plaintiffs' interpretation, surely all economic incentives will violate the public purpose requirements because they will primarily benefit the company or companies receiving those incentives. Plaintiffs are wrong, both philosophically and, most importantly, legally. Chapter 204, as well as the local resolutions and agreements, do not violate the public purpose requirements, as interpreted by our appellate courts.

The principal authority in this State concerning the public purpose requirement and economic incentives is *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996). In *Maready*, 342 N.C. at 725, 467 S.E.2d at 626, the Court concluded that local economic development incentive projects, as authorized by N.C.G.S. § 158-7.1, were for public purposes despite the fact that "private actors will necessarily benefit from the expenditures authorized."

In this case, the public purposes for which the challenged legislation and local government actions were taken are explicit. The General Assembly spelled out in great detail the governmental objectives for its actions, as did the local authorities. *See* N.C.G.S. § 105-129.60 (2005); Compl. Exs. F-G & and H (A-E) (R pp. 111-15). The encouragement of increased industry, investment in facilities, and employment

is unquestionably a public purpose. “The public advantages are not indirect, remote, or incidental; rather, they are directly aimed at furthering the general economic welfare of the people of the communities affected.” *Maready*, 342 N.C. at 725, 467 S.E.2d at 625. Moreover, the legislative assessment of the appropriateness and need for such incentives and their benefit is entitled to deference from the courts. “The initial responsibility for determining what constitutes a public purpose rests with the legislature, and its determinations are entitled to great weight.” *Id.* at 714, 467 S.E.2d at 619. Indeed, the Court in *Maready* distinguished the earlier case of *Mitchell v. North Carolina Industrial Development Financing Authority*, 273 N.C. 137, 159 S.E.2d 745 (1968), in part on the grounds that the legislation at issue in *Mitchell* appeared to have been adopted by the General Assembly with only a half-hearted endorsement. In contrast, here, in N.C.G.S. § 105-129.60, the General Assembly provided a detailed recitation of the public purposes which it intended Chapter 204 to foster. That “determination[] [is] entitled to great weight.” *Madison Cablevision, Inc. v. Morganton*, 325 N.C. 634, 644-45, 386 S.E.2d 200, 206 (1989). Those recitals of the purposes behind the incentives at issue here establish that, at least from the standpoint of the affected governments, “the transaction will promote the welfare of the [] government and results from the [] government’s efforts to better serve the interests of its people.” *Peacock v. Shinn*, 139 N.C. App. 487, 494, 533 S.E.2d 842, 847-48, *disc. rev. denied*, 353 N.C. 267, 546 S.E.2d 110 (2000).

The challenged legislation, as well as the local actions, are all designed to foster economic prosperity in the State as well as Winston-Salem and Forsyth County. Such goals fall well within the public purpose restrictions of the North Carolina Constitution.

New and expanded industries in communities within North Carolina provide work and economic opportunity for those who otherwise might not have it. This, in turn, creates a broader tax base from which the State and its local governments can draw funding for other programs that benefit the general health, safety, and welfare of their citizens. The potential impetus to economic development, which might otherwise be lost to other states, likewise serves the public interest. We therefore hold that N.C.G.S. § 158-7.1, which permits the expenditure of public moneys for economic development incentive programs, does not violate the public purpose clause of the North Carolina Constitution.

Maready, 342 N.C. at 727, 467 S.E.2d at 627. No matter how significant the benefits that Dell receives, those benefits are not the purposes of the state legislation or the local actions and cannot cancel out the expected benefits to the citizens and economy of this State.

Plaintiffs attempt to avoid the teachings of *Maready* by citing to older cases such as *Briggs v. City of Raleigh*, 195 N.C. 223, 141 S.E. 597 (1928), and *Nash v. Town of Tarboro*, 227 N.C. 283, 42 S.E.2d 209 (1947), as well as the relatively more recent decision in *Mitchell*. What plaintiffs omit from their argument is the recognition in *Maready* that application of the public purpose analysis is different in modern times even if the general principles have remained the same.

