No. _______ TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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MARGARET DICKSON, *et al.* *Plaintiffs,* v. ROBERT RUCHO, *et al.* *Defendants.*	))))))	**From Wake County** 11 CVS 16896 11 CVS 16940 (*Consolidated*)
NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP; *et al.* *Plaintiffs,* v. THE STATE OF NORTH CAROLINA, *et al.* *Defendants.*	)))))))))))	

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PETITION FOR WRIT OF SUPERSEDEAS
AND MOTION FOR TEMPORARY STAY

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PETITION FOR WRIT OF SUPERSEDEAS
AND MOTION FOR TEMPORARY STAY

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendant-Petitioners Thom Tillis, Speaker of the North Carolina House of Representatives, Philip E. Berger, President Pro Tempore of the North Carolina Senate, Bob Rucho, Chair of the Senate Committee on Redistricting, and David Lewis, Chair of the House Committee on

Redistricting (hereinafter "legislative defendants"), respectfully petition this Court to issue a temporary stay and its writ of supersedeas pursuant to Rule 23 of the North Carolina Rules of Appellate Procedure to stay enforcement of the trial court's order dated April 20, 2012, directing the legislative defendants to produce documents protected by the legislative privilege, the common law attorney-client privilege and work product doctrine, or the statutory attorney-client privilege and work product doctrine pending the legislative defendants' appeal of the order. If not stayed by this Court, the trial court's order will require the disclosure of documents protected by the legislative privilege, the attorney-client privilege and work product doctrine, and moot the appeal of the legislative defendants. In support of this Petition, the legislative defendants show the Court the following:

STATEMENT OF FACTS

Plaintiffs commenced these actions on November 3, 2011. By order dated December 19, 2011, the actions were consolidated into one action.

On November 8, 2011, plaintiffs served requests for production of documents on the legislative defendants. On January 13, 2012, after receiving an extension of time to respond, the legislative defendants served written objections and responses to plaintiffs' discovery requests. The legislative defendants objected in part on the grounds that many of the

requests sought documents or communications that were protected from disclosure by the attorney-client privilege or work-product doctrine.

On February 29, 2012, plaintiffs filed a motion seeking to compel the legislative defendants to produce the documents withheld on the basis of attorney-client privilege and the work product doctrine. In their motion, plaintiffs contended that N.C. Gen. Stat. § 120-133, first enacted in 1983, constitutes a waiver by the General Assembly of the common law attorney-client and work product privileges for redistricting communications once the relevant redistricting act becomes law. Plaintiffs contended that N.C. Gen. Stat. § 120-133 therefore compelled the production of documents prepared by counsel for the legislative defendants, including outside counsel and the Attorney General's Office.

On April 11, 2012, legislative defendants filed a response to the motion, denying that N.C. Gen. Stat. § 120-133 waives, or even addresses, the common law attorney-client privilege or the work product doctrine, or that the statute applies to outside counsel or the Attorney General's Office. A copy of the legislative defendants' response to the motion to compel is attached as Attachment A. The legislative defendants' response attached an engagement letter of counsel for the North Carolina House of Representatives from a prior redistricting session in which the legislative

leadership interpreted N.C. Gen. Stat. § 120-133 as not applying to outside counsel or documents and communications covered by the common law attorney-client privilege. Indeed, the past engagement letter shows that the prior legislative leadership which interpreted N.C. Gen. Stat. § 120-133 in this manner was represented by the same law firm (Ferguson Stein) that today represents some of the plaintiffs in the instant actions. Attachment A. The legislative defendants also attached the engagement letter of their outside counsel in this case (Ogletree Deakins), which was modeled on the prior engagement letter signed by then Speaker Dan Blue and the Ferguson Stein law firm. Attachment A.

