

PUBLIC DUTY DOCTRINE IN STATE TORT CLAIMS ACT CASES

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LIMITATIONS OF THIS PAPER

The Public Duty Doctrine appears to be eroding the very purpose of the State Tort Claims Act, which is to allow an injured person, or grieving family, to sue the state for the negligence and carelessness of state employees. The purpose of this article is to analyze the troubling trend of our appellate courts to impose the Public Duty Doctrine as a defense for the State in State Tort Claims Act cases and to alert you to analysis flaws, trends, and arguments that may assist you in prevailing against this defense.

STATE TORT CLAIMS ACT

The State Tort Claims Act¹ was promulgated to *waive the sovereign immunity of the State* with respect to suits arising from negligent acts committed by State employees in the course of their employment. *Kawai America Corp. v. University of North Carolina at Chapel Hill*, 152 N.C.App. 163, 567 S.E.2d 215 (2002). "Sovereign immunity is a legal principle which states in its broadest terms that the sovereign will not be subject to any form of judicial action without its express consent." 12 Wake Forest L.Rev. 1082, 1083 (1976). The doctrine of governmental or sovereign immunity bars actions against the state, its counties, and its public officials sued in their official capacity. *Messick v. Catawba County*, 110 N.C.App. 707, 714, 431 S.E.2d 489, 493 (1993). Through the enactment of the State Tort Claims Act, the legislature consented to be sued in those situations where a private person could be sued. The only other restriction upon a person's ability to be sued was the limited recovery available in a State Tort Claims Act case.

Actions to recover for the negligence of a state employee under the State Tort Claims Act are guided by ordinary negligence and liability principles. *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 365 S.E.2d 898 (1988). The State Tort Claims Act is to be construed so as to effectuate its purpose of waiving sovereign immunity so that a person injured by the negligence of a state employee may sue the State just as he would any other person. *Zimmer v. North Carolina Dep't. of Transp.*, 87 N.C.App. 132, 360 S.E.2d 115 (1987) (citing *Lyon & Sons v. State Bd. of Education*, 238 N.C. 24, 76 S.E.2d 553

(1953)). *See also, Midgett v. N.C. Dep't of Transp.*, 152 N.C.App. 666, 568 S.E.2d 643 (2002). The State's waiver of immunity is absolute, without regard to whether the function out of which a claim arises is a governmental function or a proprietary function, *Guthrie v. State Ports Authority*, 307 N.C. 522, 299 S.E.2d 618 (1983), or whether the case involves negligent actions or negligent omissions. *Phillips v. N.C. Dep't of Transp.*, 80 N.C.App. 135, 341 S.E.2d 339 (1986). "The waiver of immunity is not dependent upon whether the alleged negligent act involves the exercise of discretion." *Zimmer*, at 135, 360 S.E.2d at 117 (1987).

Despite the clear language of the State Tort Claims Act and the holdings of the previously cited cases, our appellate courts now appear increasingly willing to *restrict* the State's liability by superimposing upon claimants the burden of overcoming the Public Duty Doctrine. If this trend continues, it will become increasingly difficult, if not impossible, for seriously injured citizens, or the families of those killed, to recover from the State for the negligence of state agencies and state employees.

The nature of the original Public Duty Doctrine is explained in *Multiple Claimants v. N.C.D.H.H.S.*, 626 S.E.2d 666 (N.C. Court of Appeals, March 7, 2006) (*appeal pending*):

The general common law rule, known as the Public Duty Doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the *failure to furnish police protection* to specific individuals. This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for *failure to prevent every criminal act*. (emphasis added).

Despite this originally limited scope, over the past eight years our appellate courts have slipped down a slope so that now the Public Duty Doctrine has become an issue in non-law enforcement, and non-criminal action cases involving the Department of Labor; some, but not all, defective highway cases against DOT; and, most recently, a forest fire management case against the Department of Environmental Health and Natural Resources.

There are two real problems created by our Court's inconsistent, yet expanding application of the Public Duty Doctrine in State Tort Claims Act cases. First, our legislature granted our citizens the right to sue the State for its negligence, but the imposition of the Public Duty Doctrine in those cases

eliminates or restricts that right. **If, per the State Tort Claims Act, the State is allowed to be sued in every instance in which a private person can be sued, and if the Public Duty Doctrine can never be applied as a defense for a private citizen, how then can the Public Duty Doctrine be used as a defense by the State in this context?** Second, the Court's inconsistent application of the Public Duty Doctrine has made it impossible for attorneys to predict which claims might be barred by the Public Duty Doctrine. As a result, many legitimate, meritorious cases will not be brought because many attorneys cannot afford to pursue these time-intensive and expensive cases only to later see the Public Duty Doctrine invoked and applied without precedent.