While *Mitchell* and its progeny remain pivotal in the development of the doctrine, they do not purport to establish a permanent test for determining the existence of a public purpose. The majority in *Mitchell* posed the question: “Is it today a proper function of government for the State to provide a site and equip a plant for private industrial enterprise?” *Mitchell*, 273 N.C. at 145, 159 S.E.2d at 751 (emphasis added). This explicit recognition of the importance of contemporary circumstances in assessing the public purpose of governmental endeavors highlights the essential fluidity of the concept. While the *Mitchell* majority answered the question in the negative, the passage of time and accompanying societal changes now suggest a positive response.

Maready, 342 N.C. at 720, 467 S.E.2d at 623. Additionally, the Court pointed out that economic development incentives had been upheld in forty-six other states, and “it would be unrealistic to assume that the State will not suffer economically in the future if the incentive programs created pursuant to N.C.G.S. § 158-7.1 are discontinued.” *Id.* at 726-27, 467 S.E.2d at 627.

Maready, in effect, interprets the public purpose test, and especially the public vs. private benefit prong, at a different angle from that employed in many older cases. Older cases seemingly focused more on the benefit to private individuals or entities whereas *Maready* and more recent cases look more to the public motive and expected benefit to determine whether a particular action was for a public purpose in constitutional terms. Where the public benefit is the motivation for the enactment, the benefit to private individuals is incidental, even though substantial. Thus, “an expenditure does not lose its public purpose merely because it involves a private

actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose.” *Id.* at 724, 467 S.E.2d at 625. Applying these principles, the Court upheld a condemnation of land by an airport authority as being for public use against a challenge based on the contention that the land would be used for the construction by Federal Express of a facility that it would then rent from the airport. Despite the argument that the condemnation was for the private benefit of Federal Express, the Court concluded that

[t]he arrangement advances the primary goal of giving effect to the people's general desire for better seaports and airports. As such, the greater benefits flow to the people, as they have constitutionally directed, with their understanding that there will be incidental benefits to private companies involved. Under these facts, the legislative declarations of public purpose, and the constitutional directives of the people, we are persuaded that both prongs of our analysis are satisfied.

Piedmont Triad Airport Auth. v. Urbine, 354 N.C. 336, 343, 554 S.E.2d 331, 335 (2001), *cert. denied*, 535 U.S. 971, 152 L. Ed. 2d 381 (2002). *See also Peacock v. Shinn*, 139 N.C. App. at 494-95, 533 S.E.2d at 848 (upholding trial court's dismissal of lawsuit on the grounds, in part, that agreements between the City of Charlotte and a coliseum authority, on the one hand, and the Charlotte Hornets and its owners, on the other, were for a public purpose, and served a primary public goal, despite the fact that amendments to the original agreements obligated the City to pay the defendants a percentage of Coliseum profits regardless of whether those profits resulted from Hornets games).

Plaintiffs urge the Court to give *Maready* a very limited interpretation, arguing that *Maready* decided only the narrow question of the facial validity of N.C.G.S. § 158-7.1. Plaintiffs ignore the fact that *Maready* specifically noted that twenty-four economic development incentive projects were challenged in that case. *Maready*, 342 N.C. at 712, 467 S.E.2d at 618.³ Thus, the Court did not uphold § 158-7.1 in a vacuum when it approved the expenditures authorized by that section. *Id.* at 723-24, 467 S.E.2d at 625. Indeed, in dissenting from the majority opinion, plaintiffs' lead counsel, then a member of the Supreme Court, commented on particular aspects of the incentives at issue:

[i]f it is an acceptable public purpose to spend tax dollars specifically for relocation expenses to benefit the spouses of corporate executives moving to the community in finding new jobs or for parking decks that benefit only the employees of the favored company, then what can a government not do if the end result will entice a company to produce new jobs and raise the tax base?

Id. at 741-42, 467 S.E.2d at 635-36 (Orr, J., dissenting). As a result, the dissenting opinion authored by plaintiffs' counsel concluded that "N.C.G.S. § 158-7.1, as broadly interpreted and applied by the majority, is unconstitutional on its face and *as applied.*" *Id.* at 742, 467 S.E.2d at 636 (Orr, J., dissenting)(emphasis added).