On April 20, 2012, the trial court entered an order allowing plaintiffs' motion to compel as to the legislative defendants. A copy of the April 20, 2012 Order is attached as Attachment B. The Order directs the legislative defendants to provide within ten (10) days of the Order information and documents including ones for which the legislative defendants contend that N.C. Gen. Stat. § 120-133 does not waive the legislative privilege (communications between members and legislative employees *after* the enactment of redistricting plans), and documents the legislative defendants contend are protected by the common law attorney-client privilege, the work product doctrine, and the attorney-client privilege applicable under the

Public Records Act. N.C. Gen. Stat. § 132-1.1. The Order denied plaintiffs' motion to the extent it sought such documents from the Attorney General's Office.

The trial court's April 20 Order concluded that N.C. Gen. Stat. § 120-133 operates as a broad waiver of the common law attorney-client privilege for communications between the legislative defendants and their counsel, including outside counsel. The trial court also construed the statute as waiving legislative privilege for communications exchanged after the enactment of the redistricting plans, and even attorney client communications made during the actual litigation of the redistricting plans.

Despite concluding that the statute requires the disclosure of all attorney-client communications related to redistricting both before and after enactment of the redistricting plans, including during the pendency of a lawsuit, the trial court then interpreted the statute as allowing the legislative defendants to assert a common law work product privilege. The trial court limited the privilege, however, to communications related "solely" to litigation and to an unspecified time *after* the enactment of the redistricting plans. The trial court's Order then requested that the parties negotiate an appropriate start date for the applicability of the work product doctrine to the legislative defendants.

On April 24, 2012, the legislative defendants filed a Notice of Appeal from the Court's April 20, 2012 Order. A copy of the Notice of Appeal is attached as Attachment C.[1] On that same day, the legislative defendants filed a request that the trial court issue an Order recognizing the automatic stay provision of N.C. Gen. Stat. § 1-294 as applied to the legislative defendants' appeal of the April 20, 2012 Order. A certified copy of the legislative defendants' request that the Court recognize the automatic stay is attached as Attachment D.

On April 27, 2012, the three-judge panel sent an email to the parties. The email attached a draft Order which the three-judge panel indicated it was inclined to enter regarding the request of the legislative defendants to recognize the automatic stay. A copy of the email and draft order circulated by the three-judge panel is attached as Attachment E. The draft order would have recognized the automatic stay pending the appeal of the legislative defendants of the April 20, 2012 Order. The panel's email solicited a response by the plaintiffs to the panel's intention to enter the draft order.

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[1] Defendants appealed as of right directly to this Court pursuant to N.C.Gen.Stat. § 120-2.5 (2011). *See Pender County v. Bartlett*, 361 N.C. 491, 497, 649 S.E.2d 364, 368 (2007) (interpreting N.C.G.S. § 120-2.5 to apply to "any appeal" from a three-judge redistricting court), *aff'd, Bartlett v. Strickland*, 556 U.S. 1 (2009). Accordingly, defendants are filing this Petition in the first instance with this Court. Rule 23(a)(2), N.C. R. App. P.

On April 30, 2012, plaintiffs filed a document captioned "Plaintiffs' Suggestion That The Court Disregard Defendants' Notice of Appeal and Alternative Objection to Defendants' Request to Recognize Stay of Order During Appeal and Notice of Non-Production." A copy is attached as Attachment F. On that same day, the legislative defendants filed a response to plaintiffs' filing, a copy of which is attached as Attachment G.

On April 30, 2012, the trial court entered an order temporarily staying its order requiring the legislative defendants to produce the challenged documents while it considered the parties' filings from that day.

On May 1, 2012, the trial court entered an order extending its stay of its April 20 Order until May 11, 2012, but otherwise refused to recognize the automatic stay pending appeal requested by the legislative defendants. A copy of the trial court's May 1, 2012 order is attached as Attachment H.

REASONS WHY WRIT SHOULD ISSUE

I. A Stay is Necessary to Avoid Irreparable Harm to the Legislative Defendants and to Protect their Right to a Meaningful Appeal.

