

NORTH CAROLINA

HALIFAX COUNTY

MILTON JAMES GARRETT, on behalf of
himself and the CITY OF ROANOKE RAPIDS
and its TAXPAYERS

Plaintiff.

vs.

RANDLE "RANDY" H. PARTON; RICHARD
"RICK" G. WATSON; ERNEST C.
PEARSON; MOONLIGHT BANDIT
PRODUCTIONS, LLC; MOONLIGHT
BANDIT PROPERTIES, LLC; FRIENDS OF
MOONLIGHT BANDIT, LLC; MOONLIGHT
BANDIT CONCESSIONS, LLC;
MOONLIGHT BANDIT MERCHANDISING,
LLC; NORTHEASTERN NORTH CAROLINA
REGIONAL ECONOMIC DEVELOPMENT
COMMISSION; AND NORTH CAROLINA'S
NORTHEAST PARTNERSHIP.

Defendant.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08-CVS-922

**PARTON AND MOONLIGHT
COMPANIES' MOTION TO DISMISS
AMENDED COMPLAINT**

Defendants Randle "Randy" H. Parton ("Parton"); Moonlight Bandit Productions, LLC; Moonlight Bandit Properties, LLC; Friends of Moonlight Bandit, LLC; Moonlight Bandit Concessions, LLC; and Moonlight Bandit Merchandising, LLC ("Moonlight Companies"), by and through their attorneys Poyner & Spruill LLP, hereby move the Court pursuant to North Carolina Rule of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss Plaintiff's Amended Complaint. The basis for this Motion is set forth in the Legal Memorandum Parton and the Moonlight Companies have filed contemporaneously with this Motion.

WHEREFORE, Parton and the Moonlight Companies respectfully request that the Court dismiss Plaintiff's Amended Complaint with prejudice.

This the 10th day of October, 2008.

POYNER & SPRUILL LLP

By: /s/ J. Nicholas Ellis
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **MOTION TO DISMISS AMENDED COMPLAINT BY PARTON AND MOONLIGHT COMPANIES** by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following person(s) at the following address which is the last address known to me:

Jeanette K. Doran North Carolina Institute for Constitutional Law 333 E. Six Forks Road, Suite 180 Raleigh, NC 27609 <i>Attorneys for Plaintiff</i>	Cathleen M. Plaut Bailey & Dixon P.O. Box 1351 Raleigh, NC 27602 <i>Attorneys for Richard G. Watson</i>
Gary J. Rickner Ward and Smith, P.A. P.O. Box 2091 Raleigh, NC 27602-2091 <i>Attorneys for Northeastern North Carolina Regional Economic Development Commission and North Carolina's Northeast Partnership</i>	Mary Webb McAngus, Goudelock & Courie, LLC P.O. Box 30516 Raleigh, NC 27622 <i>Attorneys for Northeastern North Carolina Regional Economic Development Commission and North Carolina's Northeast Partnership</i>
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This the 10th day of October, 2008.

POYNER & SPRUILL LLP

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Defendant.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08-CVS-922

**MEMORANDUM OF LAW IN SUPPORT
OF PARTON AND MOONLIGHT
COMPANIES' MOTIONS TO DISMISS
AMENDED COMPLAINT**

Defendants Randle "Randy" H. Parton ("Parton"); Moonlight Bandit Productions ("MBP"), LLC; Moonlight Bandit Properties, LLC; Friends of Moonlight Bandit, LLC; Moonlight Bandit Concessions, LLC; and Moonlight Bandit Merchandising, LLC ("Moonlight Companies"), by and through their attorneys Poyner & Spruill LLP, respectfully submit the following in support of their Motion to Dismiss Amended Complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure.

STATEMENT OF THE FACTS

Plaintiff attempts in this action to bring a derivative action on behalf of the City of Roanoke Rapids and its taxpayers against Defendants. Plaintiff alleges Defendants

misappropriated public funds by tricking Roanoke Rapids to build a theater for Defendants' benefit. Plaintiff contends Parton and Moonlight Companies tortiously acted in concert with the other defendants and made negligent misrepresentations to the City.

