

No. COA04-593

TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

W. D. GOLDSTON, JR., JAMES E.)
HARRINGTON, and citizens, taxpayers)
and bondholders similarly situated,)
Plaintiffs-Appellants,)

From Wake County
02 CVS 015253

v.)

STATE OF NORTH CAROLINA and)
MICHAEL F. EASLEY, Governor,)
individually and in his official capacity,)

Defendant-Appellees.)

DEFENDANT-APPELLEES' BRIEF

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DEFENDANT-APPELLEES' BRIEF

QUESTIONS PRESENTED

- I. DID THE TRIAL COURT PROPERLY GRANT SUMMARY JUDGMENT TO DEFENDANTS BECAUSE PLAINTIFFS LACKED STANDING TO BRING THIS LAWSUIT?

- II. DID THE TRIAL COURT PROPERLY GRANT SUMMARY JUDGMENT TO DEFENDANTS BECAUSE PLAINTIFFS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED?

STATEMENT OF THE CASE

This matter is before the Court on appeal from the Judgment/Order granting summary judgment to defendants and denying summary judgment to plaintiffs entered in the Superior Court of Wake County on 29 January 2004 by the Honorable Joseph R. John, Emergency Superior Court Judge. The matter was heard on cross-motions for summary judgment on 25 November 2003 by Judge John, who had been appointed by the Chief Justice of North Carolina, pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts of North Carolina, to hear and determine this case. (R p. 1, Amendment to Record on Appeal, R pp. 53-55)

The plaintiffs filed their Complaint on 14 November 2002, seeking declaratory and injunctive relief arising from the allegedly unconstitutional and unlawful transfer of monies from the State of North Carolina's Highway Trust Fund (the "HTF") to its General Fund. Plaintiffs brought this suit against the State of North Carolina and against Michael F. Easley, Governor, in both his individual and official capacities. (R pp. 8-16) On 13 January 2003, the defendants moved pursuant to N.C.G.S. § 1A-1, Rule 12(b) (1), (2), and (6), to dismiss the action on a number of grounds, including lack of standing and failure to state a claim for relief. (R pp. 25-26) On 5 February 2003, the trial court denied plaintiffs' motion for preliminary injunction, which had been filed on 3 January 2003. (That motion was heard by the Honorable Robert F.

Farmer, originally designated by the Chief Justice of North Carolina, pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts of North Carolina, to hear the case. (R pp. 23, 24)) On 3 October 2003, all parties moved for summary judgment. (R pp. 36-40) Those motions were heard by the Honorable Joseph R. John, Sr., Emergency Superior Court Judge, designated pursuant to Rule 2.1 to hear the case following the withdrawal of Judge Farmer. (Amendment to Record on Appeal) On 29 January 2004, the trial court entered its order denying plaintiffs' motion for summary judgment and granting defendants'. In so doing, the trial court explained that it "merged its consideration of Defendants' Motion to Dismiss, and the stated grounds therefor, within its ruling upon Defendants' Motion for Summary Judgment," as had "the parties in their arguments." (R p. 53)

On 4 February 2004, plaintiffs filed a timely notice of appeal to the Court of Appeals. (R p. 56) On 10 March 2004, plaintiffs served their proposed record on appeal on defendants. On 15 April 2004, the parties stipulated to the contents of the record on appeal, and on 28 April 2004, the parties signed a statement regarding the settlement of the record on appeal. (R pp. 61-62) The record on appeal was filed in the Court of Appeals on 29 April 2004 and docketed on 7 May 2004. (R p. 1) On 9 August 2004, the Court of Appeals allowed plaintiff-appellants' Motion to Amend Record on Appeal to include in the record the 30 October 2003 Order entered by the Chief Justice

of North Carolina designating the Honorable Joseph R. John, Sr., Emergency Superior Court Judge, to hear the case in lieu of Judge Farmer.

STATEMENT OF THE FACTS

The Highway Trust Fund was created by the General Assembly in Chapter 692 of the 1989 Session Laws as a special account within the State Treasury comprised of funds from specific fuel and highway use taxes and fees. (Stipulation of Facts By All Parties (hereafter "Stip.") ¶ 6, R p. 29) The very legislation that created the HTF included a provision, ultimately codified as N.C.G.S. § 105-187.9, directing the State Treasurer to make annual transfers of \$170 million from the taxes deposited in the HTF to the General Fund. (Stip. ¶ 9, R p. 30) The same legislation included another provision stating, for fiscal year 1989-90, the amount transferred to the General Fund would be \$279,400,000; for fiscal year 1990-91, a total of \$356,000,000 was to be transferred to the General Fund. Session Laws 1989-692 § 4.3. Other legislation enacted during that same session of the General Assembly provided that projects funded by the HTF were subject to the provisions of the Executive Budget Act, Article 1 of Chapter 143 of the General Statutes. (Stip. ¶ 8, R p. 30)

Fiscal Year 2001-02

The General Assembly in 2001 amended N.C.G.S. § 105-187.9 to direct the transfer of \$171.7 million of the taxes deposited in the HTF to the General Fund for

fiscal year 2001-02 (\$1.7 million in addition to the previously specified \$170 million annually) and a total transfer of \$172.4 million for fiscal year 2002-03. (Stip. ¶ 10, R p. 30) On 5 February 2002, the Governor issued Executive Order No. 19, which noted that the budget enacted by the General Assembly for fiscal year 2001-02 could not be administered as enacted without the State incurring a deficit. (Stip. ¶ 26, R p. 34) Executive Order No. 19 further pointed out that General Fund revenue collections and projections for fiscal year 2001-02 would not meet budgeted and anticipated expenditures; the Executive Order authorized the Office of State Budget and Management to make transfers as necessary from the HTF to support General Fund appropriation expenditures. (Stip. ¶ 26, R p. 34) Pursuant to direction from the State Budget Officer, the State Controller transferred \$80 million from the HTF to the General Fund on 8 February 2002. (Stip. ¶ 27, R p. 34) This \$80 million transfer was the only time monies were transferred from the HTF to the General Fund under the authority of an Executive Order. (Stip. ¶ 29, R p. 34) Prior to the transfer, the State Budget Officer determined that the \$80 million transfer would not impair the Department of Transportation in meeting current or future contractual obligations under the HTF program and that the transfer would not harm or delay construction projects to be funded by the HTF. (McCoy Aff. ¶ 8) The HTF ended fiscal year 2001-02 with a balance of more than \$548 million. (Stallings Aff. ¶ 11)