The purpose of a writ of supersedeas is "to preserve the status quo pending the exercise of the appellate court's jurisdiction" and "is issued only to hold the matter in abeyance pending review." *City of New Bern v. Walker*, 255 N.C. 355, 356, 121 S.E.2d 544, 545-46 (1961). In this case, a writ of supersedeas is proper because if the legislative defendants are

required to produce the documents subject to the Order, such production would require disclosure of privileged or otherwise protected documents, and any appeal from the Order would be rendered moot. *See Willis v. Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976); *Boyce & Isley, PLLC v. Cooper*, 195 N.C. App. 625, 637, 673 S.E.2d 694, 701-02 (2009). The Order would require the legislative defendants to produce information and documents protected by the legislative privilege (for post-enactment communications), the common law attorney-client privilege and the work product doctrine, and the statutory attorney–client and work product privileges recognized under the Public Records Act. Thus, the trial court's Order affects a substantial right and is immediately appealable. *See Boyce & Isley, PLLC,* 195 N.C. App. at 637, 673 S.E.2d at 701-02.

In the absence of a writ of supersedeas, the legislative defendants would suffer irreparable harm and be deprived of their right to a meaningful appeal. If this Court disagrees with the trial court's interpretation of N.C. Gen. Stat. § 120-133, the production of these documents in advance of this Court's decision would deprive the legislative defendants of the benefit of their appeal.[2] It was for this very reason that the trial court in *Boyce & Isley,*

[2] On the other hand, plaintiffs will not suffer any irreparable harm from a stay because allowing the stay would not delay discovery in the case, which will be ongoing during the appeal.

PLLC, a case directly on point involving the attorney-client privilege, recognized the automatic stay provisions of N.C. Gen. Stat. § 1-294 and allowed defendants to refrain from production of the challenged documents pending appeal. The trial court here should have taken the same action. Because it did not, the legislative defendants respectfully request this Court enter a temporary stay and writ of supersedeas recognizing the automatic stay pending appeal.

II. The Legislative Defendants are Likely to Succeed on the Merits of Their Appeal.

The trial court's Order is unprecedented in several respects and significantly prejudices the ability of the General Assembly and its leadership to assert the same right to attorney-client confidentiality that applies to private parties and local governmental agencies. The trial court's Order is clearly erroneous.

First, the trial court erroneously concluded that, through N.C. Gen. Stat. § 120-133, the General Assembly intended to strip itself of any common law right to an attorney-client privilege in any matter related to the enactment of redistricting plans, in the preparation for litigation over redistricting plans, and in the actual litigation of redistricting plans. To the contrary, N.C. Gen. Stat. § 120-133 operates only to waive *legislative* privilege for documents exchanged by legislators and staff related to

redistricting drafting requests and requests for information on redistricting. This statute has long been construed by the legislature as applying only to such communications exchanged *prior to* the enactment of redistricting plans. Nonetheless, the court below interpreted this statute as having the effect of stripping the members of the General Assembly of legislative privilege even *after* the enactment of redistricting plans. Despite the plain language of the statute that, upon enactment, certain documents "are no longer confidential" and "become" public records, the trial court applied the waiver to *future documents not even in existence* at the time of the enactment of the redistricting plans. This result has no basis at all in the statute at issue or otherwise. Yet, under the court's unprecedented interpretation, retained outside counsel for the legislative defendants, even today, cannot have a confidential communication with their clients.[3] There is no precedent for

[3] Thus, under the trial court's interpretation of N.C. Gen. Stat. § 120-133, the only way the General Assembly can receive confidential attorney-client advice in redistricting matters is to seek such advice from the Attorney General, and not outside counsel of its own choosing. This interpretation leads to absurd results and was plainly not contemplated by the General Assembly in enacting N.C. Gen. Stat. § 120-133. This interpretation is also inconsistent with statutory amendments enacted by the General Assembly in 2011. In S.L. 2011-145 §§ 22.4-22.5 (amending N.C. Gen. Stat. §§ 120-32.6 and 147-17), the General Assembly reaffirmed the General Assembly's authority to engage outside counsel without having to receive permission to do so from the Governor. The General Assembly also made it clear that when it retains outside counsel, the General Assembly alone possesses the authority to make decisions about its legal strategy even when co-

such an interpretation, it went further than the interpretation employed by plaintiffs, and is not supported by N.C. Gen. Stat. § 120-133.