Plaintiff's lawsuit tries to vacate Roanoke Rapids City Council's judgment and actions when it decided to build a "Music & Entertainment Zone" that had included a music theater featuring Parton as the entertainment headliner. The theater opened in July 2007. Moonlight Bandit Productions, LLC ("MBP") leased the theater beginning in March 2007 and began live performances in July 2007. It leased the theater for just three more months, when due to differences with the City, Parton, MBP and the City entered into a Performance and Management Agreement ("PMA") on November 20, 2007. The PMA, among other things, terminated MBP's lease and turned over all aspects of management and operation of the theater to Roanoke Rapids. At this time, Parton simply stayed on as a contract performer at the City's theater.

Due to subsequent differences between the parties, they entered into a Settlement Agreement and Release of All Claims dated February 29, 2008 ("Settlement Agreement"). The Settlement Agreement included a "release" provision in which the parties mutually released each other of and from any and all claims known or unknown relating to any of their prior agreements, or the creation, ownership, management, promotion of, or operation of the theater.

Plaintiff brings this "taxpayer derivative" action to recover monetary damages because he contends he is a Roanoke Rapids citizen and is acting for the City and other taxpayers. However, Plaintiff lacks standing to bring this action for himself. Plaintiff also failed to satisfy the legal requirements to bring this action on behalf of Roanoke Rapids or its taxpayers. His pleadings acknowledge Roanoke Rapids completely released Parton and his companies from any and all claims concerning the theater, and he can have no greater rights than Roanoke Rapids.

which has released all such rights. Additionally, Plaintiff's claims are barred by the applicable three-year statute of limitations, and in any event, they fail to state a legally cognizable claim. Therefore, Plaintiff's case should be dismissed.

LEGAL AUTHORITY

I. Plaintiff Lacks Standing to Bring this Action Against Parton and the Moonlight Companies.

Standing is properly challenged by a North Carolina Rule of Civil Procedure 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Fuller v. Easley, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001). As the party invoking jurisdiction, plaintiff has the burden of proving the elements of standing. Coker v. DaimlerChrysler Corp., 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005). Generally, an individual taxpayer has no standing to bring a suit in the public interest. Fuller v. Easley, 145 N.C.App. 391, 553 S.E.2d 43 (2001); Green v. Eure, 27 N.C. App. 605, 608, 220 S.E.2d 102, 105 (1975). The rare exception to this general rule is that a taxpayer may have standing if he can demonstrate:

“[A] tax levied upon him is for an unconstitutional, illegal or unauthorized purpose [;] that the carrying out of [a] challenged provision will cause him to sustain personally, a direct and irreparable injury [;] or that he is a member of the class prejudiced by the operation of [a] statute.”

Fuller v. Easley, 145 N.C.App. 391, 395, 553 S.E.2d 43, 46-47 (2001) *quoting* TexFi Industries v. City of Fayetteville, 44 N.C.App. 268, 270, 261 S.E.2d 21, 23 (1979) (brackets in original.)

Plaintiff's Amended Complaint does not and cannot allege a tax levied upon him that is for an unconstitutional, illegal or unauthorized purpose. See Blinson v. State, ___ N.C.App. ___, 651 S.E.2d 268 (2007) (upholding the constitutionality of government economic incentives). Plaintiff cannot and has not alleged that the carrying out of a challenged provision will cause him

to sustain personally, a direct and irreparable injury. In fact, the injury alleged by Plaintiff is an injury that he contends will be borne by all Roanoke Rapids taxpayers and then only indirectly through the need to possibly raise taxes in the future. Finally, Plaintiff does not allege that he is a member of a class prejudiced by the operation of a statute. Therefore, under established North Carolina law, Plaintiff cannot satisfy any of the three theories that would allow him to sue directly as an individual taxpayer. See Fuller v. Easley, 145 N.C. App. at 395, 553 S.E.2d at 46-47.