Fiscal Year 2002-03

Legislation enacted by the General Assembly in 2002 amended N.C.G.S. § 105-187.9 to provide for the transfer of \$252.4 million from the Highway Trust Fund to the General Fund for the 2002-03 fiscal year. (Stip. ¶¶ 10, 11 and 12, R pp. 30-31) Furthermore, the General Assembly, in Session Law 2002-126 § 2.2(g), directed the transfer of an additional \$125 million from the HTF to the General Fund for the 2002-03 fiscal year, but provided that all funds transferred outside of the amount authorized by N.C.G.S. § 105-187.9 should be repaid to the HTF during fiscal years 2004-2005 through 2008-2009. (Stip. ¶¶ 13, 14, and 17, R pp. 31-32) The total of all legislatively directed transfers from the HTF to the General Fund for fiscal year 2002-03 was \$377.4 million, which equated to quarterly transfers of \$94.35 million. (McCoy Aff. ¶¶ 9-10) As of December 2002, when this case was being litigated in the trial court, tax revenues credited to the HTF since the beginning of that fiscal year were more than \$413 million, and the balance in the HTF was more than \$213 million. (Stallings Aff. ¶¶ 11, 17)

The State Highway Bond Act of 1996

In 1995 the General Assembly authorized a referendum for the approval of the issuance of \$950 million in general obligation bonds to expedite construction of HTF projects. (Stip. ¶ 18, R p. 32) The State Treasurer issued and sold \$250 million of the

authorized bonds in November 1997, which are the only outstanding bonds for HTF projects. (Stip. ¶ 19, R p. 32) The debt service on the bonds is approximately \$25 million annually and is paid from amounts deposited in the HTF. (Stip. ¶ 20, R pp. 32-33; Stallings Aff. ¶ 7) The named plaintiffs do not own any of the bonds issued pursuant to “The State Highway Bond Act of 1996.” (Stip. ¶ 18, R p. 32)

ARGUMENT

Plaintiffs ask this Court to declare unlawful the actions of the Governor and the State in transferring money from the Highway Trust Fund at a time of severe budget shortfalls in fiscal years 2001-02 and 2002-03. They urge this Court to declare the defendants’ actions unlawful even though plaintiffs have not established any harm to themselves, to the HTF, or to any person or entity before this Court or otherwise. They seek no refund of money; nor do they demonstrate any concrete likelihood of a recurrence of the events about which they complain.

Critically for plaintiffs’ arguments, they have not only failed to show why this Court should address the questions they raise, but they have also failed to show the Court that the trial court erred and should have granted them summary judgment. More basically, they have failed woefully to provide any persuasive argument that the trial court erred in granting defendants’ motion for summary judgment. Indeed, they have hardly addressed the grounds defendants raised in support of their motion for

summary judgment. Defendants first moved to dismiss (R pp. 25-26) and subsequently for summary judgment (R pp. 39-40). The trial court observed in its Judgment/Order that it, “in like manner as the parties in their arguments to the court, merged its consideration of Defendants’ Motion to Dismiss, and the stated grounds therefor, within its ruling upon Defendants’ Motion for Summary Judgment.” (R p. 53) Consequently, it is logical to presume that the trial court granted defendants’ motion for summary judgment on one or more of the grounds argued by defendants to support their motion to dismiss and motion for summary judgment. These included plaintiffs’ lack of standing and failure to state a claim upon which relief can be granted. (R pp. 25-26) Yet, the plaintiffs have curiously not *argued* the standing question presented vigorously by defendants as its first ground for summary judgment. Instead, they merely assert in their Statement of the Facts, pp. 7-8, Appellants’ Brief, that they have standing, citing cases without argument. Nor have they given significant attention to much of the rationale on which defendants contended that plaintiffs had failed to state a claim upon which relief may be granted. Defendants here argue to the Court why the trial court properly granted them summary judgment by presenting to the Court the same theories on which they relied, and prevailed, in the trial court.

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS BECAUSE PLAINTIFFS LACKED STANDING TO BRING THIS LAWSUIT.

ASSIGNMENT OF ERROR NO. 2 (R p. 58)

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

For such a controversy to exist in this case, plaintiffs must have standing to challenge the Governor's and the General Assembly's transfer of funds from the Highway Trust Fund to the General Fund. *See Transcontinental Gas Pipe Line Corp. v. Calco Enters.*, 132 N.C. App. 237, 246, 511 S.E.2d 671, 678 (Wynn, J., concurring) ("Constitutionally, a plaintiff can only have standing if it satisfies the 'case or controversy' requirement of Article III of the Constitution of the United States." (citations omitted)), *disc. review denied*, 351 N.C. 121, 540 S.E.2d 751 (1999). Because standing is a jurisdictional prerequisite, plaintiffs' inability to establish standing was, and is, fatal to their claim. *See Transcontinental Gas Pipe Line Corp.*,

132 N.C. App. at 241, 511 S.E.2d at 675; *Union Grove Milling & Mfg. Co. v. Faw*, 109 N.C. App. 248, 251, 426 S.E.2d 476, 477, *aff'd per curiam*, 335 N.C. 165, 436 S.E.2d 131 (1993). *See also Tucker*, 312 N.C. at 346, 323 S.E.2d at 307 (“actual and existing case or controversy” is a jurisdictional prerequisite to an action, including a declaratory judgment proceeding).

