No. 201PA12-5 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** No. 11 CVS 16896 No. 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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LEGISLATIVE DEFENDANTS-APPELLANTS' RESPONSE TO PLAINTIFFS-APPELLEES' MOTION TO DISMISS APPEAL

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The Legislative Defendants-Appellants ("Legislative Defendants") file this response to Plaintiffs-Appellees' ("plaintiffs") Motion to Dismiss this appeal. For the forgoing reasons, plaintiffs' motion to dismiss should be denied, or, in the alternative, the Court should treat this response as a Petition for Writ of Certiorari pursuant to Rule 21, N.C. R. App. P., and grant the petition. Alternatively, since

the notice filed by Legislative Defendants is the functional equivalent to a notice to the Court of Appeals, Legislative Defendants request that the Court transfer this appeal to the North Carolina Court of Appeals. Finally, and alternatively to the requests above, pursuant to Rule 2, N.C. R. App. P., Legislative Defendants request that this Court hear this appeal in the first instance or transfer the appeal to the Court of Appeals.

I. STATEMENT OF THE CASE

In July 2011, the General Assembly enacted new redistricting plans for the North Carolina House of Representatives, the North Carolina Senate, and the United States Congress. On 1 November 2011, the North Carolina State Conference of the Branches of the *NAACP* and forty-nine other plaintiffs also filed a complaint challenging these plans ("*NAACP* Plaintiffs"). On 3 November 2011, Margaret Dickson and forty-five other plaintiffs filed a second complaint challenging these plans ("*Dickson* Plaintiffs"). *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238, 243 (2014) ("*Dickson I"*).

In their amended complaints, the plaintiffs challenged districts on both federal and state constitutional grounds. Plaintiffs alleged that certain "majority black" districts constituted racial gerrymanders in violation of the Fourteenth Amendment to the United States Constitution. (*Dickson* Pls' Am. Compl., Twenty-Second Claim for Relief; Twenty-Third Claim for Relief; Twenty-Fourth

Claim for Relief); (*NAACP* Pls' Am. Compl., Ninth Claim for Relief; Tenth Claim for Relief; and Eleventh Claim for Relief). Both sets of plaintiffs also challenged these same districts as alleged racial gerrymanders in violation of Article I, Section 19 of the North Carolina Constitution. (*Dickson* Pls' Am. Compl., Nineteenth Claim for Relief; Twentieth Claim for Relief; Twenty-First Claim for Relief); (*NAACP* Pls' Am. Compl., First Claim for Relief; Second Claim for Relief; Third Claim for Relief).

On 5 February 2012, the Superior Court partially granted defendants' motion to dismiss. This resulted in the dismissal of many of the plaintiffs' state law claims. All parties then filed motions for summary judgment. Before ruling on the summary judgment motions, the Superior Court ordered a trial on two specific issues related to plaintiffs' claims of racial gerrymandering. Following the trial, on 8 July 2013, the Superior Court rendered its unanimous opinion dismissing all of plaintiffs' state and federal claims. *Dickson I*, 766 S.E.2d at 243-44.

Pursuant to N.C. Gen. Stat. §120-2.5, plaintiffs then filed a direct appeal with the North Carolina Supreme Court. On 19 December 2014, the North Carolina Supreme Court affirmed the decision by the Superior Court to dismiss all of plaintiffs' claims. *See Dickson I, supra*. On 16 January 2015, plaintiffs filed their first petition for *certiorari* with the United States Supreme Court seeking review of the federal issues decided by the North Carolina Supreme Court in

Dickson I. *See* Petition for Writ of Certiorari, *Dickson v. Rucho*, 135 S. Ct. 1843 (mem.) (2015) (No. 14-839), 2015 WL 241877.

Before the North Carolina Supreme Court issued its ruling in *Dickson I*, plaintiffs who were represented by counsel for the *Dickson* plaintiffs, filed a federal lawsuit challenging Congressional Districts 1 and 12 as racial gerrymanders. *Harris v. McCrory*, No. 1:13-CV-949 (M.D.N.C. 24 October 2013).

On 20 April 2015, the United States Supreme Court vacated the judgment in *Dickson I* and remanded that case to this Court for further consideration in light of the decision in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), which had been handed down a month earlier on 25 March 2015.

Thereafter, another group of plaintiffs, who were represented either by counsel for the *Dickson* Plaintiffs or by counsel for the *NAACP* Plaintiffs, filed a second federal lawsuit challenging the majority black 2011 State legislative districts as racial gerrymanders. *Covington v. North Carolina*, No. 1:15-CV-399 (M.D.N.C. 19 May 2015).