Plaintiff relies on Goldston v. State of North Carolina, 361 N.C. 26, 637 S.E.2d 876 (2006) to support his contention that he has standing as a taxpayer to sue Defendants Parton and Moonlight Companies. However, the issue in Goldston was “whether individual taxpayers have standing to seek relief when they allege government officials violated statutory and constitutional provisions. . . .” Id. at 27-28, 637 S.E.2d at 878. The Court held only that “a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds.” Id. at 33, 637 S.E.2d at 881. Similarly, the other case Plaintiff relies on, Teer v. Jordan, 232 N.C. 48, 59 S.E.2d 359 (1950), was a suit which sought to restrain government officials, members of a state agency (the State Highway and Public Works Commission), from using tax money for unauthorized or illegal purposes. These cases are inapposite to Plaintiff’s case against Parton and the Moonlight Companies, who are not and have never been government officials or government agencies charged with the responsibility of the disbursement of tax money.

Rather than seeking to sue government officials to restrain illegal expenditures, Plaintiff sues Parton and the Moonlight Companies for tortiously acting in concert and negligent misrepresentation. The right, if any exists, which is denied, to recover for these alleged torts

belongs to the City of Roanoke Rapids. See Branch v. Board of Education, 233 N.C. 623, 65 S.E.2d 124 (1951) (“the right to sue for the protection or recovery of the school funds of a particular school administration unit belongs by necessary implication to the governing board of that unit”). A taxpayer like Plaintiff may sue on behalf of such public agencies or political subdivisions only if the proper authorities wrongfully neglect or refuse to act (“derivative taxpayer standing”). Fuller v. Easley, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001).

No North Carolina case has recognized that a taxpayer has standing to sue a private person or entity when a public agency or political subdivision has taken legal action in good faith to resolve all claims against the private person or entity. Cf. Goldston v. State, 361 N.C. 26, 637 S.E.2d 876 (2006) (holding that a taxpayer has standing to bring an action against appropriate *government officials* for alleged *misuse or misappropriation* of public funds). In this case, the City entered into a Settlement Agreement with Parton and the Moonlight Companies, and Plaintiff does not allege any bad faith on the City’s part, nor does it allege any wrongful act by Parton or his businesses concerning the Settlement Agreement. Thus, since the City took legal action in good faith (executing the Settlement Agreement), none of the cases analyzing derivative taxpayer standing apply, and Plaintiff has no standing to sue on behalf of the City.

Even if the cases interpreting derivative taxpayer standing applied in this case, Plaintiff still could not establish standing because he has not met the requisites for standing outlined in those cases. The derivative taxpayer standing cases hold that to survive a 12(b)(1) motion to dismiss for lack of standing, Plaintiff must allege (1) that there has been both a demand on and wrongful refusal by the proper authorities to act, or (2) particular facts which would make such a demand futile. See Fuller v. Easley, 145 N.C. App. at 395, 553 S.E.2d at 47; Whitmire v. Cooper, 153 N.C. App. 730, 570 S.E.2d 908 (2002). Plaintiff can do neither and he has not done

so in his Amended Complaint. The Amended Complaint should therefore be dismissed as to Parton and Moonlight Companies pursuant to Rule 12(b)(1).

A. There was no demand on and wrongful refusal by the proper authorities to act.

An essential element to derivative taxpayer standing is that there was a demand on and a wrongful refusal by the proper authorities to act. See, e.g., Fuller v. Easley, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001). Plaintiff's Amended Complaint does not allege that he or anyone else made a demand on the City or any other public agency or political subdivision, such as the State of North Carolina, to act. Thus, Plaintiff cannot achieve derivative taxpayer standing through this avenue.

Moreover, even if there had been a demand, there was no refusal by the City to act. The Settlement Agreement was executed by Roanoke Rapids and Defendants in February, 2008, long after all of the facts cited by Plaintiff occurred and were publicly disclosed. Pursuant to the Settlement Agreement, the City agreed to pay \$750,000 to Defendants Parton and MBP in consideration of the release of and from any and all claims that each party had or might have had against the other at the time it was executed. Since the City did act and did not neglect or refuse to act, Plaintiff lacks standing to bring this suit against Parton and the Moonlight Companies.