Importantly, “plaintiffs have the burden of *proving* that standing exists.” *American Woodland Indus. v. Tolson*, 155 N.C. App. 624, 627, 574 S.E.2d 55, 57 (2002) (emphasis added), *disc. review denied*, 357 N.C. 61, 579 S.E.2d 283 (2003). Thus, in order to survive defendants’ motion for summary judgment, plaintiffs were required to demonstrate that they suffered an “‘injury in fact’ in light of the applicable statutes or caselaw.” *Neuse River Found., Inc., v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002) (citations omitted), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). They were unable to do so in the trial court, and they have not done so in this Court. Because plaintiffs cannot show they have “sustained an ‘injury in fact’ as a direct result of” the challenged fund transfers, their claims are doomed to failure. *Dunn v. Pate*, 334 N.C. 115, 119, 431 S.E.2d 178, 181 (1993). *See also Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 444, 358 S.E.2d 372, 375 (1987) (plaintiffs in declaratory judgment action must show they have “sustained an injury or [are] in immediate danger of sustaining an injury as a result of” the

challenged governmental action); *accord Andrews*, 132 N.C. App. at 814, 513 S.E.2d at 350.

Plaintiffs are in no jeopardy of any direct harm from the fund transfers they challenge in this case. Neither of them owns any highway bonds, so they cannot claim any threatened injury with regard to those bonds. *See Stip.* ¶ 18, R p. 32. No new or different taxes have been imposed or collected by virtue of the challenged fund transfers, so plaintiffs have not been required to pay more taxes than they paid previously or would pay without the transfers. Neither alleged that he had been harmed by the lack of any specific new road or construction project that has been or will be delayed or impacted by the transfer of funds, so plaintiffs have not alleged any personal impact on them as a result of the fund transfers. In fact, plaintiffs could not have made any such claims because defendants have established that the fund transfers have had no effect on highway construction projects or bond obligations and are unlikely to have any such effects. (Stallings Aff., McCoy Aff) Despite their allegations to the contrary (Complaint, ¶ 5a, R p. 9), plaintiffs clearly have not shown any personal stake in the effects of the fund transfers that would satisfy their obligation to prove their standing to bring this lawsuit.

In their complaint, plaintiffs emphasized their status as taxpayers in order to assert a basis for standing. (Complaint, ¶ 5, R p. 9) Yet, even taxpayers cannot sue the

government simply because they believe the government is acting wrongly with regard to the collection or spending of tax monies. Otherwise, any citizen and taxpayer who disagreed with any action of any government official or entity could judicially challenge the validity of that action so long as any tax funds were collected or spent in connection with the action. Such a rule of standing would allow virtually unlimited challenges to government action by any taxpayer who disagreed with anything the government did. Plaintiffs cannot show the existence of any such standing rule and cannot fit themselves within any existing rule.

Exercise of the judicial power is properly invoked only when it is necessary to determine the respective rights and liabilities or duties of litigants in an actual controversy properly brought before the court. It is not appropriate merely to determine questions of general public interest. Plaintiff here has shown only such interest as is shared generally by all residents, citizens, and taxpayers of the State. He has failed to show that individual interest which is requisite for standing in court.

Green v. Eure, 27 N.C. App. 605, 610, 220 S.E.2d 102, 106 (1975), *disc. review denied*, 289 N.C. 297, 222 S.E.2d 696 (1976). *See also Cannon v. City of Durham*, 120 N.C. App. 612, 615, 463 S.E.2d 272, 274 (1995) (“Our courts have consistently held that a taxpayer has no standing to challenge questions of general public interest that affect all taxpayers equally.”), *disc. review denied*, 342 N.C. 653, 467 S.E.2d 708 (1996); *Nicholson v. State Education Assistance Auth.*, 275 N.C. 439, 447, 168 S.E.2d

401, 406 (1969) (“A taxpayer, as such, does not have standing to attack the constitutionality of any and all legislation.”).

Moreover, government officials cannot be forced to litigate the validity of their actions against all citizens and taxpayers based on whatever whims, personal beliefs, or political motivations may lead citizens to initiate lawsuits. No principle of law authorizes a citizen or taxpayer to compel the courts “to determine the validity of any statute [or governmental action] which he may choose to question.” *Green*, 27 N.C. App. at 609, 220 S.E.2d at 105. “Absent evidence to the contrary, it will always be presumed ‘that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law.’” *Styers v. Phillips*, 277 N.C. 460, 473, 178 S.E.2d 583, 591 (1971) (citations omitted). The fact that a particular governmental action may never be judicially examined if challengers are determined to be without standing does not somehow create standing in litigants who otherwise lack a personal stake in the matter. *See Whitmire v. Cooper*, 153 N.C. App. 730, 735-36, 570 S.E.2d 908, 912 (2002) (agreeing that alleged actions may be “beyond the reach of the Courts” if plaintiffs are held to be without standing, but nevertheless concluding on grounds of lack of standing that the court was without jurisdiction to consider the matter), *disc. review denied & appeal dismissed*, 356 N.C. 696, 579 S.E.2d 104 (2003).

Although they never *argue* standing before this Court, plaintiffs do assert on page 7 of their brief that they have “direct standing,” citing *Texfi Indus. v. City of Fayetteville*, 44 N.C. App. 268, 269, 261 S.E.2d 21, 23 (1979), *aff’d*, 301 N.C. 1, 269 S.E.2d 142 (1980), and *Wynn v. Trustees*, 255 N.C. 594, 599, 122 S.E.2d 404, 407-08 (1961). Their Complaint relies upon this theory of “direct standing” to justify their suit “since a tax has been levied for an unconstitutional purpose,” thereby resulting in a “direct and irreparable injury” to challenging taxpayers or making such taxpayers members of a class “prejudiced by the operation of a law or Executive Order.” (Complaint, ¶ 5a, R p. 9)