NORTH CAROLINA APPELLATE HISTORY OF THE PUBLIC DUTY DOCTRINE IN STATE TORT CLAIMS ACT CASES

In *Humphries v. N.C. Dep't of Correction*, 124 N.C.App. 545, 479 S.E.2d 27 (1996), a probationer under the supervision of a DOC probation officer killed one person and injured another. The plaintiffs sued DOC for failing to properly supervise the probationer. The N.C. Court of Appeals applied the Public Duty Doctrine to bar a claim against the N.C. Dep't of Corrections.

Two years later, the North Carolina Supreme Court upheld a Public Duty Doctrine defense in its 1998 decision in *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 495 S.E.2d 711 (1998). In that case the plaintiffs brought claims against the N.C. Department of Labor for failing to adequately inspect a chicken plant and alleged that a fire, in which many workers died, would have been avoided had the Department of Labor properly inspected the plant, as it was required to do by statute. The Court found that the Department's duty to inspect was to the public in general, and not to the individual decedents, and the Court upheld the use of the Public Duty Doctrine as a defense. The Court, quoting a Kentucky case, stated: "[A] government ought to be free to enact laws for the public protection without thereby exposing its supporting taxpayers ... to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all." *Id.*, 347 N.C. at 481, 495 S.E.2d at 716 (quoting *Grogan v. Commonwealth*, 577 S.W.2d 4, (Ky.), cert. denied, 444 U.S. 835, 100 S.Ct. 69, 62 L.Ed.2d 46 (1979)). In response to Justice Orr's

vigorous dissent, the majority in *Stone* emphasized that the extension of the Public Duty Doctrine involved a "**limited** new context, not heretofore confronted by this Court." *Id.* at 483, 495 S.E.2d at 717 (emphasis added).

Later in 1998 the North Carolina Supreme Court again upheld the Public Duty Doctrine to bar the claim of an injured go-kart rider who alleged that his injuries would have been avoided had the Department of Labor properly inspected the go-kart track, as it was required to do by statute. *Hunt v. N.C. Dep't of Labor*, 348N.C. 192, 499 S.E.2d 747 (1998). In its decision, the Court attempted to explain its reasoning as follows:

The general rule is that a governmental entity acts for the benefit of the general public, not for a specific individual, and, thus, cannot be held liable for a failure to carry out its duties to an individual. *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901. Without any distinct duty to any specific individual, the entity cannot be held liable. *Tise*, 345 N.C. at 460, 480 S.E.2d at 680.

A review of the Amusement Device Safety Act discloses that nowhere in the Act did the legislature impose a duty upon defendant to each go-kart customer. Pursuant to N.C.G.S. § 95-111.4, the Commissioner of Labor has promulgated rules governing the inspection of go-karts. 13 NCAC 15.0400 (June 1992). These rules similarly do not impose any such duty.

Id., at 196-197, 499 S.E.2d at 749-750.

In the following years in rulings in **non-State agency** cases, our Supreme Court described the *Hunt* and *Stone* holdings as limited to "state agencies required by statute to conduct inspections for the public's general protection." *Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000); see also *Isenhour v. Hutto*, 350 N.C. 601, 517 S.E.2d 121 (1999); see also *Wood v. Guilford County*, 355 N.C. 161, 558 S.E.2d 490 (2002). In *Thompson v. Waters*, 351 N.C. 462, 526 S.E.2d 650 (2000) the N.C. Supreme Court declined to extend the application of the Public Duty Doctrine in a case against a county building inspector, and stated