As stated above, no North Carolina case holds that a taxpayer may sue on behalf of a public body when the public body has in good faith entered into a settlement agreement with the defendant which completely resolves all legal disputes between them. A city has the authority to resolve legal disputes by entering into a settlement agreement without instituting formal legal proceedings. See Clayton v. Branson, 170 N.C. App. 438, 613 S.E.2d 259 (2005). To allow this plaintiff to sue on behalf of Roanoke Rapids when the City Council has already considered and fully resolved its disputes with Parton and the Moonlight Companies would do nothing but

encourage “the disruptive tendency of officious intermeddling by taxpayers in matters committed to the decision of public officers.” Branch v. Board of Educ., 233 N.C. 623, 65 S.E.2d 124 (1951) (explaining why a taxpayer cannot bring an action on behalf of a public agency or political subdivision where the proper authorities have not wrongfully neglected or refused to act). Since the City took action by entering into the Settlement Agreement, Plaintiff cannot meet this element of taxpayer standing, and the Amended Complaint should therefore be dismissed as to these defendants.

Finally, an essential element of the first prong of derivative taxpayer standing is that the refusal to act was wrongful. See, e.g., Whitmire v. Cooper, 153 N.C. App. 730, 570 S.E.2d 908 (2002). Even if Roanoke Rapids neglected or refused to act, there is no allegation in the Amended Complaint that such refusal was wrongful. There is no allegation of any fact that makes the City’s entry into the Settlement Agreement with Parton “wrongful.” There is nothing “wrongful” about the City entering into the Settlement Agreement without voter approval. North Carolina General Statute § 160A-11 gives a city the right to sue and be sued and the right to contract and be contracted with. “A settlement agreement is a contract resolving a dispute without a trial.” Clayton v. Branson, 170 N.C. App. 438, 613 S.E.2d 259 (2005), and cities are free to enter into such contracts. See id. There is no law in North Carolina requiring a city to obtain voter approval for settlement agreements. A local government has discretion to decide whether to enter into a settlement agreement, and absent an allegation that the conduct of local government officials was wrongful, a taxpayer does not have standing to sue on behalf of that local government. See Branch v. Board of Educ., 233 N.C. 623, 65 S.E.2d 124 (1951).

In his brief, Plaintiff argues the City cannot simply contract away a taxpayer’s right to challenge the misuse or misappropriation of public money. However, as stated above, Plaintiff is

suing Parton and the Moonlight Companies for claims that would have belonged to Roanoke Rapids. Plaintiff has not met his legal burden of establishing standing to bring this suit, and the City has therefore not "contracted" away his right to sue because he never had that right.

Plaintiff further argues the Settlement Agreement is itself a misuse and misappropriation of money because the City failed to comply with statutory mandates requiring notice and public hearings as specified in N.C. Gen. Stat. § 160A-400.25, which requires that "consideration of a proposed major modification of [a development] agreement shall follow the same procedures as required for initial approval of a development agreement." Plaintiff argues that the release contained in the Settlement Agreement shifted the burden of covering the operating costs of the Theatre to the City, and therefore was a major modification of the EDA requiring compliance with 160A-400.20 *et seq.* However, §160A-400.20 *et seq.* did not become effective until January 1, 2006, after the EDA was signed on June 30, 2005. Thus, the requirement that major modifications follow the same procedures as for initial approval only required the City to follow the same procedures it followed when the EDA was approved, which it did. The City Council voted publicly to build the theater and voted publicly to execute the Settlement Agreement. Since the notice and hearing requirements of §160A-400.20 *et seq.* were not required when the EDA was approved, they were also not required for modifications of the EDA.

Regardless, the Settlement Agreement was not a modification of the EDA. As referenced in Plaintiff's Amended Complaint, City officials negotiated a new contract with Parton in September 2007. The new contract was simply an employment contract, not a "development agreement," and it specifically terminated the EDA. Thus, when the Settlement Agreement was signed in February of 2008, it was not a development agreement, it was not modifying a

development agreement, and it therefore was not subject to any requirements of § 160A-400.20 *et seq.*

Finally, addressing Plaintiff's argument about N. C. Gen. Stat. § 160A-400.20 *et seq.*, all the City did was enter into a contract with Parton to lease a building. Parton had no obligations to build the facility or to determine how it was to be operated. He simply agreed to lease it and pay rent. This agreement was not a "development agreement" as defined by these statutes. Simply, Plaintiff's citation to this statute is in error.