Plaintiffs apparently are confused about the type of standing they assert or about their own claim. In reality, they do not contend that any of the taxes levied against them at issue in this case are for unconstitutional or illegal purposes. Certainly, the Highway Trust Fund purposes which they seek to further are not unconstitutional or illegal uses of tax monies. Nor can the General Fund be considered an unconstitutional or illegal use for tax funds. Instead, plaintiffs are complaining about the distribution or division of tax monies among purposes that are both constitutional and legal uses for public funds. Plaintiffs cannot establish standing under this theory. The very cases on which plaintiffs rely in fact demonstrate plaintiffs’ lack of standing. Those cases establish that a taxpayer cannot challenge government actions when he is affected in

the same manner as the group of taxpayers generally. *Texfi Indus.*, 44 N.C. App. at 269, 261 S.E.2d at 23; *Wynn*, 255 N.C. at 599-601, 122 S.E.2d at 408-09 (county taxpayer cannot challenge particulars or methods of use of bond proceeds for construction of colleges, even on grounds their ad valorem taxes may be increased to pay the bonds, when taxes are not for unconstitutional or unlawful purpose, bonds are not unconstitutional, and taxpayer is not affected directly by the colleges). *See also Cannon*, 120 N.C. App. at 615, 463 S.E.2d at 274 (taxpayer cannot challenge manner of funding athletic park). Plaintiffs in this case sought to manufacture standing by alleging in their Complaint that they paid motor fuels taxes, driver license fees, auto title certificate fees, vehicle registration fees, and other taxes and fees which must be deposited to the Highway Trust Fund. (Complaint, ¶ 6, R pp. 9-10) These allegations demonstrate that plaintiffs have suffered no special injury, but instead are in the same position as millions of other citizens. They have not demonstrated a direct injury special to them any more than if they claimed that, because they paid income taxes, they could challenge any state expenditures from the General Fund. In either case, their mere status as taxpayers who pay the tax in question, along with millions of other citizens, does not anoint them with the right to challenge all governmental actions relating to those taxes, especially when plaintiffs make no claim that the taxes themselves are unconstitutional or void.

Plaintiffs also claim to have “derivative standing,” asserting in their complaint that their status as taxpayers gives them “standing to bring a ‘taxpayer action’ on behalf of a public agency or political subdivision because the proper authorities wrongfully failed, neglected or refused to act and a demand on such authorities to act was rendered useless.” (Complaint, ¶ 5b, R p. 9). *See also* Appellants’ Brief, p. 7, (citing *Fuller v. Easley*, 145 N.C. App. 391, 395-96, 553 S.E.2d 43, 47-47 (2001) and *Guilford County Bd. of Comm’rs v. Trogdon*, 124 N.C. App. 741, 747, 478 S.E.2d 643, 647 (1996), *disc. review denied*, 345 N.C. 753, 485 S.E.2d 52 (1997)).

Derivative standing may, in limited circumstances, permit taxpayers to recover, on behalf of governmental entities, tax funds that those governmental entities have improperly disbursed or failed to collect. Plaintiffs, however, cannot establish, and have not even alleged, the prerequisites which would support such a suit. Our courts have recognized “the disruptive tendency of officious intermeddling by taxpayers in matters committed to the decision of public officers.” *Branch v. Board of Education*, 233 N.C. 623, 625, 65 S.E.2d 124, 126 (1951). Accordingly, a taxpayer must meet very specific standards before he may bring such a suit:

[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, after a proper demand to do so, unless the circumstances are such as to indicate affirmatively that such a demand would be unavailing. *Hughes v. Teaster*, 203 N.C. 651, 166 S.E. 745;

Murphy v. Greensboro, 190 N.C. 268, 129 S.E. 614; *Waddill v. Masten*, 172 N.C. 582, 90 S.E. 694; *Merrimon v. Paving Company*, 142 N.C. 539, 55 S.E. 366, 8 L.R.A. (N.S.) 574; 20 C.J.S., Counties, section 287; 64 C.J.S., Municipal Corporations, section 2138; 56 C.J., Schools and School Districts, section 913.

Id. Specifically, in order to sue on behalf of a *local* governmental unit, a taxpayer

must allege facts sufficient to establish the existence of one or the other of these alternative requirements: (a) That there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the public agency or political subdivision (*Hughes v. Teaster, supra; Merrimon v. Paving Company, supra*); or (b) that such a demand on such authorities would be useless. *Murphy v. Greensboro, supra*. See, also, in this connection: 52 Am. Jur., Taxpayers' Actions, section 35; 64 C.J.S., Municipal Corporations, section 2164.

Branch, 233 N.C. at 626, 65 S.E.2d at 126-27. *Accord Peacock v. Shinn*, 139 N.C. App. 487, 491, 533 S.E.2d 842, 845-46, *disc. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000); *Guilford County Bd. of Comm'rs*, 124 N.C. App. at 747, 478 S.E.2d at 647. Nowhere do plaintiffs actually proclaim that they made a request of anyone. Instead, they allege vaguely only that derivative standing existed because "the proper authorities wrongfully failed, neglected or refused to act and a demand on such authorities to act was rendered useless." (Complaint, ¶ 5b, R p. 9)

Not only do plaintiffs fail to establish that they made any demand, but they ignore the differences between actions to recover local government funds and the action they pursue here. Whether a derivative claim can be brought "on behalf of" one

part of State government (the Highway Trust Fund) against others (the Governor and the State itself) is unclear. What is clear, however, is that plaintiffs have not met the criteria for bringing a derivative suit against the State. The proper entity for recovery of State funds is the Attorney General who has, under N.C.G.S. § 143-32, been accorded the exclusive authority to pursue such matters. *Flaherty v. Hunt*, 82 N.C. App. 112, 345 S.E.2d 426 (holding that plaintiffs could not bring action to recover funds for State for former Governor's alleged misuse of State property), *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986). Nowhere have plaintiffs claimed that they made any demands for action to the Attorney General. *See* Complaint, ¶¶ 5b, 8, R p. 9, 10. Moreover, even if plaintiffs had made such a demand on the Attorney General and he refused, his refusal does not constitute the dereliction of duties that is mandatory before taxpayers would have standing to sue. "Plaintiffs do not have standing to sue on behalf of the State and to compel the Attorney General to act." *Whitmire*, 153 N.C. App. at 736, 570 S.E.2d at 912 (holding that plaintiffs lacked standing as taxpayers to seek recovery of monies they allege defendants had unlawfully spent from the North Carolina Clean Water Management Trust Fund for condemnation of tract of land or, in the alternative, to compel the Attorney General by mandamus to recover the funds). *Cf. Fuller*, 145 N.C. App. 391, 396-97, 553 S.E.2d 43, 47 (2001) (in action seeking, in part, to have funds received by Attorney General

as proceeds of lawsuit transferred to the State Treasurer, plaintiff lacked standing because he had not alleged *expressly* that the Treasurer or any state entity refused to file suit or that a demand would have been in vain). Plaintiffs have utterly failed to show that they were entitled to bring this action to force the return to the Highway Trust Fund of monies which they say were unlawfully transferred to the General Fund.