On 19 December 2015, following the first remand by the United States Supreme Court, this Court issued its second decision in the *Dickson* litigation. This Court once again affirmed the decision by the Superior Court to dismiss all of

the state and federal claims alleged by the *Dickson* Plaintiffs and the *NAACP* Plaintiffs. *Dickson v. Rucho,* 368 N.C. 481, 781 S.E.2d 404 (2015) ("*Dickson II*").

On 5 February 2016, the federal district court issued its decision in *Harris*, finding that the 2011 versions of Congressional Districts 1 and 12 were racial gerrymanders. *Harris v. McCrory*, 159 F.Supp.3d 600 (M.D.N.C. 2016), *aff'd Cooper v. Harris*, 137 S. Ct. 1455 (2017). Subsequently, on 19 February 2016, the General Assembly enacted a new 2016 Congressional Plan. *See* N.C. Sess. Law 2016-1. Elections were conducted under the 2016 Congressional Plan during the 2016 General Election. The 2016 Congressional Plan remains in force.

On 30 June 2016, the *Dickson* and *NAACP* Plaintiffs filed a second petition for a writ of *certiorari* again seeking review of the federal issues resolved by this Court's decision in *Dickson II*. *See* Petition for Writ of Certiorari, *Dickson v Rucho,* 2016 WL 3611905; *see also* 137 S. Ct. 2186 (mem.) (2017).

On 11 August 2016, the *Covington* federal district court entered an opinion and judgment finding that the 2011 majority black legislative districts constituted racial gerrymanders. The *Covington* district court did not enjoin the 2011 legislative plans for the 2016 election but prohibited the State from using these plans in elections after 2016. The federal district court also directed that new plans be drawn by the General Assembly in its "next legislative session." *Covington v.*

North Carolina, 316 F.R.D. 117, 176-78 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017).

On 16 December 2016, the North Carolina General Assembly ratified Session Law 2016-125 ("S.L. 125"). Section 22(f) of S.L. 125 states: "G.S. 120-2.5 is repealed."

On 22 May 2017, the United States Supreme Court affirmed the decision of the *Harris* district court. *Cooper v. Harris*, *supra*.

On 30 May 2017, the United States Supreme Court vacated this Court's judgment in *Dickson II* and remanded the case a second time for further consideration in light of the United States Supreme Court's decision in *Harris*. *See Dickson v. Rucho,* 137 S. Ct. 2186 (mem.) (2017).

On 5 June 2017, the United States Supreme Court affirmed the decision of the *Covington* district court. *Covington v. North Carolina*, *supra.*

On 31 July 2017, the *Covington* district court provided North Carolina an opportunity to enact new legislative redistricting plans no later than September 1, 2017. *See* 2017 WL 3254098 (M.D.N.C. 2017). The General Assembly enacted new legislative plans on 31 August 2017. *See* N.C. Sess. Law 2017-207; 2017-208. These new plans repealed all of the legislative districts challenged in this case.

On 12 July 2017, following the remand of *Dickson II* by the United States Supreme Court, this Court entered an expedited briefing schedule and heard oral argument on 28 August 2017 regarding how the Court should proceed. Following the oral argument, on 28 September 2017, this Court entered an order remanding the case back to the Superior Court to answer three questions: (1) whether in light of *Cooper v. Harris* and *North Carolina v. Covington* a controversy exists or if this matter is moot in whole or in part; (2) whether there are other remaining collateral state and/or federal issues that require resolution; and (3) whether other relief may be proper. *Dickson v. Rucho*, No. 201PA12-4 (N.C. 2017) ("*Dickson III*"). The 28 September 2017 was amended on 9 October 2017 but the three issues the Superior Court was asked to consider by this Court remained the same.

Following remand by this Court to the Superior Court, on 12 February 2018, the Superior Court entered two separate orders. One of the orders denied plaintiffs' motion for emergency relief requesting that the legislature be required to redraw certain 2017 House Districts in time for the 2018 General Election. The Superior Court also entered what it styled as a "judgment" answering the three questions posed to it by this Court. The Superior Court concluded that the plaintiffs were entitled to a judgment on their claims that the 2011 majority black districts violated the Fourteenth Amendment to the United States Constitution and Article I, §14 of the North Carolina Constitution. The Superior Court also

concluded that the plaintiffs were not entitled to any relief concerning the 2016 Congressional Plan or the 2017 legislative plans.