Plaintiff does not allege any other potential wrongdoing by the City, and therefore he does not have the right to challenge the Settlement Agreement on behalf of the City. Plaintiff's remaining theories as to why the Settlement Agreement is void fail to recognize the essential tenet of derivative taxpayer standing—that it is the public body that has the right to pursue remedies for an alleged wrong and not an individual taxpayer. If the Settlement Agreement is void as against public policy or due to fraud and breach of fiduciary duty (notably, Plaintiff's Amended Complaint does not allege any fraud or breach of fiduciary duty on the part of Parton or Moonlight Companies), then it is the City's right to have the agreement set aside, and Plaintiff may only seek such a remedy if the City wrongfully refuses to do so. Since Plaintiff has no direct claims against Parton and his stated claims are derivative and depend entirely upon the viability of the City's claims, his derivative claims fail. To hold otherwise would allow taxpayers like Plaintiff to attempt to substitute their judgment for those of elected officials acting in good faith. With no allegations that Roanoke Rapid's action or refusal to act was wrongful, Plaintiff cannot meet the prerequisites of the first prong of derivative taxpayer standing.

B. Plaintiff Does Not Allege Particular Facts that Make a Demand on the City Futile.

Under the second prong of derivative taxpayer standing, a taxpayer may have standing to bring an action on behalf of a public agency or political subdivision without first demanding that the proper authorities act if the circumstances are such as to indicate affirmatively that such a demand would be futile. Branch v. Board of Educ., 233 N.C. 623, 65 S.E.2d 124 (1951). This element, like all of the elements of derivative taxpayer standing, comes from corporate law. See, e.g., Merrimon v. Paving Co., 142 N.C. 539, 55 S.E. 366 (1906) (citing corporate law and finding that the same rules regarding a shareholder's standing to sue on behalf of a corporation apply to taxpayers who sue on behalf of a municipality). The North Carolina Court of Appeals has explained the "futility" requirement in the context of a derivative shareholder action as follows:

A demand for action by the directors is unnecessary only when the complaint alleges with particularity facts indicating that such a demand would be futile. Particular facts that excuse a shareholder from demanding action by the board of directors before suing to enforce a corporate right include, so our courts have held, those that indicate corruption or bad faith by the directors, such as self-dealing or self-interest, fraud, or conflict of interest.

Roney v. Joyner, 86 N.C. App. 81, 356 S.E.2d 401 (1987). Like a shareholder, a taxpayer is excused from making a demand on the proper authorities only when there are allegations which indicate that a demand on those authorities would be futile because the authorities have not or are not acting in good faith on behalf of the public agency or political subdivision. See Merrimon v. Paving Co., 142 N.C. 539, 55 S.E. 366.

In Merrimon, taxpayers sued a construction company alleging it did not provide the quality of paving services promised under their contract with the city. Id. The taxpayers did not allege they made a demand on the city before instituting the action. Id. at 553, 55 S.E. at 370.

Our Supreme Court analyzed the exceptions to the requirement of such a demand and found since the plaintiffs did not allege with particularity any fraud by the city, or that the city was acting oppressively, illegally, or for their interest in a manner destructive to the city, the plaintiffs were not excused from the requirement of making a demand on the city. Id. The fact that the city authorities' opinion about the quality of the work differed from the opinion of the plaintiffs did not give the plaintiffs the right to sue without first making a demand upon those authorities. Id. See also Murphy v. City of Greensboro, 190 N.C. 268, 129 S.E.614 (1925) (holding that the plaintiff did not need to make a demand on the city when the city council's good faith was directly assailed by allegations that it unlawfully and secretly devised a scheme to award a contract to one company while disregarding the bid of another).

The Amended Complaint does not allege that a demand on the City or any other government agency would be futile, nor does it allege any of the facts identified in North Carolina case law that excuse such a demand. The Amended Complaint does not allege any bad faith whatsoever on the part of Roanoke Rapids officials. It does not allege any facts to indicate that they were acting in their own interests to the detriment of the City or that the City officials were acting illegally, fraudulently or oppressively. Moreover, as discussed above, cities have a right to enter into settlement agreements, and there is no law requiring voter approval of such agreements. To the extent Plaintiff is suing on behalf of some public agency or political subdivision other than the City, he again has not alleged any facts to indicate that a request that these entities act would be futile. Thus, Plaintiff does not fall within the futility exception, and he was required to make a demand on the public agency or political subdivision on behalf of which he is suing. The failure to make and allege this demand defeats any claim Plaintiff has to

derivative taxpayer standing, and accordingly, Plaintiff's Amended Complaint should be dismissed for lack of subject matter jurisdiction.