In their brief before this Court, plaintiffs also rely on what they describe as “constitutional standing.” In support of this third theory of standing, plaintiffs cite at page 8 of their Brief to three cases: *Lewis v. White*, 287 N.C. 625, 216 S.E.2d 134 (1975) (citizens may bring suit to prevent commission from constructing an unauthorized building with tax funds appropriated by General Assembly solely for purpose of building art museum); *Wishart v. Lumberton*, 254 N.C. 94, 118 S.E.2d 35 (1961) (action to restrain city from using as parking lot land that had allegedly been dedicated to use as a public park); and *Shaw v. City of Asheville*, 269 N.C. 90, 152 S.E.2d 139 (1967) (taxpayer may bring action to enjoin performance of void agreement between city and Cablevision, to prevent use of tax funds and tearing up of city streets, sidewalks, and other areas).

The cases relied on by plaintiffs for their purported “constitutional standing” at most permit citizens to seek equitable relief against the *threatened* use of public money or property for unauthorized purposes. In this case, plaintiffs conceded in the

trial court that the General Assembly may prospectively alter the flow of funds between the HTF and the General Fund or could terminate the HTF altogether. Thus, the trial court noted in its Judgment/Order that plaintiffs had stated both orally and in writing that they no longer sought relief in the form of mandamus as requested in their Complaint. (Judgment/Order, p. 2, R p. 54) Indeed, in this Court plaintiffs have addressed only two transactions as unconstitutional – the transfer of \$80 million pursuant to the Executive Order No. 19 and the transfer of \$125 million pursuant to legislative action. They explicitly deny that they seek damages or any refund of money from the State. *See* Appellants’ Brief, p. 2. Because there are no impending future unauthorized transfers from the HTF in this case, plaintiffs cannot rely on *Lewis* or similar cases for standing. Plaintiffs are now in the position of challenging past actions, and they cannot do so. In particular they cannot do so when, as in this case, they are affected in the same manner as the group of taxpayers generally. *See Nicholson*, 275 N.C. at 448, 168 S.E.2d at 406 (taxpayer suit challenging statute requires showing of injury “apart from his general interest as a citizen in good government in accordance with the provisions of the Constitution”). *See also Texfi Indus.*, 44 N.C. App. at 269, 261 S.E.2d at 23; *accord Cannon*, 120 N.C. App. at 615, 463 S.E.2d at 274 (taxpayer cannot challenge manner of funding athletic park).

Plaintiffs attempt to manufacture a controversy by suggesting that the Court should rule in order to provide guidance in the future in another budget crisis. (Appellants' Brief, p. 2) Yet, the "constitutional standing" they assert does not allow them to challenge governmental actions except in the presence of real, concrete controversies, not in the case of imagined potential future disagreements. *See Shaw*, 269 N.C. at 95-96, 152 S.E.2d at 143-44 (citing *Angell v. Raleigh*, 267 N.C. 387, 148 S.E.2d 233 (1966)). *See also Granville County Bd. of Comm'rs v. North Carolina Hazardous Waste Management Com.*, 329 N.C. 615, 625, 407 S.E.2d 785, 791 (1991); *Calton v. Calton*, 118 N.C. App. 439, 442-43, 456 S.E.2d 520, 522 ("the Declaratory Judgment Act does not authorize the adjudication of abstract or theoretical questions"), *disc. review denied*, 341 N.C. 647, 463 S.E.2d 506 (1995).

Plaintiffs have not shown, and cannot show, they have standing to pursue this lawsuit. Therefore, defendants were entitled to have summary judgment entered in their favor, and the trial court's judgment should be affirmed.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS BECAUSE PLAINTIFFS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

ASSIGNMENT OF ERROR NO. 2 (R p. 58)

The trial court properly granted summary judgment to defendants because plaintiffs failed to state a claim upon which relief can be granted. Plaintiffs' challenge to the \$80 million gubernatorial transfer and the \$125 million legislative transfer from the HTF to the General Fund does not present the Court with any cognizable cause of action; accordingly, this Court should affirm the trial court's judgment.

A. PLAINTIFFS ARE MISTAKEN IN THEIR CONTENTION THAT THE CHALLENGED TRANSFERS OF FUNDS FROM THE HIGHWAY TRUST FUND TO THE GENERAL FUND VIOLATE ARTICLE V, § 5 OF THE CONSTITUTION OF NORTH CAROLINA.

At the heart of plaintiffs' case is their contention that the Governor and the General Assembly violated Article V, § 5 of the Constitution of North Carolina by transferring funds from the HTF to the General Fund in excess of the amount scheduled to be transferred under N.C.G.S. § 105-187.9. Article V, § 5 reads as follows:

Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose.

For some reason, plaintiffs seem to think that this language restricts the State to collect and distribute tax proceeds only in the precise manner and amounts which the original taxing statute contemplated. Plaintiffs' argument fails, however, because the constitutional provision does not handcuff the State in the way plaintiffs contend. The language of Article V, § 5, which plaintiffs have misread, disproves plaintiffs' theories.

Constitutional provisions, like legislation, are to be interpreted according to their plain language. "First, we must give meaning to the plain language of the amendment. 'In interpreting our Constitution -- as in interpreting a statute -- where the meaning is clear from the words used we will not search for a meaning elsewhere.'" *Martin v. State*, 330 N.C. 412, 416, 410 S.E.2d 474, 476 (1991) (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989)). The plain language or everyday meaning of Article V, § 5 is that tax statutes must state the *objects* or *purposes* for which the taxes are levied, and those taxes can only be used for those same *objects* or *purposes*. Nowhere does it state that tax acts must specify fixed or unalterable percentages of moneys going to the purposes for which those taxes are imposed.