The Public Duty Doctrine has caused confusion in other jurisdictions. Several courts have expressed difficulty applying or interpreting the doctrine and its exceptions. See *Jean W. v. Commonwealth*, 414 Mass. 496, 499, 610 N.E.2d 305, 307 (1993); *Doucette v. Town of Bristol*, 138 N.H. 205, 209, 635 A.2d 1387, 1390 (1993); *Schear v. Board of County Comm'rs*, 101 N.M. 671, 674, 687 P.2d 728, 731 (1984). In some states where sovereign immunity has been either legislatively or judicially abrogated, courts have abandoned the Public Duty Doctrine as another form of sovereign immunity. See, e.g., *Adams v. State*, 555 P.2d 235, 241-42 (Alaska 1976); *Schear*, 101 N.M. at 677, 687 P.2d at 734; *Coffey v. City of Milwaukee*, 74 Wis.2d 526, 536, 247 N.W.2d 132, 137 (1976). Some courts have criticized the doctrine as speculative and the cause of "legal confusion, tortured analyses, and inequitable results in practice." *Doucette*, 138 N.H. at 209, 635 A.2d at 1390; see also *Jean W.*, 414 Mass. at 509, 610 N.E.2d at 313. Moreover, courts in at least three states have renounced the Public Duty Doctrine when considering claims for negligent building inspections. See *Adams*, 555 P.2d at 241-42; *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979); *Coffey*, 74 Wis.2d at 540, 247 N.W.2d at 139.

This Court has not heretofore applied the Public Duty Doctrine to a claim against a municipality or county in a situation involving any group or individual other than law enforcement. After careful review of appellate decisions on the Public Duty Doctrine in this state and other jurisdictions, we conclude that the Public Duty Doctrine does not bar this claim against Lee County for negligent inspection of plaintiffs' private residence.

Id., at 464-465, 526 S.E.2d at 651-652. In addition, North Carolina legal scholars have commented that “[o]ther jurisdictions have exhibited an increasing willingness to limit or even to do away with the Public Duty Doctrine under certain circumstances.” David Logan and Wayne Logan, *North Carolina Torts*, §4.10, p. 92 (1996).

In 2004, in the case of *Viar v. N.C. Department of Transp.*, 162 N.C.App. 362, 590 S.E.2d 909 (2004), the Estates of Megan and Macey Viar sued DOT, claiming that DOT negligently failed to install median barriers despite the fact that DOT had, prior to the crash, investigated the area and determined that median barriers should be installed, although DOT had the means and resources necessary to install them. The Industrial Commission decided that plaintiffs failed to prove that NCDOT was negligent and ruled for DOT. The plaintiffs appealed, and a divided Court of Appeals reversed and remanded the case to the Industrial Commission. Judge Tyson dissented on several grounds, including procedural rules, the negligence issue, and the Public Duty Doctrine. In response to Judge Tyson’s dissent, Judge Levinson wrote the following:

The dissent contends the Department of Transportation cannot be held liable to plaintiff under the Public Duty Doctrine. We note that the NCDOT has not raised this issue on appeal. Moreover, the Public Duty Doctrine has never been applied to shield the NCDOT from acts of negligence. See, e.g., *Norman v. N.C. Dep't of Transp.*, 161 N.C.App. 211, 588 S.E.2d 42 (2003) (noting that the NCDOT may have a duty to install a stop sign if the evidence establishes that NCDOT knew or should have known that an intersection was hazardous, the breach of which duty gives rise to a cause of action under the Torts Claim Act); *Smith v. N.C. Dep't of Transp.*, 156 N.C.App. at 101, 576 S.E.2d at 351-52 (affirming the Commission's finding that the DOT negligently failed to maintain a railroad crossing, in dereliction of its statutory duty to do so); *Phillips v. N.C. Dep't. of Transportation*, 80 N.C.App. 135, 138, 341 S.E.2d 339, 341 (1986) (stating that the DOT's "duty to maintain the right-of-way necessarily carried with it the duty to make periodic inspections" and concluding that the NCDOT could be found negligent based on implied notice of a hazardous condition on the right-of-way).

Id., at 374, 590 S.E.2d at 918. DOT appealed *Viar* to the N.C. Supreme Court. The Supreme Court did **not** address the Public Duty Doctrine issue, but instead dismissed the plaintiff’s appeal “for violation of the Rules of Appellate Procedure.” *Viar v. N.C. Department of Transp.*, 359 N.C. 400, 610 S.E.2d 360 (emphasis added).

Judge Tyson's dissent on the issue of the Public Duty Doctrine was not part of the Supreme Court's opinion, and therefore contains no precedential value.

