

SUPREME COURT OF NORTH CAROLINA

HOKE COUNTY BOARD OF EDUCATION, *et al.*,

Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD OF
EDUCATION,

Plaintiff Intervenor,

and

RAFAEL PENN, *et al.*,

Plaintiff Intervenor,

v.

STATE OF NORTH CAROLINA,

Defendant,

and

STATE BOARD OF EDUCATION,

Defendant,

and

CHARLOTTE-MECKLENBURG BOARD OF
EDUCATION,

Realigned Defendant,

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.

From Wake County

No. 95-CVS-1158

No. COA22-86

PLAINTIFFS' MOTION AND SUGGESTION OF RECUSAL

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

Pursuant to Rule 37 of the North Carolina Rules of Appellate Procedure, Plaintiffs Hoke County Board of Education *et al.* (collectively, "Plaintiffs") respectfully move The Honorable Justice Philip Berger, Jr. and this Court to consider Justice Berger's recusal from participation in this matter. Recusal is appropriate and necessary because Justice Berger's father intervened in this case on 8 December 2021 for the purpose of appealing the 10 November 2021 trial court order which is presently before the Court. The appeal filed by Justice Berger's father is separate from the appeal filed by the Defendant State of North Carolina. Indeed, Justice Berger's father takes a position directly at odds with that of the Defendant State.

REQUEST FOR RECUSAL

N.C. Code of Judicial Conduct, Canon 3(C)(1) states "[o]n motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned[.]" Canon 3(C)(1) further provides examples of specific situations that necessitate recusal, including when "a person within the third degree of relationship" to the judge "(i) Is a party to the proceeding, or an officer, director, or trustee of a party"; and "(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding."

Justice Berger's father is Intervenor-Defendant Philip Berger Sr. ("Intervenor Berger"). Intervenor Berger is appearing as President *Pro Tempore* of the North Carolina Senate in the appeal before the Court. Intervenor Berger falls within the third degree of relationship to Justice Berger as it is defined under Canon 3(C)(1) and the civil law system. Indeed, a parent-child relationship, such as that between Intervenor Berger and Justice Berger, constitutes a *first* degree of relationship. Justice Berger should recuse himself from deciding an appeal to which his father is a participant.

Plaintiffs understand that Justice Berger previously received a motion for his recusal in an appeal concerning a lawsuit that named his father as a party-defendant. See *N.C. State Conf. of NAACP v. Moore*, 380 N.C. 263, 866 S.E.2d 476 (2022). In that case, Justice Berger decided that his recusal was not required because that lawsuit was "a suit against the State" and his father was named as a party-defendant "in the caption only as a matter of procedure." *Id.* at 264, 866 S.E.2d at 477. Justice Berger decided that his recusal was not required in that case because the plaintiffs' naming of his father as a party-defendant in his official capacity was no different than a suit against the State. This appeal, however, presents very different circumstances.

Plaintiffs did not name Intervenor Berger as a defendant in this case. And his appearance in this case is certainly not "a matter of procedure." This lawsuit has been litigated for nearly twenty-eight years against the Defendant State of North Carolina and Defendant State Board of Education. Intervenor Berger actively sought

to insert himself in this case—nearly three decades after its filing—when he affirmatively intervened on 8 December 2021 for the very purpose of challenging the order that is now before Justice Berger and this Court in this appeal.

And, unlike the circumstances present in *Moore*, Justice Berger’s father is *not* the State in this appeal. The Defendant State filed a separate appeal of the 10 November 2021 Order. Intervenor Berger’s position in his appeal is directly contrary to that of the State.

As further evidence of these points, the following are statements that Justice Berger’s father released regarding the trial court, the parties to this case, and the specific matters currently on appeal before this Court:

- “*Judge Lee makes a mockery of our constitutional order with every additional hearing.*” 18 October 2021, [Unhinged Judge Contemplates Ordering All Public Schools Closed Until Legislature Passes His Preferred Budget Plan](#), [BergerPress.medium.com](#).
- “*It’s a circus.*” 10 November 2021, [Joint Statement from Senate Leader Phil Berger and House Speaker Tim Moore](#), [BergerPress.medium.com](#).
- “*Judge Lee, education special interests, and the Cooper Administration hatched this unconstitutional scheme to funnel \$1.7 billion in extra money to a failed education bureaucracy.... The legislature will continue to follow the Constitution and advance policies that enhance opportunities for student achievement, empower parents, and fund students, not failing bureaucratic systems.*” 30 November 2021, [Court of Appeals Blocks Judge Lee’s Order in Leandro Case](#), [BergerPress.medium.com](#).
- “*The people of North Carolina through their elected legislators, not an unelected county-level trial judge, decide how to spend tax dollars. Rather than accepting responsibility for lagging achievement and*

outright failure, the Leandro parties insist that the pathway to student improvement is always the simple application of more money.” Id.

- *“A 27-year old education lawsuit, commonly referred to as ‘Leandro,’ will come to a head this week when a county-level trial judge will order North Carolina’s executive branch to withdraw \$1.7 billion from the state’s General Fund and spend it on the judge’s preferred policy proposals.” 8 November 2021, Leandro: Background on Relevant Case Law and Statutes, BergerPress.medium.com.*
- *“If Judge Lee’s orders are followed, the legislature’s core duty is usurped by an unelected county-level trial judge and an out-of-state consultancy funded by the Governor and his political allies.” 10 November 2021, 10 November 2021, Joint Statement from Senate Leader Phil Berger and House Speaker Tim Moore, BergerPress.medium.com.*

Under these circumstances, Plaintiffs respectfully submit that the recusal of Justice Berger is proper and warranted.

CONCLUSION

Plaintiffs respectfully move and request Justice Berger to recuse himself from this matter. In the event such motion is referred to the entire Court, Plaintiffs respectfully move the Court for the recusal of Justice Berger.

Respectfully submitted, this the 15th day of July 2022.

Electronically Submitted

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N.C. R. App. P. 33(b) Certification: I certify that all 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

I hereby certify that on 15 July 2022 the foregoing was served upon the following by electronic mail and US Mail addressed as follows:

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