Plaintiff relies on Guilford County v. Trogdon, 124 N.C. App. 741, 478 S.E.2d 643 (1996) to show that the facts of this case fall within the futility exception. In Trogdon, the Court of Appeals held since the Board of Education voted not to take legal action to recover \$275,000 illegally paid to defendant, it would have been useless for the taxpayers to demand that the Board institute proceedings against the defendant. The Court of Appeals did not discuss or analyze the futility exception beyond declaring that it would have been useless for the taxpayers to make such a demand in that case. While it is unclear from the opinion what about the Board's vote in Trogdon made such a demand futile as defined in North Carolina law, it is clear that Trogdon does not and cannot change the law with regard to the futility exception since Trogdon cites with approval the North Carolina Supreme Court case of Branch v. Board of Educ., 233 N.C. 623, 625, 65 S.E.2d 124, 126 (1951), which in turn cites the Merrimon v. Paying Co. and Murphy v. City of Greensboro cases discussed above. Moreover, the facts of Trogdon are clearly distinguishable from the facts of this case. In Trogdon, unlike in this case, the proper authorities took a vote in which they decided not to take any legal action. In this case, the proper authorities did take legal action by terminating their contract with Parton and entering into a valid Settlement Agreement. Since there is no allegation of bad faith on behalf of the City officials, this case does not fall within the futility exception, and Plaintiff was required to make his demands on the City officials before filing suit. The Plaintiff did not do this, and therefore, he has not met the requirements of either the first or second prong for derivative taxpayer standing. For these reasons, Plaintiff's Amended Complaint should be dismissed pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure.

II. Even if Plaintiff has Standing, He has Failed to State a Claim Against Parton and the Moonlight Companies because the City of Roanoke Rapids Released Parton from All Claims

Pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, a claim should be dismissed if: (1) no law exists to support the claim; (2) sufficient facts to make out a valid claim are absent; or (3) facts are disclosed that will necessarily defeat the claim. Perry v. Carolina Builders Corp., 128 N.C. App. 143, 146, 493 S.E.2d 814, 816 (1997) (citing Forbis v. Honeycutt, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981)). The mere assertion of a grievance is insufficient to state a claim for relief. Smith v. City of Charlotte, 79 N.C. App. 517, 527-28, 339 S.E.2d 844, 851 (1986) (citing Sutton v. Duke, 277 N.C. 94, 105, 176 S.E.2d 161, 167 (1970)).

A derivative claim depends on the validity of the original claim of the person or entity through whom the claim is derived. See Southerland v. Kapp, 59 N.C. App. 94, 295 S.E.2d 602 (1982); 74 Am. Jur. 2d Taxpayers' Actions § 4 (2008) ("in a derivative action by resident taxpayers, the plaintiffs have no greater rights than the taxing district itself possessed"). By signing a general release, a plaintiff discharges all claims between the parties. See Merrimon v. The Postal Telegraph-Cable Co., 207 N.C. 101, 106, 176 S.E. 246, 248 (1934), Spivey v. Lowery, 116 N.C. App. 124, 126, 446 S.E.2d 835, 837 (1994). Thus, if the original claim has been discharged by a release, so, too, has the derivative claim. See Spivey v. Lowery, 116 N.C. App. 124, 127, 446 S.E.2d 835, 838 (1994) (holding that if a plaintiff signs a general release releasing all claims against a tortfeasor, she may not later seek to recover against an underinsured motorist carrier whose liability is derivative).