The following year, in *Drewry v. N.C. Dep't of Transp.*, 168 N.C.App. 332, 607 S.E.2d 342 (2005), a driver hydroplaned in deep standing water on a rural highway. The driver's Estate sued DOT, contending that it failed to properly repair/install an adequate drainage pipe capable of accommodating the water runoff from an adjacent farm, thereby allowing deep water to pond on the highway. The reported facts of the case indicate that the plaintiff simply did not prove its negligence case against DOT. However, the Court of Appeals panel, which included Judge Tyson, chose to unnecessarily insert the following language:

In examining whether NCDOT failed to meet the standard of care owed to a plaintiff, we note that our Supreme Court has held that the Public Duty Doctrine applies to causes of action under the Tort Claims Act:

The general common law rule provides that governmental entities, when exercising their statutory powers, act for the benefit of the general public and therefore have no duty to protect specific individuals. Because the governmental entity owes no particular duty to any individual claimant, it cannot be held liable for negligence for a failure to carry out its statutory duties. Absent a duty, there can be no liability. *Stone v. N.C. Dep't. of Labor*, 347 N.C. 473, 482, 495 S.E.2d 711, 716 (1998) (internal citations omitted).

Drewry, 607 S.E.2d at 346. This language was not only irrelevant to the decision and outcome, but it was also misplaced, as our Supreme Court had previously limited the application of the Public Duty Doctrine in State Tort Claims Act cases to "state agencies required by statute to conduct inspections for the public's general protection." *Lovelace*, 351 N.C. 458. Further, as pointed out by Judge Levinson in *Viar*, "the Public Duty Doctrine had never previously been applied to shield the NCDOT from acts of negligence."

The unpublished 2005 case of *Walker v. N.C. Dep't. of Transp.*, 617 S.E.2d 721 (COA - Sept. 6, 2005) also involved a defective highway, hydroplane, fatality wreck. DOT defended the case at trial solely upon negligence issues, but then, after losing, raised the Public Duty Doctrine for the first time in its appellate brief. The Court of Appeals, in a unanimous decision, ruled against DOT and, in addressing DOT's argument that the Public Duty Doctrine should shield DOT's negligence, the Court of Appeals stated "**we find the strength of these arguments to be dubious.**" *Id.* (emphasis added).

The March 2006 case of *Multiple Claimants v. N.C. Dep't of Health and Human Services*, 626 S.E.2d 666 (March 7, 2006) involved a fire at the Mitchell County jail in which four inmates were killed and another inmate was seriously injured. The plaintiffs contended that had the DHHS inspections been conducted in the proper manner, the fire would not have occurred. The Industrial Commission ruled that the Public Duty Doctrine did not shield DHHS' negligence, and the State appealed. The Court of Appeals upheld the Industrial Commission's decision in a 2-1 decision (Judge Tyson dissented on the Public Duty Doctrine issue). The *DHHS* Court determined that there were numerous specific statutes and regulations which required regular inspections of the jails to see that "minimum standards" were met. Some of those "minimum standards" specifically related to fire hazards, and all of those "minimum standards" were related to "providing secure custody of prisoners and to protecting their health and welfare..." The Court distinguished DHHS' duty to inspect the jail, and the fact that these inspections were mandated specifically for the safety of the prisoners, from the more general and less specific inspections present in *Stone* and *Hunt*². Judge Marty Geer wrote:

The Public Duty Doctrine provides that, absent a special relationship between the governmental entity and the injured individual, the governmental entity will not be liable for injury to an individual where liability is alleged on the ground that the governmental entity owes a duty to the public in general. The doctrine has been commonly described by the oxymoron, "duty to all, duty to none."....*After the historic tort barrier of governmental immunity crumbled, and states provided waiver mechanisms, state courts resurrected the [Public Duty Doctrine] to provide limits to governmental tort liability when their legislatures had not done so.* Thus, state courts embraced the Public Duty Doctrine to confine liability to specific types of governmental actions, namely those not undertaken for the public in general.

Id. at P. 669, quoting Frank Swindell, Note, *Municipal Liability for Negligent Inspections* in *Sinning v. Clark--* *A "Hollow" Victory for the Public Duty Doctrine*, 18 *Campbell L.Rev.* 241, 247-49 (1996) (emphasis added).