³ Plaintiffs cite in their Brief, at p. 26, to "Defendant-Intervenor-Appellant State of North Carolina's Brief" in *Maready* to support their contention that *Maready* addressed only the facial invalidity of N.C.G.S. § 158-7.1. Tellingly, the State was, as indicated by the title of its brief, an intervenor without a stake as to each of the local incentives challenged in that case.

Clearly, while the holding in *Maready* was that § 158-7.1 is constitutional, both the majority and the dissenters addressed that question in the context of particular incentives offered pursuant to specific economic development projects challenged by the plaintiffs in that litigation.

Not only are plaintiffs here mistaken in contending that *Maready* involved only a determination of the facial validity of N.C.G.S. § 158-7.1, they seek to have this Court engraft an unrealistically narrow interpretation on the ruling in *Maready*. Yet, it is plaintiffs' lead counsel who described the *Maready* holding in extremely broad terms in his dissent from the majority opinion:

The logic upon which the majority opinion rests its conclusion that the expenditure of these funds was for a public purpose can be stated as follows: The creation of new jobs and an increase in the tax base *ipso facto* benefits the general public. Therefore, local government expenditure of tax dollars to a private business for its private benefit in order to induce the business to either expand or locate in the community is for a public purpose if it creates new jobs and increases the tax base.

Id. at 734, 467 S.E.2d at 631 (Orr, J., dissenting). The interpretation of *Maready* by the trial court and defendants is no broader than that previously voiced by plaintiffs' counsel himself. Thus, plaintiffs' counsel expressed his concern "that little remains of the public purpose constitutional restraint on governmental power to spend tax revenues collected from the public." *Id.*

The State defendants submit that plaintiffs' counsel accurately described the impact of the decision when he argued that *Maready* should be viewed as a broad

endorsement of economic incentives and an implicit rejection of *Mitchell* and other older cases that he now cites in promoting the narrow construction which he currently advocates. Consequently, plaintiffs' public purpose claims of Counts 11, 13, 18, and 20 of their Complaint are without merit as a matter of law and were properly dismissed by the trial court.

III. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS' CLAIM THAT THE INCENTIVES PROVIDED TO DELL ARE UNCONSTITUTIONAL EXCLUSIVE EMOLUMENTS.

Assignments of Error Nos. 30-32, 49-51, 60, 62
(R pp. 202-03, 206-08, 267-68, 242-45)

Plaintiffs argue that the incentives provided to major computer manufacturers, including Dell, are exclusive emoluments that violate Article I, Section 32 of the Constitution. Article I, Section 32 reads as follows: "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." The incentives provided in Chapter 204 and received by Dell are not exclusive or separate emoluments, and this Court should so rule.

According to plaintiffs, defendants (and presumably the trial court) rely on a line of cases that supposedly analyses the exclusive emoluments issue incorrectly. As our Supreme Court has explained, the prohibition on exclusive emoluments contained in Article I, Section 32

does not apply to an exemption from a duty imposed upon citizens generally if the purpose of the exemption is the promotion of the general welfare, as distinguished from the benefit of the individual, and if there is a reasonable basis for the Legislature to conclude that the granting of the exemption would be in the public interest.

Town of Emerald Isle v. State, 320 N.C. 640, 653, 360 S.E.2d 756, 764 (1987) (quoting *State v. Knight*, 269 N.C. 100, 108, 152 S.E. 2d 179, 184 (1967)). Rather,

a statute which confers an exemption that benefits a particular group of persons is not an exclusive emolument or privilege within the meaning of Article I, section 32, if: (1) the exemption is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest.

Id. at 654, 360 S.E.2d 764. *Accord Peacock*, 139 N.C. App. at 496, 533 S.E.2d at 848 (concluding that agreement providing for percentage of Charlotte Coliseum Authority profits to go to Hornets owners “was intended to promote the public benefit and plaintiff’s second claim must fail on its face, even though a benefit resulted, as well, to the Shinn defendants”).

