No. 201PA12-2 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**
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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DEFENDANTS-APPELLEES' RESPONSE IN OPPOSITION TO PLAINTIFF-APPELLANTS' MOTION FOR TEMPORARY INJUNCTION

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendants-Appellees ("defendants") submit this response in opposition to Plaintiff-Appellants' ("plaintiffs") Motion for Temporary Injunction. For the reasons set forth below, the motion should be denied.

FACTS

Plaintiffs initially filed the Complaints in these consolidated matters on November 3, 2011 – more than three months after the redistricting plans that are the subject of this litigation were enacted by the General Assembly. On December 5, 2011, plaintiffs filed a motion with the trial court to expedite discovery by compressing discovery in this case between the months of December 2011 and January 13, 2012 – ostensibly to receive relief on their claims prior to the opening of the filing period in February 2012.[1] The trial court did not allow plaintiffs' requested schedule and plaintiffs have never appealed that order to this Court. (R pp. 390-94)

Having failed to disrupt the election cycle through their motion to expedite discovery, plaintiffs next filed a motion for a preliminary injunction on January 6, 2012. By order dated January 20, 2012, the three-judge panel in this matter denied that motion and plaintiffs have never appealed that order to this Court. (R pp. 439-443)

On July 8, 2013, the trial court entered its Judgment finding the redistricting plans at issue constitutional and legal in all respects and dismissing plaintiffs' claims in their entirety. (R pp. 1264-1434) Plaintiffs thereafter filed a notice of

[1] The full text of the motion to expedite discovery can be found on the native format disc that was filed as part of the Record under the provisions of N.C. R. App. P. 9(d).

appeal from that judgment, but did not seek an injunction pending appeal from the trial court. Until filing the instant motion, plaintiffs also have never sought injunctive relief from this Court after the trial court entered its Judgment.

On September 4, 2013, the record on appeal was filed in this Court. (R p. 7) Plaintiffs did not seek an expedited briefing schedule from this Court. Plaintiffs did not seek an expedited oral argument or decision from this Court. In addition, until filing the instant motion, plaintiffs did not file any motion for an injunction pending appeal following the docketing of the appeal in this Court.

On November 25, 2013, this Court issued an order setting this matter for oral argument on January 6, 2014. Plaintiffs thereafter filed a motion to extend the time limits for oral argument, but still did not file a motion for injunctive relief pending appeal. Plaintiffs finally filed the instant motion on January 2, 2014, just two business days before the oral argument in this case.

ARGUMENT

This Court should summarily deny plaintiffs' motion for multiple reasons.

First, the motion is woefully late. As recounted above, plaintiffs had opportunity after opportunity with the trial court and this Court to seek injunctive relief pending appeal and simply failed to do so. Plaintiffs' procrastination in seeking injunctive relief started from the very beginning of the case when they tried – first through a motion for expedited discovery and then through a motion

for a preliminary injunction – to interfere with the election process. In both instances, the trial court rejected their requests, and in both instances plaintiffs failed to seek any relief from this Court. Plaintiffs have forfeited any argument that the 2014 elections should be enjoined. "As a general rule, equity protects the vigilant, and not those who sleep on their rights, and courts of equity discourage laches and unreasonable delay in the enforcement of rights." *Bd. of Architecture v. Lee*, 264 N.C. 602, 612, 142 S.E.2d 643, 650 (1965). Plainly, plaintiffs have slept through any reasonable timeframe for seeking the requested injunctive relief.

Second, the case comes to this Court from a ruling by the trial court (including detailed findings of fact) that the redistricting plans are ***constitutional in all respects***. Thus, the order cited by plaintiffs from *Stephenson v. Bartlett*, 355 N.C. 281, 561 S.E.2d 888 (2002), rather than supporting plaintiffs' position, compels an *opposite* result. In *Stephenson*, the trial court entered a *final judgment* that the redistricting plans at issue were *unconstitutional* under the State Constitution. Thus, in *Stephenson*, this Court was faced with the specter of elections being held in districts that had been adjudicated as unconstitutional. Nothing about those circumstances is relevant to this case.

Third, this Court's most recent redistricting decision requires denial of this motion. This Court last considered whether to delay the elections process in a redistricting case in *Pender County v. Bartlett,* 361 N.C. 491, 649 S.E.2d 364

(2007). In *Pender County,* the Court reversed a final judgment finding that District 18 in the 2003 House Plan did not violate the Whole County Provision of the N.C. Constitution, Art. II, §§ 3 and 5 ("WCP"). Instead, the Court held that District 18 did in fact violate the WCP. Rather than order the General Assembly to immediately correct the deficiencies in District 18 as well as "other legislative districts directly and indirectly affected" by the Court's opinion, the Court stayed its remedy until after the next election.

The timing of the *Pender County* case is significant. The *Pender County* Court issued its opinion on August 24, 2007. Despite the fact that the filing period was not set to begin until February 2008 – nearly six months later – and the primary was not until May 2008, the Court refused to direct the General Assembly to correct the deficient districts at a time when such correction would have required a special session. Moreover, the case involved only a limited redistricting in one area of the State as opposed to the entire statewide plan. In refusing to disrupt the elections process, the Court explained that it "realize[s] that candidates have been preparing for the 2008 election in reliance upon the districts as presently drawn." The Court further noted that

> [i]n awarding or withholding immediate relief [in an apportionment case], a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can

> reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree."

