

No. 425A21-3

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TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

HOKE COUNTY BOARD OF
EDUCATION et al,
Plaintiffs-Appellees,
and

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION,
Plaintiff-Intervenor-Appellee,
and

RAFAEL PENN, CHARLOTTE-
MECKLENBURG BRANCH OF
THE STATE CONFERENCE OF
THE NAACP et al.,
Plaintiffs-Intervenors-Appellees,
v.

STATE OF NORTH CAROLINA,
Defendant-Appellee,
and

THE STATE BOARD OF EDUCATION,
Defendant-Appellee,
and

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION,
Realigned Defendant-Appellee,
and

PHILIP E. BERGER, in his official
capacity as President Pro Tempore of
the North Carolina Senate, and
TIMOTHY K. MOORE, in his official
capacity as Speaker of the North
Carolina House of Representatives,
Intervenor Defendants-Appellants.

From Wake County
No. 95-CVS-1158
No. COA23-788

MOTION AND SUGGESTION OF RECUSAL

TO THE HONORABLE JUSTICE EARLS AND THE SUPREME COURT OF
NORTH CAROLINA:

NOW COME Legislative Intervenor-Defendants / Appellants, Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, on behalf of the General Assembly and as agents of the State (together, “Legislative Intervenors”), pursuant to N.C. R. App. P. 37, and hereby move the Honorable Justice Earls and this Honorable Court to consider the recusal of Justice Earls from participation in this matter, and, for the reasons stated herein, suggest that such recusal is warranted. In support of this Motion, Legislative Intervenors show the Court as follows:

1. Justice Earls participated in this case as an attorney representing Plaintiff-Intervenors Rafael Penn, et al. (the “Penn-Intervenors”), and signed Initial and Amended Complaints on behalf of the Penn-Intervenors, along with other pleadings. (See, e.g., Intervening Complaint dated 9 February 2005 (R p 682); Second Amended Complaint, dated 30 September 2005 (R p 704)).

2. The North Carolina Code of Judicial Conduct provides that a judge should disqualify himself or herself when he or she participated in the case as a lawyer for the parties. In relevant part, the Code of Judicial Conduct provides:

- (1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge’s

impartiality may reasonably be questioned, including but not limited to circumstances where:

. . .

(b) The judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

North Carolina Code of Judicial Conduct Canon 3(C)(1)(b).

3. The United States Supreme Court has also noted that a judge presiding over a case in which he or she participated as counsel raises due process concerns. *Williams v. Pennsylvania*, 579 U.S. 1, 9 (2016) (“When a judge has served as an advocate . . . in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome.”).

4. Consistent with these authorities, Justice Earls has recused herself in similar cases where she previously participated as an attorney representing the parties. In *Bouvier v. Porter*, Case No. 403P21-1, the defendants filed a motion asking that Justice Earls be recused in a matter where she had previously participated as a lawyer representing the plaintiffs. Justice Earls recused herself from the case on her own initiative, rendering the motion for recusal moot. See Order, *Bouvier v. Porter*, Case No. 403P21-1 (entered 18 January 2022).

5. On 23 December 2021, the Court issued an Order setting forth a recusal process that follows a “motion . . . seeking recusal or disqualification[.]” Similarly, Canon 3(C)(1) of the Code of Judicial Conduct states that a judge should be

disqualified “[o]n motion from any party[.]” Under the process set forth in the Court’s Order, a motion for recusal will be referred to the justice who is subject to the motion for their determination. Alternatively, the Order permits the justice to “decline to decide the motion on their own and exercise the discretion to refer the motion to the full Court for disposition without their participation.”

6. In a previous appeal involving this matter, Justice Earls concluded that her prior participation as counsel for the Penn-Intervenors did not require her recusal because “the facts and claims at issue in the Intervening Complaint—which largely concerned student assignment policies in [Charlotte-Mecklenburg Schools]—are entirely unrelated to the questions presently before the court.” (See Order, Hoke Cnty. Bd. of Educ., et al. v. State, et al. Case No. 425A21-2 (entered 19 Aug. 2022) (attached as Exhibit A)). In doing so, she noted that on 19 August 2005, the trial court granted the Penn-Intervenors the right to intervene in this matter “limited . . . to consideration of the facts and law arising under [their] third claim for relief . . . which addresses the ‘failure of the CMS school district to provide sufficient human, fiscal, and educational resources to its central city and high poverty schools.’” (Id. (quoting Order re: Motion to Intervene, at 4-5, Hoke Cnty. Bd. of Educ., et al. v. State., et al., No. 95 CVS 1158, Wake Co. Super. Ct. (entered Aug 19, 2005) (emphasis added))). The trial court then severed the Penn-Intervenors’ CMS claim “so as to permit separate trial of the CMS claims from the pending matters that are on-going in the remedial phase of this case.” (Id.).