In this case, Plaintiff is suing on behalf of the City and/or another public agency or political subdivision, and his claims are derivative in nature. Indeed, all of the causes of action which Plaintiff asserts against Parton are derived from his alleged actions in relation to Roanoke Rapids, and not from anything Parton did directly to Plaintiff. As discussed above, municipalities have the right to enter into settlement agreements and there is no law in North Carolina that requires a municipality to obtain voter approval for settlements. See N.C. Gen. Stat. §160A-11; Clayton v. Branson, 170 N.C. App. 438, 613 S.E.2d 259 (2005). In February 2008, Roanoke Rapids entered into a contract with Parton and the Moonlight Companies and pursuant to the contract (the Settlement Agreement), Roanoke Rapids agreed to pay \$750,000 to Defendants Parton and MBP “in consideration of the release of and from any and all claims, actions or causes of action which each party to the Settlement Agreement had or might have had against the other party at the time the Settlement Agreement was executed.” As explained above, Plaintiff does not assert any allegations that would make the Settlement Agreement void. Thus, any claims Roanoke Rapids had against Parton or the Moonlight Companies are barred by the Settlement Agreement. Since Plaintiff’s alleged claims against Parton and the Moonlight Companies are derived from Roanoke Rapids’ claims, Plaintiff’s claims are also barred by the Settlement Agreement. Thus, Plaintiff has failed to state a claim upon which relief can be granted, and the Amended Complaint should be dismissed as to Parton and the Moonlight Companies.

III. Plaintiff’s claims against Parton and the Moonlight Companies for Tortious Acting in Concert and Negligent Misrepresentation should be dismissed pursuant to Rule 12(b)(6) because they are barred by the three-year statute of limitations found in N. C. Gen. Stat. §1-52.

Plaintiff has asserted two causes of actions against Parton and the Moonlight Companies. Count Two of the Amended Complaint – Tortious Acting in Concert and Count Three - Negligent Misrepresentation. Even if valid claims, they both are subject to dismissal as they were filed more than three years after the acts alleged in the Amended Complaint occurred.

Where, as here, a defendant properly pleads an applicable statute of limitations, the burden is on the plaintiff to show that his lawsuit was instituted within the time allowed. Jewell v. Price, 264 N.C. 459, 142 S.E.2d 1 (1965). While the question of whether a cause of action is barred by the statute of limitations can be a mixed question of law and fact, where the statute of limitations is properly pled and the facts are not in conflict, the issue becomes one of law. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992) (citing Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 491, 329 S.E.2d 350 (1985)). Further, where it appears from the allegations of the complaint that suit was not filed within the applicable statute of limitations, dismissal pursuant to Rule 12(b)(6) is appropriate. Horton v. Carolina Medicorp, Inc., 344 N.C. 133, 472 S.E.2d 778 (1996.)

Plaintiff alleges in his Amended Complaint that the actions and omissions of Parton for which he is now suing are based on misrepresentations Parton made to Roanoke Rapids and conspiratorial agreements Parton made with Watson. These alleged acts must have occurred prior to January 13, 2005 as that is the date Roanoke Rapids signed a letter of intent to work with Parton on the theater project. (¶24 Amended Complaint.) (They must have occurred before the letter of intent was signed or else how could the City have relied on the misrepresentations?) Roanoke Rapids City Council approved the theater project at a public meeting on April 5, 2005. (¶31 Amended Complaint.) Plaintiff alleges Parton submitted a “business plan” to Roanoke Rapids on April 15, 2005 that described Parton’s experience with theater management and

disclosed that Watson would be the business manager for MBP, which would be the tenant at the theater. (¶¶32,35 Amended Complaint.) So, by April 15, 2005, Parton had allegedly committed tortious acts and negligently misrepresented his background to the City. Since Plaintiff did not file his complaint until June 19, 2008, he filed his action more than three years after Parton committed the alleged wrongful acts, which was after the statute of limitations expired.

Plaintiff's claims against Parton for tortious conduct and negligent misrepresentation are barred by the three-year statute of limitations of N.C. Gen. Stat. § 1-52(5); White v. Consolidated Planning, 166 N.C.App. 283, 308, 603 S. E. 2d 147, 164 (2004). In recognition of the sometimes harsh effects of application of a statute of limitations, the North Carolina General Assembly has promulgated a "discovery rule" in certain specified situations. See, e.g., N.C. Gen. Stat. §§ 1-15(c), 1-52(16). However, the discovery rule does not apply to Plaintiffs' claims for tortious conduct or negligence. Doe v. Doe, 973 F.2d 237 (4th Cir. 1992); White v. Consolidated Planning, 166 N.C.App. 283, 308, 603 S. E. 2d 147, 164 (2004).