Pender County, 361 N.C. at 510, 649 S.E.2d at 376 (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)).

Thus, the North Carolina Supreme Court refused to require the General Assembly to correct *finally adjudicated* deficiencies in *one district* in the North Carolina House Plan where the Court issued its ruling in *August* prior to the next year's election. In the instant case, plaintiffs did not even file their injunction request until January 2, 2014 – just a little more than a month away from the opening of the filing period. Using the example set by *Pender County*, plaintiffs have plainly missed their window of opportunity to disrupt the 2014 elections.

This Court's reluctance to disrupt the elections process in redistricting cases is consistent with United States Supreme Court precedent. The United States Supreme Court has often stayed final orders of three-judge courts invalidating election plans and enjoining elections. *See Voinovich v. Quilter*, 503 U.S. 979 (1992); *Wetherell v. DeGrandy*, 505 U.S. 1231 (1992); *Louisiana v. Hays*, 512 U.S. 1273 (1994); *Miller v. Johnson*, 512 U.S. 1283 (1994); *Hunt v. Cromartie*, 529 U.S. 1014 (2000). In other instances, the Court has affirmed lower courts' decisions permitting elections to go forward under invalidated plans because the

plans were not invalidated until late in the election process. *See, e.g., Watkins v. Mabus*, 502 U.S. 954 (1991) (summarily affirming in relevant part *Watkins v. Mabus*, 771 F.Supp. 789, 801, 803-05 (S.D. Miss. 1991) (three-judge court)); *Republican Party of Shelby County v. Dixon*, 429 U.S. 934 (1976) (summarily affirming *Dixon v. Hassler*, 412 F.Supp. 1036, 1038 (W.D. Tenn. 1976) (three-judge court)). *See also Growe v. Emison*, 507 U.S. 25 (1993) (noting that elections must often be held under a legislatively-enacted plan prior to any appellate review of that plan). Indeed, other than citing *Stephenson*, a case on which reliance for an injunction under these circumstances is completely misplaced as described above, plaintiffs' motion cites *no authority* for the extraordinary and unprecedented relief they seek. When both the United States Supreme Court and this Court's own precedent recognize the need for elections to proceed under the plans chosen by the districting authority, great pause should be taken in considering any action that might disrupt or delay the 2014 elections.

Fourth, plaintiffs cannot demonstrate, and have not even attempted to demonstrate, that their motion satisfies the legal standards for injunctive relief under these circumstances. A preliminary injunction "is an extraordinary measure taken by a court to preserve the *status quo* of the parties during litigation." *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574

(1977).[2] Plaintiffs have the burden of establishing a right to a preliminary injunction. *Adams v. Beard Dev. Corp.*, 116 N.C. App. 105, 109, 446 S.E.2d 862, 865 (1994). A preliminary injunction may only be issued "after a careful balancing of the equities." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983). The standards for issuing a preliminary injunction are well established:

> a preliminary injunction . . . will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of the litigation.

Id. at 412, 302 S.E.2d at 766 (citations omitted, emphasis omitted).

Plaintiffs must meet a difficult burden of showing that their alleged injuries are not merely anticipated or probable, but irreparable, real, and immediate. *Duke Power Co. v. City of High Point*, 69 N.C. App. 335, 337, 317 S.E.2d 699, 700 (1984). Plaintiffs must also show that any injury is not the result of their own delay or acquiescence. *North Carolina Bd. of Architecture v. Lee*, 264 N.C. 602, 614, 142 S.E.2d 643, 650 (1965).

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[2] Of course, the *status quo* in this case is that elections are scheduled to proceed under plans duly enacted by the General Assembly, precleared by the United States Department of Justice, and found to be constitutional in all respects by the trial court.

Plaintiffs obviously are unlikely to succeed on the merits of their claims in light of the trial court's ruling. In their motion, plaintiffs claim they are likely to succeed based on "amicus curiae briefs filed by legal scholars in North Carolina and from around the nation advising the Court" that the plans are unconstitutional. With due respect, defendants believe that the trial court's lengthy, thorough, and well-reasoned memorandum opinion, along with its substantial factual findings after a trial, is a better predictor of success on the merits than the amicus brief of mostly out-of-state law professors.

More importantly, however, irreparable harm inevitably results from court orders interfering with ongoing elections. These injuries take many forms. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by the representatives of the people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977). Likewise, undue judicial interference with the redistricting process is a form of irreparable injury. *Karcher v. Daggett*, 455 U.S. 1303, 1306-07 (1982). The injuries resulting from the interruption of ongoing elections are also widespread. Voters are confused. Candidates suffer from wasted efforts and expenditures. Tax dollars are spent needlessly. And voter turnout inevitably turns out to be very low.[3]

[3] The Affidavits of Gary O. Bartlett submitted in connection with plaintiffs' attempts to disrupt the 2012 election process describe the harm caused by delaying elections. (Rule 9(d) Exs. pp. 1-13, 999-1002)

Plaintiffs who sat on their rights for months, and even years, now ask this Court to upend the elections process. Any harm to plaintiffs is plainly of their own making. This request should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion for a Temporary Injunction.

Respectfully submitted this 15th day of January, 2014.

OGLETREE, DEAKINS, NASH,
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Electronically submitted

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N.C. R. App. P. 33(b) Certification: 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 hereby certifies that the foregoing document has been served this day by depositing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first-class postage-prepaid envelope properly addressed to the following:

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This the 15th day of January, 2014.

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