The legislation creating the Highway Trust Fund, Chapter 692 of the 1989 Session Laws, specified that some or all of the funds collected from various taxes were to be paid into the HTF. (Act of 29 July, 1989, 1989 N.C. Sess. Laws 692 ("Chapter 692" or the "Act"); Stip. ¶ 6, R p. 29) Chapter 692 not only specified that

HTF monies were to be used for particular highway and road uses; it also contained a provision creating what is now codified as N.C.G.S. § 105-187.9, expressly directing the State Treasurer to transfer the sum of \$170,000,000 from the HTF to the General Fund each fiscal year. (Act, § 4.1; Stip. ¶ 9, R p. 30) Moreover, it even provided that greater sums than the \$170 million were to be transferred the first two fiscal years. (Act, § 4.3) In simple terms Chapter 692 itself provided that the money collected from various sources and paid into the HTF was to be used for specified road-related purposes, for expenses of administering the HTF, and – via transfer of funds from the HTF to the General Fund – for General Fund purposes. When the State Budget Officer directed the transfer of \$80 million from the HTF to the General Fund in 2002 pursuant to the Governor’s Executive Order No. 19, no one used, or authorized the use of, that money for any purpose other than those same purposes for which the taxes were originally levied. The \$80 million transfer simply altered the allocation of funds between the road-related objects and General Fund objects.

Similarly, when the General Assembly authorized additional transfers from the Highway Trust Fund to the General Fund in legislation enacted in both 2001 and 2002, it merely changed the amount of money flowing to the respective objects of the taxing acts, not the objects themselves. (Stip. ¶¶ 10-13, R pp. 30-31) Clearly, the General Assembly did not change the objects of the taxing acts when it provided by session law for additional funds to be transferred from the Highway Trust Fund to the General Fund in the 2002-03 fiscal year.

Plaintiffs have attempted to cite precedent to suggest that Article V, Section 5 prohibits what the Governor and the General Assembly have done. Specifically, they cite to *McCless v. Meekins*, 117 N.C. 334, 23 S.E.2d 99 (1895), *Southern Railway Co. v. Board of Comm'rs of Mecklenburg County*, 148 N.C. 220, 61 S.E. 690 (1908), and *Board of Education v. Commissioners*, 137 N.C. 310, 49 S.E. 353 (1904), each of which involved the constitutional predecessor to the current Article V, Section 5. Yet, each of those cases involved circumstances in which local government officials sought to apply tax monies to purposes totally distinct from the specific purposes for which the taxes were levied. In contrast here, the General Fund has always been an object of the same taxes as those used in part to fund the HTF. Plaintiffs' citations thus offer no support for their thesis.

Similarly, plaintiffs also erroneously cite *State v. Rippy*, 80 N.C. App. 232, 341 S.E.2d 98 (1986), in support of their argument. In *Rippy*, this Court held that the requirement in N.C.G.S. § 113-156.1(a) that managers of ocean fishing piers obtain licenses did not violate Article V, Section 5. The license tax was contained in Subchapter IV of Chapter 113 of the General Statutes, and the special purpose of the tax was evident from the titles and purposes of the chapter and subchapter in which it was contained. Far from supporting plaintiffs' argument, *Rippy* shows that reason and common sense must be employed in interpreting the Constitution in lieu of the type of strained construction which plaintiffs advocate here.

Because no Highway Trust Fund money has been used for any purpose or object other than those specified in Chapter 692, neither the transfer pursuant to the

Governor's Executive Order No. 19 nor the additional transfers pursuant to legislation enacted by the General Assembly in 2001 or 2002 resulted in or authorized the use of any Highway Trust Fund money contrary to Article V, § 5.

B. THE GENERAL ASSEMBLY HAS COMPLIED FULLY WITH ARTICLE V, § 5 IN PROVIDING FOR TRANSFERS OF FUNDS FROM THE HIGHWAY TRUST FUND.

Even if the provisions of Article V, § 5 addressed the amounts directed to specific objects or purposes of a taxing act, plaintiffs cannot prevail on any challenge to the actions of the General Assembly in transferring \$125 million in fiscal year 2002-03 in Session Law 2002-126 § 2.2(g). The General Assembly has properly provided prospectively for changes in the amounts of tax monies allocated from funds initially deposited in the HTF. Consequently, there is no basis upon which this Court could conclude that Article V, § 5 has been violated by legislative action.

What Article V, § 5 requires is that acts levying taxes state the special objects for which the taxes are levied and that those taxes are used for no other purpose. Nowhere does the Constitution require that the allocation among the stated purposes and objects remain unchanged for all time from the moment the tax is first levied. Taxing acts are not expected to be frozen in the face of our changing world and budget shortages. Thus, the General Assembly appropriately amended N.C.G.S. § 105-187.9 in 2001 to increase the amount transferred to the General Fund. (N.C.G.S. § 105-187.9; Stip. ¶ 10, R p. 30) The following year, the legislature enacted Session Law 2002-126 providing for the transfer of a total of \$250,000,000 pursuant to another

amendment to N.C.G.S. § 105-187.9 plus an additional \$125,000,000 to the General Fund. (Stip. ¶¶ 11-13, R pp. 30-31)

Curiously, plaintiffs concede in their Complaint that the General Assembly may enact legislation prospectively concerning the collection and appropriation of taxes “relating to intrastate highways,” and similar purposes. (Complaint, ¶ 20 R p. 12) They insist that their “claims for relief relate to unlawful and unconstitutional spending of Highway Trust Funds for purposes not specified by tax laws at the time of collection as required by the Constitution and the threat of future misappropriation.” (Complaint, ¶ 20 R p. 13) Plaintiffs’ characterization of their claims is difficult to reconcile with their continued attack on the \$125 million legislative transfer in fiscal year 2002-03. The affidavit of Department of Transportation Chief Financial Officer Wayne Stallings makes it clear that the 2002-03 transfers could be fully funded from money collected after the General Assembly enacted the legislation increasing the transfer amount. (Stallings Aff. ¶¶ 10, 15-17)

Directing that an increased amount be transferred from the HTF to the General Fund is something that the General Assembly has done at various times since the HTF came into existence. In fact, the General Assembly’s original enactment of the HTF directed transfers to the General Fund that exceeded the amounts set forth in the statutory provision that was codified as N.C.G.S. § 105-187.9. *See* Section 4.3 of Chapter 692 of the 1989 Session Laws, which provided that

[n]otwithstanding [G.S. 105-187.9], as enacted by this act, in fiscal year 1989-90, the State Treasurer shall transfer from the Highway Trust Fund

to the General Fund the sum of . . . (\$279,400,000). . . . In addition, in fiscal year 1990-91, the State Treasurer shall transfer from the Highway Trust Fund to the General Fund the sum of . . . (\$356,000,000) of the tax revenue deposited in the Trust Fund.