Thus, for the same reasons that the challenged actions do not violate the public purpose provisions of the Constitution, the incentives at issue fall well within the permissible limits of Article I, Section 32. Regardless of any benefits that redound to Dell or any other manufacturer, “the primary purpose was the promotion of the general public welfare and not a private interest.” *Town of Highlands v. Hendricks*, 164 N.C. App. 474, 596 S.E.2d 440 (quoting *Peacock* to apply the very test to which

plaintiffs now object), *disc. rev. denied*, 359 N.C. 75, 605 S.E.2d 149 (2004).

Plaintiffs, however, insist that the proper test requires the Court to consider the portion of Article I, Section 32 that focuses on whether a forbidden emolument is “in consideration for public services.” They argue that the Court should look at cases such as *Leete v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995) and *State v. Felton*, 239 N.C. 575, 80 S.E.2d 625 (1954), which held that specific emoluments were unconstitutional because they were not “in consideration of public services.” Those cases, of course, dealt with actions or grants that were deemed to be exclusive emoluments and thus would be unconstitutional unless they were given in exchange for public services. Here, as in *Town of Emerald Isle, Peacock*, and *Town of Highlands*, there was no exclusive emolument. Consequently, the Court need not reach the second portion of the Article I, Section 32 test. Therefore, plaintiffs’ exclusive emoluments claims were properly dismissed.

IV. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS’ CLAIM THAT THE LOCAL SUBSIDIES AT ISSUE ARE NOT AUTHORIZED BY N.C.G.S. § 158-7.1.

Assignments of Error Nos. 1, 5-7, 52, 58-60, 62
(R pp. 196-98, 207-08, 231-32, 243-45)

Without specifying any particular defects, plaintiffs argue that the local subsidies at issue in this case are not authorized by N.C.G.S. § 158-7.1. Contrary to plaintiffs’ allegations (Count 21, R p. 73) and contentions here, the various incentives

provided to Dell by the local governments are fully contemplated by the broad authorizations given to local governments by N.C.G.S. § 158-7.1. Just as the Supreme Court rejected the challenge of the *Maready* plaintiffs to the myriad local incentives assailed in that case, this Court should reject plaintiffs' generalized challenge to the local incentives offered in this case. Accordingly, this Court should affirm the trial court in holding that N.C.G.S. § 158-7.1 fully, and constitutionally, authorized the local incentives challenged by plaintiffs.

V. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS' CLAIM THAT THE TAX REFUNDS OR CREDITS GRANTED PURSUANT TO CHAPTER 204 ARE NOT UNIFORMLY APPLICABLE.

Assignments of Error Nos. 2, 42-44, 60, 62
(R pp. 197, 204-05, 240-41, 245)

Plaintiffs insist that the credits and refunds of Chapter 204 are not uniformly applicable and violate Article V, Sections 2(2) and 2(3) of the Constitution. The Constitution directs that “[n]o class of property shall be taxed except by uniform rule, and every classification shall be made by general laws uniformly applicable in every county, city and town, and other unit of local government.” N.C. CONST. art. V, § 2(2). The Constitution also mandates that “[e]very exemption shall be on a State-wide basis and shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.” N.C. CONST. art. V, § 2(3). According to plaintiffs, Chapter 204 violates these constitutional directives by

providing Dell with unique tax incentives.

Importantly, Chapter 204 does not limit its credit and refund provisions to Dell. Indeed, plaintiffs allege in their Complaint that one major computer manufacturer taking advantage of the provisions of Chapter 204 could suffer unconstitutional discrimination by receiving credits less than another manufacturer with the same employment and investment, based solely on whether that other manufacturer at some point reached a higher employment level than the supposedly disadvantaged one. (Compl. ¶ 98, R p. 65) Thus, on the one hand, plaintiffs contend that another manufacturer could be discriminated against under Chapter 204, thereby assuming that more than one manufacturer could take advantage of its provisions, while on the other hand they urge this Court to invalidate Chapter 204 on the theory that only Dell could take advantage of its provisions.