Further, in a brilliantly simple rebuttal of the State's argument that these inspections were for the benefit of the general public, Judge Geer said "suffice it to say that inmates are in jail specifically so that they will be separate from the general public." *Id.*, at 673. As to the policy implications raised by Judge Tyson's dissent, Judge Geer wrote:

We are not free to employ a common law rule to reinstate sovereign immunity when the State has both waived that immunity and specifically assumed a duty to jail inmates...[I]f we were to embrace the view of the dissents in this case and in *Myers*, it is difficult to identify any negligence claim asserted against the State that would fall outside the scope of the Public Duty Doctrine. The result would be to judicially amend the State Tort Claims Act to require all

plaintiffs to prove either a special relationship or a special duty as an element of their claim under the Tort Claims Act. To do so - based on a judicial assessment of the policy implications for the State and its taxpayers - would be to sit as a super-legislature.”

Multiple Claimants, at 675-676. As expected, the State appealed *Multiple Claimants* based upon Judge Tyson’s dissent, and that appeal is pending.

The most recent case to address the issue of the Public Duty Doctrine within a State Tort Claims Act case is *Myers v. McGrady*, 628 S.E.2d 761 (2006). In addition to several interesting procedural issues, the relevant issue in *Myers* was whether a state agency could be liable for negligently failing to control a naturally occurring forest fire or failing to make safe a public highway adjacent to the fire. The State raised the Public Duty Doctrine defense. In a 2-1 decision (Judge Tyson dissented), the Court of Appeals held that the Public Duty Doctrine did not apply because it applied only “where plaintiffs allege negligence through (a) failure of law enforcement to provide protection from the misconduct of others, and (b) failure of state departments or agencies to detect and prevent misconduct of others through improper inspections.” *Myers v. McGrady*, 170 N.C.App. 501, 613 S.E.2d 334 (2005) In explaining its decision, the Court further stated that “because our Supreme Court in *Lovelace* sought to reign in the expansion of the Public Duty Doctrine’s application to other government agencies (citations omitted)...we decline to extend the Public Duty Doctrine to the Division of Forest Resources in this case.” *Id.*, 613 S.E.2d at 340.

However, in May 2006 the N.C. Supreme Court reversed the Court of Appeals’ decision and *Myers* and held as follows:

[T]he public duty doctrine applies to negligence claims filed under the Tort Claims Act against NCDENR for alleged mismanagement of forest fires. Because N.C.G.S. §§ 113-51, -52, -54, and -55, which set forth the powers and duties of NCDENR and appointed state forest rangers, are designed to protect the citizens of North Carolina as a whole, NCDENR does not owe a specific duty to plaintiff or to third-party plaintiffs; thus, these parties have failed to state a negligence claim for which relief may be granted, and the trial court should have allowed NCDENR’s motion to dismiss and motion for judgment on the pleadings.

Myers v. McGrady, 628 S.E.2d 761, 767 (2006). The Supreme Court stated that “[t]he public duty doctrine is a separate rule of common law negligence that may limit tort liability, even when the State has waived sovereign immunity.” *Id.*, 628 S.E.2d at 766. The Supreme Court explained that “the alleged negligence arises from the agency’s purported failure to perform a statutory duty owed to the general public and that this duty is generally

unenforceable by individual plaintiffs in tort.” However, the Court, at P. 767, also carefully limited its holding as follows:

We further note that N.C.G.S. §§ 113-51,-52,-54, and -55 are readily distinguishable from statutes which create a special duty or specific obligation to a particular class of individuals and to which the North Carolina Court of Appeals and courts in other states have declined to apply the public duty doctrine. Our decision today expresses no opinion regarding application of the public duty doctrine to statutes that are arguably designed to protect a narrower class of individuals.