7. While they recognize Justice Earls previously addressed the issue of recusal in a prior appeal, Legislative Intervenors submit that recusal is still warranted in this appeal. Although Justice Earls concluded that the trial court's orders below did not involve the Penn-Intervenors' claims, the Penn-Intervenors have taken a seemingly different position. Following Justice Earls's decision that recusal was unnecessary, Legislative Intervenors moved to dismiss the Penn-Intervenors' appeal. In their motion, Legislative Intervenors argued that, because the Penn-Intervenors' claims were unrelated to the issue on appeal—which dealt with the trial court's authority to issue orders purporting to grant “statewide” relief in the form of injunctions requiring the State to implement and fund a “Comprehensive Remedial Plan”—they could not be a “party aggrieved” within the meaning of N.C. Gen. Stat. §§ 1-271 and 7A-27. In response, the Penn-Intervenors argued they had a right to appeal because they “stood to benefit directly from the statewide implementation of the CRP” even though they had originally only asserted district-specific claims.” (See Penn-Intervenors' Response to Motion to Dismiss, Hoke Cnty. Bd. of Educ., et al. v. State, et al., Case No. 425A21-2, filed 26 Aug. 2022)). Thus, the Penn-Intervenors have taken a position that their original claims—which they characterize as “district-specific”—give them an interest in the orders now on appeal.

8. The nature of the issues presented in this appeal likewise warrant recusal. This Court has granted discretionary review to determine whether the trial court lacked subject matter jurisdiction to enter its order of 17 April 2023, including whether Plaintiffs' and the Penn-Intervenors' claims give them standing to

obtain relief for school districts where they do not reside. Thus, to the extent they were not before, the Penn-Intervenors' pleadings, including specifically those Justice Earls signed in the early stages of this case, are now before this Court as a necessary part of its review of the trial court's subject matter jurisdiction.

9. While they do not wish to relitigate Justice Earls' previous decision not to recuse, Legislative Intervenors respectfully suggest, under the circumstances of this new appeal, that recusal nonetheless is warranted.

WHEREFORE, Legislative Intervenors provide this notice so that Justice Earls, or the Court, may consider whether recusal is warranted.

Respectfully submitted, this the 16th of November 2023.

/s/ Matthew F. Tilley
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Pursuant to Rule 33(b) I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 16th of November 2023, he caused a true and correct copy of the foregoing document to be served via U.S. Mail upon the following:

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/ s/ Matthew F. Tilley

Matthew F. Tilley

EXHIBIT A

2021 DEC 23 P 12:53

SUPREME COURT OF NORTH CAROLINA


ORDER

Pursuant to the powers conferred by the North Carolina Constitution and General Statutes, the Court hereby determines that with regard to any motion filed with the Court under Rule 37 of the North Carolina Rules of Appellate Procedure seeking the recusal or disqualification of a Justice from participation in the deliberation and decision of a matter pending before the Court, the Court shall assign the motion to the Justice who is the subject of the motion for their determination. That determination shall be final.

As an alternative, any Justice who is the subject of a recusal or disqualification motion filed with the Court may decline to decide the motion on their own and exercise the discretion to refer the motion to the full Court for disposition without their participation. In that instance, a majority of the Court must concur to disqualify a Justice from participating in the deliberation and decision of a case. The determination by the Court shall then be final.

Any Order reporting the disposition on a motion to recuse shall indicate whether it was decided by the Justice who was the subject of the motion or was by them referred to the remaining members of the Court for decision.

By order of the Court in Conference, this the 23rd day of December, 2021.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of December, 2021.



Amy L. Funderburk

AMY L. FUNDERBURK
Clerk, Supreme Court of North Carolina

Assistant Clerk, Supreme Court of
North Carolina