In its legislation in 2001 and 2002, the General Assembly effectively modified the existing taxing acts to specify, prospectively, the objects and purposes of the taxing acts and the specific amounts to be directed from the Highway Trust Fund to the General Fund for those and future years. Those acts of the General Assembly are presumed constitutional, and plaintiffs have a heavy burden of showing otherwise if they are to prevail. Indeed, it is often said that “[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.” *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (quoting *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967)). In North Carolina, more so than in some jurisdictions, the decisions of the General Assembly are entitled to great weight because the people act through their General Assembly by enacting legislation. This is so because

our State Constitution is not a grant of power. *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961). All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution. *Id.* See *Lassiter v. Board of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958); *Airport Authority v. Johnson*, 226 N.C. 1, 8, 36 S.E.2d 803, 809 (1946).

State ex rel. Martin, 325 N.C. at 448-49, 385 S.E.2d at 478; *accord Baker*, 330 N.C. at 337-38, 410 S.E.2d at 891. *See also Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (The legislative power rests “with the people and is exercised through the General Assembly, which functions as the arm of the electorate. An act of the people’s elected representatives is thus an act of the people and is presumed valid *unless it conflicts with the Constitution*” (citations omitted)). Moreover, “[i]f there is any doubt as to the Legislature’s power to act in any given case, the doubt should be resolved in favor of the Legislature’s action.” *Baker*, 330 N.C. at 338, 410 S.E.2d at 891 (citations omitted).

Plaintiffs could only prevail in their challenge to the \$125 million legislative transfer if they could convince the Court, first, that Article V, § 5 meant that a taxing act must spell out the amounts or percentages of funds to go to the specified objects or purposes, contrary to Argument II.A. *supra*, and, second, that the General Assembly had not enacted appropriate taxing provisions to accomplish these purposes. Plaintiffs cannot do this. Plaintiffs apparently have no problem with the transfers accomplished by amendments to N.C.G.S. § 105-187.9 as they do not argue to this Court that those transfers are unconstitutional. Neither do they offer any grounds for distinguishing the \$125 million transfer from the other increased transfers which they have chosen not to dispute. In the trial court, they contended the \$125 million transfer was different

because it was accomplished by a non-codified portion of the session law. However, even when the General Assembly provided for transfers by session law, it effectively amended the taxing acts through those session laws. Moreover, Article V, § 5 of the Constitution speaks to “[e]very act of the General Assembly,” not to statutes. The General Assembly acts by ratifying bills, which may or may not be contained in the codified General Statutes in whole or in part. Indeed, the Codifier of the General Statutes may affect which portions of a bill are contained in the General Statutes and where, but it is the legislative action, not the codified statute, that controls in the event of apparent discrepancies. *See Custom Molders, Inc. v. American Yard Prods., Inc.*, 342 N.C. 133, 137, 463 S.E.2d 199, 202 (1995) (following precedents in holding that “the statement of a legislative enactment contained in the Session Laws is controlling over the statement codified in the General Statutes”).

Putting it all together, the taxes imposed for fiscal years 2001-02 and 2002-03, including the \$125 million transfer, were imposed pursuant to taxing acts that specified the purposes for which the money was collected and applied and, by reading the various provisions together, specified the allocations of such amounts as determined by the legislature. Significantly, the money generated from the relevant taxes in the 2001-02 and 2002-03 fiscal years was more than sufficient to fund the amounts transferred from the HTF to the General Fund, including the increased

transfers resulting from the 2001 and 2002 legislative actions, entirely from money collected after the legislative changes. (Stallings Aff.) In fact, plaintiffs have acknowledged that the General Assembly could enact prospective changes to the tax laws and allow future transfers of funds between the HTF and the General Fund. (Complaint, ¶ 20, R pp. 12-13) Clearly, plaintiffs cannot show that the General Assembly has unconstitutionally transferred funds to the General Fund from the Highway Trust Fund or violated Article V, § 5.

C. PLAINTIFFS HAVE NO CLAIM CHALLENGING THE EXECUTIVE TRANSFER IN 2002.

Plaintiffs have no claim for relief challenging the actions of the Governor and his Budget Director and Controller in transferring funds from the Highway Trust Fund to the General Fund in 2002. First, as argued in II.A. *supra*, the transfer in no way violated Article V, § 5 of the Constitution because it did not cause tax funds to be used for purposes or objects other than those for which the taxes had been levied. Secondly, even if that were not true, the General Assembly in effect ratified the Executive Department's action. For this Court to attempt to determine whether the Governor was entitled to take such action would be to embark on a theoretical exercise which plaintiffs have no right to pursue.

Assuming for the sake of argument that there could be a question about the Governor's transfer of funds under the Executive Order in 2002, plaintiffs have no claim to have this Court review that transfer. Plaintiffs themselves have conceded that the General Assembly could make such transfers by prospective legislation. (Complaint ¶ 20, R pp. 12-13) The General Assembly has in effect ratified the Governor's actions in 2002 by not requiring the funds to be returned and then by providing for the transfer of additional funds as part of its budgeting process. While plaintiffs might argue that the Governor's action, and any legislative ratification, would not have been prospective in operation, the General Assembly could have easily required the \$80 million to be transferred back to the HTF and then transferred an additional \$80 million to the General Fund from the HTF. In effect, the General Assembly's actions since then are simply the net effect of what it would have done otherwise and what the Executive Branch had already done. To try to analyze at this point what the Executive Branch did in 2002 would serve no purpose except to satisfy plaintiffs' desire to have this Court declare the Governor's actions to be impermissible. Plaintiffs are not entitled to have the Court go through such an exercise for their intellectual satisfaction¹.