OTHER RELATED ISSUES

THE PUBLIC DUTY DOCTRINE IS AN AFFIRMATIVE DEFENSE AND MUST BE PLED BY THE STATE AGENCY IN ITS ANSWER

There have been several reported and unpublished cases in which it is apparent that the State did not properly raise the Public Duty Doctrine defense. Be aware that our Court of Appeals has long recognized and analyzed the Public Duty Doctrine as an affirmative defense. *Moses v. Young*, 149 N.C.App. 613, 615, 561 S.E.2d 332, 333, *disc. review denied*, 356 N.C. 165, 568 S.E.2d 332 (2002) (“The sole issue on appeal is whether defendants may assert the Public Duty Doctrine *as an affirmative defense* to plaintiff’s claims”) (emphasis added); *Tise v. Yates Constr. Co., Inc.*, 122 N.C. App. 582, 5-85, 471 S.E.2d 102, 105 (1996), *aff’d as modified and remanded by* 345 N.C. 456, 480 S.E.2d 677 (1997) (“The substantial rights exception has been specifically applied to the assertion of the Public Duty Doctrine *as an affirmative defense.*”) (citations omitted) (emphasis added). Under Rule 8(c) of the North Carolina Rules of Civil Procedure, an affirmative defense must be pled by answer, and set forth “a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice...” North Carolina Rule of Evidence 8(c) (2003). Rule 8(c) is “not in conflict with the provisions” of N.C.G.S. Chapter 143, Article 31, *Tort Claims Against State Departments and Agencies*, and is, therefore, applicable to Answers filed in State Tort Claims Act cases. N.C.G.S. 143-300. The failure to plead an affirmative defense by answer generally results in a waiver thereof. *Robinson v. Powell*, 248 N.C. 562, 500 S.E.2d 714 (1998), *on remand*, 510 S.E.2d 712, 131 N.C. App. 334. As such, a state agency must plead Public Duty Doctrine as an affirmative defense in its Answer, and then bears the burden of proving it, if it wishes to rely upon it as a defense in a State Tort Claim Act case.

The following is an excerpt from the unpublished case of *Walker v. N.C. Dep't. of Transp.*, 617 S.E.2d 721 (COA – Sept. 2005). In that case DOT did not plead the Public Duty Doctrine as an affirmative defense; it did not raise the issue at trial; and it did not include the issue in its Assignments of Error. Instead, DOT argued the Public Duty Doctrine for the very first time in its brief. The Court of Appeals declined to reach the issue and stated as follows:

“...Likewise, the arguments contained in DOT's brief which do not correspond to an appropriate assignment or error are not properly before this Court. *Bustle v. Rice*, 116 N.C.App. 658, 659, 449 S.E.2d 10, 11 (1994) (holding that, if the issues presented in an appellant's brief do not correspond to an assignment of error, the issues raised in the brief will not be considered by this Court); see also *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (holding that the North Carolina Rules of Appellate Procedure are mandatory). For example, in its second and third arguments on appeal, DOT contends that the Public Duty Doctrine and public officer immunity preclude a finding of liability in the instant case. Though we find the strength of these arguments to be dubious, we do not reach the merits of either argument because there are no corresponding assignments of error in the record on appeal. See N.C. R.App. P. 10(a) (“[T]he scope of review on appeal is confined to consideration of those assignments of error set out in the record on appeal[.]”).

Furthermore, the record indicates that DOT failed to raise either the Public Duty Doctrine or Public Official Immunity in the proceedings before the Industrial Commission. Both doctrines are affirmative defenses that must be asserted before the trial tribunal. See, e.g., *Moses v. Young*, 149 N.C.App. 613, 615, 561 S.E.2d 332, 333 (“The sole issue on appeal is whether defendants may assert the Public Duty Doctrine as an affirmative defense”), disc. review denied, 356 N.C. 165, 568 S.E.2d 199 (2002); *Epps v. Duke University*, 122 N.C.App. 198, 205, 468 S.E. 2d 846, 852 (characterizing Public Official Immunity as an affirmative defense), disc. review denied, 344 N.C. 436, 476 S.E. 2d 115 (1996). Therefore, DOT has also waived appellate review of these issues by failing to present them to the Industrial Commission. See N.C. R.App. P. 10(b)(1) (“In order to preserve a question for appellate review, a party must have presented to the trial [tribunal] a timely request, objection or motion stating the specific grounds for the ruling the party desired the [tribunal] to make....”).

“OPPRESSIVE AND MANIFEST ABUSE”

Court of Appeals Judge Tyson, and recently several Assistant Attorney Generals, have curiously begun inserting an argument based upon “oppressive and manifest abuse” language that has been mysteriously plucked from several clearly inapplicable cases in their discussions regarding the Public Duty Doctrine. In his dissent in *Viar v. N.C. Department of Transp.*, 162 N.C.App. 362, 590 S.E.2d 909 (2004), Judge Tyson wrote the following:

The [NCDOT] is *vested with broad discretion* in carrying out its duties and responsibilities with respect to the design and construction of our public highways. The policies of the Board of Transportation and the Department of Transportation and the myriad discretionary decisions

made by them as to design and construction are not reviewable by the judiciary "unless [their] action is so clearly unreasonable as to amount to oppressive and manifest abuse." *Hochheiser v. N.C. Dep't. of Transportation*, 82 N.C.App. 712, 717-718, 348 S.E.2d 140, 143 (1986), *aff'd*, 321 N.C. 117, 361 S.E.2d 562 (1987) (quoting *Guyton v. North Carolina Board of Transp.*, 30 N.C.App. 87, 90, 226 S.E.2d 175, 177 (1976) (emphasis added)).