Second, the trial court did not acknowledge this Court's precedent that statutes in derogation of the common law must be strictly construed. *Price v. Edwards*, 178 N.C. 493, 500, 101 S.E. 33, 36-37 (1919); *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 624 (2006) (refusing to interpret the alimony statute as addressing the tort of alienation of affection); *Sims v. Charlotte Liberty Mutual Ins. Co.*, 257 N.C. 32, 37, 125 S.E.2d 326, 330 (1962). Instead, the trial court gave N.C. Gen. Stat. § 120-133 its broadest possible interpretation rather than a narrow interpretation that preserved the common law rights of the members of the General Assembly.

Third, the trial court's Order is internally inconsistent. The Order first construes N.C. Gen. Stat. § 120-133 as a waiver of the common law attorney-client privilege and work product doctrine, but then construes it as allowing the legislative defendants to assert a limited common law work product privilege. The Order, without any basis in the text of N.C. Gen. Stat. § 120-133 or any other statute, arbitrarily sets the time for when such a privilege could be asserted to some unspecified time *after* the enactment of

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represented by the Attorney General. These amendments were contained in a bill addressing preclearance of redistricting bills. These recent amendments thus plainly express an anticipation by the General Assembly that it may receive confidential attorney-client advice in these matters.

the redistricting statutes. This arbitrary modification of the work product doctrine ignores the normal operation of this privilege as encompassing work done by attorneys in anticipation of litigation. *See Evans v. United Services Automobile Association*, 142 N.C. App. 18, 29, 541 S.E.2d 782, 789 (2001), *citing Hickman v. Taylor*, 329 U.S. 495 (1947); Rule 26(a)(5), N.C. R. Civ. P. (protecting documents prepared in anticipation of litigation).

The record before the trial court demonstrated that outside counsel, Ogletree Deakins and Jones Day, were expressly hired by the General Assembly to prepare a lawsuit in the federal court in the District of Columbia to obtain preclearance of the plans under Section 5 of the Voting Rights Act and to defend the General Assembly against lawsuits that were anticipated even before the General Assembly convened in 2011. Attachment A, at Exhibit B. Thus, if the trial court correctly recognized in N.C. Gen. Stat. § 120-133 a right by the General Assembly to assert a common law work product privilege, then there is no basis whatsoever for limiting the time period for that privilege to something narrower than the typical common law privilege which would apply at the time outside counsel was hired to advise the legislative defendants in anticipation of litigation.

Finally, in interpreting the statute the trial court completely ignored past legislative leaders' interpretation of the statute as not applying to

outside counsel or attorney-client communications or work product. Attachment A, at Exhibit A.

III. The Legislative Defendants are Entitled to An Automatic Stay Pending Appeal

In opposing defendants' request that the trial court recognize the automatic stay of N.C. Gen. Stat. § 1-294, plaintiffs cited cases which either support the legislative defendants' position or are irrelevant. For instance, plaintiffs cited *Sharpe v. Worland*, 351 N.C. 159, 522 S.E.2d 577 (1999), and *Evans v. United Services Automobile Association*, 142 N.C. 18, 541 S.E.2d 782 (2000), *see* Attachment F, both of which emphasize North Carolina's established law that orders compelling the discovery of information from a party asserting either a common law or statutory privilege affect a substantial right, are therefore immediately applicable, and are automatically stayed pending the appeal of that order. Similarly, the legislative defendants assert that (1) the trial court's order compels the production of communications exchanged after the enactment of redistricting plans and are therefore protected by legislative privilege; (2) that communications exchanged before and after the enactment of the redistricting plans are protected by the common law attorney-client and work product privileges; and (3) this same information is protected by

statutory privileges applicable to "public records" under the Public Records Act.

Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377 (1950), also cited by plaintiffs, is simply inapplicable. *Veazey* involved the appeal of an interlocutory order denying a party's motion to refer the case to a special master. Unlike orders compelling the production of privileged information, the interlocutory order in question did not affect a substantial right. Finally, *RPR & Associates v. UNC*, 153 N.C. App. 3-12, 570 S.E.2d 510 (2002), also cited by plaintiffs, involved a trial court order denying defendants' motion to dismiss on the grounds of sovereign immunity. Unlike the instant case, at the time of the *RPR* decision, the Supreme Court had never before ruled that the denial of a motion to dismiss on the grounds of sovereign immunity affected a substantial right. *RPR*, 153 N.C. at 348, 570 S.E.2d at 514. Moreover, in *RPR*, the Court of Appeals ultimately ruled that the trial court had committed an error and that an order denying a motion to dismiss on the grounds of sovereign immunity *did* impact a substantial right and *should have* been considered immediately appealable. *Id.* However, the trial court's error was harmless because the defendant was able to obtain review of its sovereign immunity defense prior to the final resolution of the case, and because the Court of Appeals ruled that defendant had in fact waived the

defense by entering into a contract. *RPR*, 153 N.C. App. at 349, 570 S.E.2d at 515.

The legal issues in this case are completely different from those in *RPR*. Here, there is no dispute that orders compelling the production of information which may be protected by common law or statutory privileges affect a substantial right. Moreover, unlike the defendant in *RPR*, which was able to obtain review of its sovereign immunity defense before final resolution of the case, there is no remedy for the legislative defendants if they are compelled to produce privileged information while this case is pending. This truth has long been recognized by North Carolina courts and explains why orders compelling the discovery of privileged information affect a substantial right.

Accordingly, this Court should issue its writ to stay enforcement of the trial court's April 20, 2012 Order pending appeal.

MOTION FOR TEMPORARY STAY

Pursuant to Rule 23(e) of the North Carolina Rules of Appellate Procedure, the legislative defendants respectfully apply to this Court for an order temporarily staying enforcement of the trial court's April 20, 2012 Order until a determination is made by this Court of whether it shall issue its writ. In support of their Motion for Temporary Stay, the legislative

defendants rely on the arguments presented in their Petition for Writ of Supersedeas.

CONCLUSION

The legislative defendants respectfully pray that this Court:

1. Issue an Order granting the legislative defendants' Motion for a Temporary Stay pending this Court's consideration of the foregoing Petition for Writ of Supersedeas;

2. Issue its Writ of Supersedeas to the Superior Court of Wake County staying enforcement of the April 20, 2012 Order pending this Court's review and determination of the legislative defendants' appeal of that Order; and

3. Grant the legislative defendants such other relief that this Court may deem proper.

ATTACHMENTS

Attached to this Petition for consideration by the Court are copies of the orders sought to be reviewed, and the following other trial court records pertinent to consideration of this Petition:

Attachment A – Legislative Defendants' Response In Opposition to Motion to Compel

Attachment B – April 20, 2012 Order Allowing Plaintiffs' Motion to Compel

Attachment C – Notice of Appeal from the April 20, 2012 Order

Attachment D – Legislative Defendants' Request to Recognize Stay or Order During Appeal and Notice of Non-Production

Attachment E – April 27, 2012 Email and Draft Order from the Three-Judge Panel

Attachment F – Plaintiffs' Suggestion That the Court Disregard Defendants' Notice of Appeal and Alternative Objection to Defendants' Request to Recognize Stay of Order During Appeal and Notice of Non-Production

Attachment G – Legislative Defendants' Response to Plaintiffs' Suggestion That the Court Disregard Defendants' Notice of Appeal and Alternative Objection to Defendants' Request to Recognize Stay of Order During Appeal and Notice of Non-Production

Attachment H – May 1, 2012 Order on Legislative Defendants' Request to Recognize Stay or Order During Appeal and Notice of Non-Production