¹ Plaintiffs' contention that the Highway Trust Fund is a trust does not bolster their argument. First, the Highway Trust Fund, although called a "trust fund," is not in fact structured as a trust. Second, it is difficult to see how plaintiffs can

This Court need not determine the constitutionality of the \$80 million transfer in 2002, and it should not “anticipate . . . questions of constitutional law not necessary to the decision of the precise controversy presented in the litigation before it.” *Nicholson*, 275 N.C. at 447, 168 S.E.2d at 406. “[A] constitutional question is addressed ‘only when the issue is squarely presented upon an adequate factual record and only when resolution of the issue is necessary.’” *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (quoting *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 359, 261 S.E.2d 908, 914, *aff’d per curiam on reh’g*, 299 N.C. 731, 265 S.E.2d 387, *and appeal dismissed*, 449 U.S. 807, 66 L. Ed. 2d 11 (1980)). “[T]he established judicial policy is to refrain from deciding constitutional questions unless (1) the judicial power is properly invoked, and (2) it is necessary to do so in order to protect the constitutional rights of a party to the action.” *Tucker*, 312 N.C. at 345, 323 S.E.2d at 307 (quoting *Greensboro v. Wall*, 247 N.C. 516, 520, 101 S.E.2d 413, 416 (1958)). The Court is not required “to give a purely advisory opinion” or to “decide abstract, hypothetical, or contingent questions.” *Pearson v. Martin*, 319 N.C. 449, 451-52, 355 S.E.2d 496, 498 (1987) (citations omitted). *See also Kirkman*

succeed simply by arguing that the HTF is a “trust fund” when that “trust fund” was set up from the beginning to include transfers of funds to the General Fund and when plaintiffs themselves acknowledge that the General Assembly can increase the amounts to be transferred to the General Fund.

v. Wilson, 328 N.C. 309, 312, 401 S.E.2d 359, 361 (1991) (“function of appellate courts . . . is not to give opinions on merely abstract or theoretical matters” (citation omitted)). Plaintiffs’ wish to have this Court adjudicate the validity of the 2002 Executive Branch transfer is no reason for this Court to undertake such a pointless inquiry.

Nor should this Court consider the question of whether the Governor was authorized, whether pursuant to Article III, § 5(3) of the Constitution or otherwise, to provide for the \$80 million transfer in order to ensure that the State’s budget was balanced. Article III, § 5(3) does not create individual constitutional rights that give rise to claims for relief to individuals who might want to question every gubernatorial action under this provision. Nor is there any other jurisdictional peg on which to hang an individual claim for relief for plaintiffs to question the Governor’s actions. For this Court to delve into the question of whether the Governor was authorized to issue Executive Order No. 19, and act pursuant thereto, would propel the Court into the role of supervisor of the Governor in the exercise of his constitutional and statutory authority. Absent any showing of any direct harm to any person, this Court should not intrude on the Governor and his responsibilities under the Constitution and statutes of this State. Such intrusion violates the principle of separation of powers, which “is a cornerstone of our state and federal governments.” *State ex rel. Wallace v. Bone*, 304

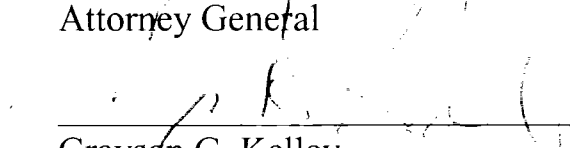
N.C. 591, 601, 286 S.E.2d 79, 84 (1982). *See also Bacon v. Lee*, 353 N.C. 696, 549 S.E.2d 840, *cert. denied*, 533 U.S. 975, 150 L. Ed. 2d 804 (2001). In fact, so important is the doctrine of separation of powers to the North Carolina constitutional framework that “each of our [three] constitutions has *explicitly* embraced the doctrine of separation of powers.” *State ex rel. Wallace*, 304 N.C. at 595, 286 S.E.2d at 81(emphasis added); *accord Bacon*, 353 N.C. at 716, 549 S.E.2d at 854. The Governor has both the authority and responsibility under the Constitution to take necessary steps to ensure that the budget is in fact balanced and that the State does not engage in deficit spending, and the courts should not second-guess the exercise of that constitutional duty without a compelling necessity to do so. This is not such a case. In sum, plaintiffs have failed to state any justiciable claim for relief against the defendants, and the court below properly granted summary judgment to defendants.

CONCLUSION

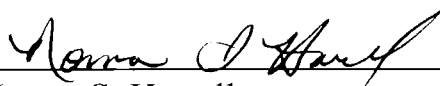
The plaintiffs in this case seek to have the Court engage in an unnecessary and inappropriate questioning of the actions of the Governor and General Assembly. Plaintiffs cannot show any harm to them or any use of tax monies for purposes other than those stated in the acts levying the taxes. Accordingly, the court below properly granted summary judgment to defendants, and this Court should affirm.

Respectfully submitted this the 7th day of March, 2005.

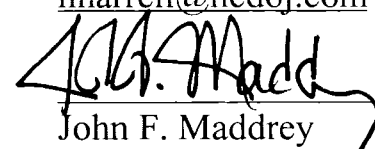
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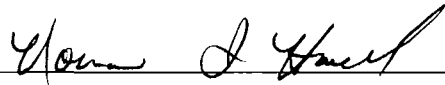
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CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)(A)2.

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 the 7th day of March, 2005.



Norma S. Harrell
Special Deputy Attorney General

CERTIFICATE OF SERVICE

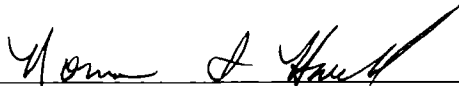
This is to certify that the undersigned has this day served the foregoing
DEFENDANT-APPELLEES' BRIEF in the above titled action upon all other parties
to this cause by:

- Hand delivering a copy hereof to each said party or to the attorney thereof;
- Transmitting a copy hereof to each said party via facsimile transmittal;
or
- Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

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This the 7th day of March, 2005.



Norma S. Harrell
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