First, *Guyton*, the case quoted by *Hochheiser* above, is not a State Tort Claims case. Instead, it involved a request for Temporary Restraining Order and Permanent Injunction against DOT's Board of Transportation in connection with the excavation of a roadway. *Guyton* has absolutely no applicability to State Tort Claim actions – cases in which the legislature has 1) specifically waived sovereign immunity and 2) imposed regular negligence rules and standards. Second, the Court of Appeals' decision in *Hochheiser* was reviewed by the N.C. Supreme Court, *Hochheiser v. N.C. Dep't. of Transp.*, 321 N.C. 117, 361 S.E.2d 562 (1987), and our Supreme Court split 3-3. As a result, the Court of Appeals decision in *Hochheiser*, the one relied upon by Judge Tyson in *Viar*, "stands without precedential value." *Id.* Accordingly, any reliance upon *Hochheiser* is not only misplaced, but unsupported, as well.

Later, in *Drewry v. N.C. Dep't of Transp.*, 607 S.E.2d 342 (COA - Feb 1, 2005), a panel of the Court of Appeals, which included Judge Tyson, repeated the statement previously made in *Viar*:

"The NCDOT is vested with broad discretion in carrying out its duties and the discretionary decisions it makes are not subject to judicial review "unless [their] action is so clearly unreasonable as to amount to oppressive and manifest abuse." *State Highway Comm'n v. Greensboro City Bd. of Education*, 265 N.C. 35, 48, 143 S.E.2d 87, 97 (1965).

As with the *Guyton*, the *Greensboro City Bd. Of Education* case was not a State Tort Claim Act case but was, instead, a governmental land condemnation case. Further, the citation was quoted out of context – the exact quote in *Greensboro* follows:

Third, it is well-settled law in this State that the State Highway Commission is vested by statute with broad discretionary authority in the performance of its statutory duties, and the court cannot substitute its judgment for that of the State Highway Commission and control *the discretion* vested in the State Highway Commission *to acquire by condemnation* the property here sought to be acquired for 'controlled-access facilities', and the exercise by it of such discretionary authority and powers is not subject to judicial review, unless its action here is so clearly unreasonable as to amount to oppressive and manifest abuse, and as to this the City Board of Education's answer raises no issue of oppressive and manifest abuse of its discretion by the State Highway Commission here, and if it did, there is no evidence before us that the action of the State Highway Commission here in respect to City Board of Education's property amounts to an oppressive and manifest abuse of the State Highway Commission's discretion.

Id., 265 N.C. at 48, 143 S.E.2d at 97 (emphasis added). It is obvious that this “discretionary decision”; “so clearly unreasonable”; “oppressive and manifest abuse” language applies to discretionary condemnation decisions – not negligence / bodily injury cases arising within the State Tort Claims Act.

CONCLUSION

Unless and until our legislature addresses this problem by specifically invalidating the Public Duty Doctrine as a defense in State Tort Claims Act cases, our appellate courts would do well to heed the advice of Judge Geer in *Multiple Claimants*:

We are not free to employ a common law rule to reinstate sovereign immunity when the State has both waived that immunity and specifically assumed a duty to...[I]f we were to embrace the view of the dissents in this case and in *Myers*, it is difficult to identify any negligence claim asserted against the State that would fall outside the scope of the Public Duty Doctrine. The result would be to judicially amend the State Tort Claims Act to require all plaintiffs to prove either a special relationship or a special duty as an element of their claim under the Tort Claims Act. To do so - based on a judicial assessment of the policy implications for the State and its taxpayers - would be to sit as a super-legislature.

Otherwise, our citizens will eventually lose the right to sue the State that was given to our citizens by their elected representatives.

¹ N.C.G.S. 143-291 states “...The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. If the Commission finds that there was negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority that was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages that the claimant is entitled to be paid, including medical and other expenses, and by appropriate order direct the payment of damages as provided in subsection (a1) of this section,...