Despite plaintiffs' protestations, Chapter 204 is not limited to Dell, and there is no reason that another computer manufacturer could not avail itself of Chapter 204's provisions. Moreover, it is for the General Assembly to determine tax classifications, and the General Assembly may make fine distinctions and tax different industries under different standards.

The Legislature is sole judge of what subjects it shall select for taxation . . . , and the exercise of its discretion is not subject to the approval of the judicial department of the State. In selecting subjects for taxation, narrow distinctions are sometimes invoked, and if founded on a rational basis and reasonably related to the object of the legislation, the courts

will not say that a different result should have been reached or that the differentiation is arbitrary.

Deadwood, Inc. v. N.C. Dep't of Revenue, 356 N.C. 407, 410, 572 S.E.2d 103, 105 (2002) (quoting *Leonard v. Maxwell*, 216 N.C. 89, 96, 3 S.E.2d 316, 322 (1939)) (upholding the taxation of live entertainment differently from “moving picture shows”) (citations omitted). The Court “has sustained numerous tax classifications which rested on subtle distinctions.” *Id.* at 414, 572 S.E.2d at 107.

The General Assembly’s stated purposes in Chapter 204 are rationally related to the legislation in question. Chapter 204 is not simply designed to stimulate economic activity and new jobs; it is specifically designed to recognize the significance of *computer* manufacturing and distribution in this State. “Computer manufacturing and distribution has been an important industry for the State and has prospered in this State.” N.C.G.S. § 105-129.60(4). Further, that “industry will remain a vital part of the world's, nation's, and State's future economy as society becomes more dependent on advanced computer technology.” N.C.G.S. § 105-129.60(5). Critically, “[i]t is the intent of the State to encourage the sustainability of this industry cluster in this State and to encourage the maintenance and growth of computer manufacturing and distribution employment in the State through tax policies,” and other means. N.C.G.S. § 105-129.60(6). Consequently, the General Assembly acted within its broad legislative discretion, including authority to “impose

different specific taxes upon different trades and professions and [to] vary the rate of excise upon various products.” *Appeal of Martin*, 286 N.C. 66, 75-76, 209 S.E.2d 766, 773 (1974).

As our Supreme Court has acknowledged, the business of government now includes competing with other states to attract industry by offering inducements to that industry. *Maready*, 342 N.C. at 727, 467 S.E.2d at 627. The provisions of Chapter 204 are rationally related to the unquestionably legitimate goal of encouraging the computer manufacturing and distribution industry as part of the larger goal of promoting economic development and jobs for the citizens of North Carolina. The trial court thus properly dismissed plaintiffs’ uniformity of taxation claims.

VI. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE COMMERCE CLAUSE DOES NOT PROHIBIT THE ECONOMIC INCENTIVES AT ISSUE IN THIS CASE.

Assignments of Error Nos. 17-18
(R pp. 234-35, 200)

Plaintiffs also contend that the trial court erred in dismissing their “negative” or “dormant” Commerce Clause claims. “In its negative aspect, the Commerce Clause prohibits economic protectionism -- that is, regulatory measures designed to benefit instate economic interests by burdening out-of-state competitors.” *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330, 133 L. Ed. 2d 796, 804 (1996) (citations and internal

quotations omitted). Accordingly, “the first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.” *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93, 99, 128 L. Ed. 2d 13, 21 (1994) (citations and internal quotations omitted). Because Chapter 204 does not discriminate against interstate commerce, the trial court properly dismissed plaintiffs’ Commerce Clause claims.

“The [Commerce] Clause was designed in part to prevent trade barriers that had undermined efforts of the fledgling States to form a cohesive whole following their victory in the Revolution.” *Hughes v. Alexandria Scrap Corp*, 426 U.S. 794, 807, 49 L. Ed. 2d 220, 230 (1976) (footnote omitted). The Commerce Clause

prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses ‘would invite a multiplication of preferential trade areas destructive’ of the free trade which the Clause protects.

Boston Stock Exchange v. State Tax Comm’n, 429 U.S. 318, 329, 50 L. Ed. 2d 514, 524 (1977).