Plaintiff contends in his Amended Complaint Parton conspired and tricked the City into approving the theater project. He contends Parton did this through the submission of his business plan. With these acts occurring in and prior to April 2005 and no "discovery rule" applicable to these claims, his cause of action, which is denied even exists, accrued at that time and since he waited more than three years to file his suit, it is now barred by the statute of limitations.

IV. In any event, Plaintiff has not stated a claim for Tortious Acting in Concert or Negligent Misrepresentation

Even if Plaintiff's claims against Parton and the Moonlight Companies are not barred by the statute of limitations, they should both be dismissed as they fail to state a claim upon which

relief can be granted. Claim Two for alleged tortious conduct is essentially a conspiracy claim. The elements of a civil conspiracy are: "(1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme." Privette v. University of North Carolina, 96 N.C. App. 124, 139 385 S.E.2d 185, 193 (1989). A civil action for conspiracy is an action for damages resulting from wrongful acts committed by the conspirators pursuant to the formed conspiracy, and not simply because of the existence of the conspiracy. There is no independent claim for civil conspiracy alone. An overt act in furtherance of the conspiracy which causes damage is necessary. McAdams v. Blue, 3 N.C. App. 169, 173, 164 S.E.2d 490, 494 (1968); NCPI – Civil 103.31 Agency Issue – Civil Conspiracy.

In order for Plaintiff to allege a viable claim for conspiracy against Parton, he must also allege a viable underlying, independent claim against him, too. Plaintiff's only other claim against Parton is for negligent misrepresentation. As will be established, this claim also should be dismissed, therefore the conspiracy claim should be dismissed with it.

The tort of negligent misrepresentation occurs when (1) a party justifiably relies, (2) to his detriment, (3) on information prepared without reasonable care, (4) by one who owed the relying party a duty of care. Simms v. Prudential Life Ins. Co., 140 N.C.App. 529, 532, 537 S. E. 2d 237, 240 (2000). Plaintiff claims Parton misrepresented his experience in the music theater industry and concealed Watson's ownership interest in the Moonlight Companies. A close look at the Amended Complaint reveals no allegations at all concerning Parton's experience in the music theater industry, much less any allegations he misrepresented his experience in the "music theater industry." Plaintiff does allege in ¶35 that Parton submitted a business plan that included a heading "Experienced Management." It emphasized Parton's experience as a performer (no

misrepresentation there) and stated he “has worked with experienced, knowledgeable industry experts in the management of Theaters.” That is 100% correct. Parton has worked with such individuals, but he never represented, nor is it alleged he represented, that he personally had experience with music theater management. This is the only allegation in the Amended Complaint about any possible representation Parton made about his experience with theater management, and as the Court can plainly see, it is not alleged that he ever represented he had experience with theater management. Since this information was true, it was prepared with reasonable care, which knocks out one of the four elements necessary to allege a negligent misrepresentation claim. As such, this claim should be dismissed and for the reasons stated above, the civil conspiracy claim (Claim Two) should be dismissed, as well.

CONCLUSION

Plaintiff has not alleged elements that are essential to establish his standing to bring suit against Parton and the Moonlight Companies, and his Amended Complaint should therefore be dismissed pursuant to North Carolina Rule of Civil Procedure 12(b)(1). Even if Plaintiff does have standing to bring this action, he has not stated a claim against Parton and the Moonlight Companies for which relief may be granted because a Settlement Agreement released all claims that Roanoke Rapids had against them. Since Plaintiff’s claims are derivative, his Amended Complaint should also be dismissed pursuant to Rule 12(b)(6).

Moreover, Plaintiff’s claims are barred by the statute of limitations, and his pleading fails to allege the necessary elements for his claims of conspiracy and negligent misrepresentation against Parton and the Moonlight Companies. For these reasons, Plaintiff’s Amended Complaint should be dismissed in its entirety as to Parton and Moonlight Companies.

This the 10th day of October, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF PARTON AND MOONLIGHT COMPANIES' MOTION TO DISMISS AMENDED COMPLAINT** by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following person(s) at the following address which is the last address known to me:

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This the 10th day of October, 2008.

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