Simply put, the negative Commerce Clause protects interstate commerce against discriminatory or burdensome treatment by the states. The incentives at issue here are intended and designed to foster investment and employment in North

Carolina. They do not involve the taxation of interstate transactions or burden interstate transactions in any way. The incentives are not offered solely to domestic corporations; out-of-state or in-state corporations could qualify for the incentives. It makes no difference whether Dell or any other corporation qualifying for the incentives then sells its wares outside or inside North Carolina or purchases goods outside or inside North Carolina.⁴ In sum, nothing about the incentives which plaintiffs challenge limit or restrict or burden or discriminate against interstate commerce in any way.

North Carolina has enacted legislation designed to promote the very types of goals which the Supreme Court has approved states' encouraging. The Commerce Clause

does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy.

Boston Stock Exchange, 429 U.S. at 336-37, 50 L. Ed. 2d at 528-29. *See also Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 385, 112 L. Ed. 2d 884, 912

⁴ Plaintiffs alleged in their Complaint, incorrectly, that "N.C. Gen. Stat. § 105-164(j)(2) and (3)" distinguish between building materials, supplies, fixtures and equipment used in projects in North Carolina according to whether those items are purchased in North Carolina. (Compl. ¶ 86, R p. 62) Plaintiffs are wrong. There is no such distinction made in the relevant statute, § 105-164.14(j), or in any other provision related to this litigation.

(1991) (“It is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State.”)

To be sure, the United States Supreme Court has never addressed the application of the Commerce Clause to tax incentives of the type at issue here. *West Lynn Creamery v. Healy*, 512 U.S. 186, 199 n.15, 129 L. Ed. 2d 157, 170 n.15 (1994). It has, however, noted that subsidies of various forms may well pass constitutional muster.

The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State’s regulation of interstate commerce*. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does.

New Energy Co. v. Limbach, 486 U.S. 269, 278, 100 L. Ed. 2d 302, 311 (1988) (emphasis in original). “A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business.” *West Lynn Creamery*, 512 U.S. at 199, 129 L. Ed. 2d at 170. Nor is a state confined to pure cash subsidies in encouraging local industry and economic development. *See also Hughes*, 426 U.S. at 816, 49 L. Ed. 2d at 235 (Stevens, J., concurring) (Commerce Clause does not “inhibit a State’s power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment

capital, it should not be characterized as a ‘burden’ on commerce.”)

Most recently, the Supreme Court vacated, on the grounds of standing, a lower court decision invalidating Ohio tax incentives as being in violation of the Commerce Clause. *DaimlerChrysler*, 164 L. Ed. 2d at 610. While the Court did not express an opinion on the merits of the lower court’s ruling, it did observe that a prior Michigan state court opinion had ruled differently on a similar question. *Id.* at 601 (citing *Caterpillar, Inc. v. Dept. of Treasury*, 440 Mich. 400, 488 N.W.2d 182 (1992)). Thus, although plaintiffs would have this Court believe that Supreme Court precedent requires a decision in their favor, no such precedent exists, and the only intimation by the Court as to what it would decide is contrary to plaintiffs’ argument.

In sum, the State of North Carolina has structured certain tax provisions to encourage the growth and development of intrastate industry in an effort to provide jobs and prosperity to the citizens of this State. It has neither burdened nor discriminated against interstate commerce, and plaintiffs’ claims in Counts 1 through 3 of their Complaint attacking Chapter 204 on Commerce Clause grounds were properly dismissed.

CONCLUSION

For all the reasons discussed above, the State defendants submit that the trial court properly granted defendants' motion to dismiss pursuant to N.C.G.S. § 1A-1, Rules 12(b) (1) and (6). This Court should overrule each of plaintiffs' assignments of error and affirm the trial court's judgment for the defendants.

Respectfully submitted, this the 10th day of January, 2007.

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N.C. App. R. 33(b) Certification: I certify that all of the attorneys listed above have authorized me to list their names on this document as if they had personally signed.

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CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)(A)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 12), the document does not exceed 8750 words, exclusive of cover, index, table of authorities, certificate of compliance, certificate of service, and appendices.

This 10th day of January, 2007.

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CERTIFICATE OF SERVICE

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

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

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