On 14 March 2018, the Legislative Defendants filed a notice of appeal from the Superior Court's order entered on 12 February 2018. The Notice of Appeal indicates that the Legislative Defendants were seeking an appeal to the North Carolina Supreme Court pursuant to N.C. Gen. Stat. §120-2.5. Plaintiffs did not file a cross appeal or notify the Legislative Defendants that they would object to the filing of a direct appeal to the North Carolina Supreme Court until they filed their motion to dismiss the appeal on 11 May 2018.

II. ARGUMENT

1. The repeal of N.C. Gen. Stat. §120-2.5 may not be applied retroactively to this case.

This case had been pending for over five years before the General Assembly repealed N.C. Gen. Stat. § 120-2.5 on 16 December 2016. Two direct appeals were resolved by this Court before N.C. Gen. Stat. § 120-2.5 was repealed. Then, after the statute was repealed, this Court heard a third appeal and issued a decision directing the Superior Court to resolve three questions posed by the Supreme Court. This Court did not remand the case to the Court of Appeals before issuing its third decision in this case. Indeed, it would make little sense for the Court of Appeals to consider in the first instance answers to questions posed by this Court.

Under these circumstances, the Legislative Defendants have a substantive or "vested" right to have this matter heard in the first instance by the North Carolina Supreme Court. This right was not extinguished by the repeal of N.C. Gen. Stat. § 120-2.5. Under North Carolina law, there is a presumption against the retroactive application of statutes. *Cauble v. City of Asheville*, 314 N.C. 598, 601 n.1, 336 S.E.2d 59 (1985) ("it is generally recognized that a statute or an amendment to a statute will be given prospective effect only, and will not be construed to have retroactive effect unless such intent is clearly expressed or arises by necessary implication from its terms."). Where the legislature has not expressed its intent that a statute be applied retroactively, the provisions will apply retroactively only as it relates to procedural matters but not as it may apply to substantive rights. *Smith v. Mercer*, 276 N.C. 329, 338, 172 S.E.2d 489, 495 (1970).

The right of all parties in this case to have their appeals heard in the first instance by this Court, as established by N.C. Gen. Stat. § 120-2.5, is a substantive right that may not be altered simply by the repeal of the statute. A nearly identical issue was resolved by this Court in *Stephenson v. Bartlett*, 358 N.C. 219, 595 S.E.2d 112 (2004) ("*Stephenson III*"). The *Stephenson* case was originally filed in Johnston County Superior Court. In 2003, the General Assembly enacted legislation establishing the Wake County Superior Court as the exclusive venue for

redistricting cases. *Stephenson III*, 595 S.E.2d at 115 (*citing* N.C. Gen. Stat. §1-81.1). The *Stephenson* plaintiffs argued that the legislature could not change the venue for the *Stephenson* case because they had a vested right of venue in Johnston County. In making this argument, the *Stephenson* plaintiffs relied upon the decision in *Gardner v. Gardner*, 300 N.C. 715, 268 S.E.2d 468 (1980). *Id*. at 116.

The facts in *Gardner* are analogous to the facts of this case. In *Gardner*, the plaintiff brought a civil action seeking alimony without divorce in the District Court of Wayne County. While that action was pending, the plaintiff moved to Georgia. The legislature then amended the venue statute giving either party the right to move to change venue if one of the parties had moved to another state. The defendant then moved to change venue to Johnston County and his motion was allowed by the Superior Court.

In *Gardner*, this Court affirmed a decision by the Court of Appeals reversing the Superior Court's ruling allowing a change of venue. In support of its holding, this Court stated that "'a statute may be applied retroactively only insofar as it does not impinge upon a right which is otherwise secured, established, and immune from further legal metamorphosis.'" *Stephenson III*, 595 S.E.2d at 116 (*citing Gardner* at 719, 268 S.E.2d at 471). Thus, under North Carolina law, the judicial forum is a substantive right that may not be changed in a particular case legislatively.

In rejecting the arguments of the *Stephenson III* plaintiffs that the legislature could not change venue in the *Stephenson* litigation, this Court agreed that the *Stephenson* plaintiffs could assert a vested right to venue in Johnston County if the *Stephenson* case was still pending. *Id*. But, the North Carolina Supreme Court concluded that the *Stephenson III* plaintiffs did not have a vested right to venue in Johnston County because its prior decisions in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) ("*Stephenson I*") and *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) had resolved all of the claims made by the *Stephenson* plaintiffs regarding the 2001 and 2002 redistricting statutes. Based upon this conclusion, this Court ruled that the *Stephenson* case was over and, as a result, the *Stephenson* plaintiffs no longer had a case pending in Johnston County. *Id*.

The Legislative Defendants here would no longer have a vested right to direct appeal to the North Carolina Supreme Court if this case was "over." But if this case was "over," based upon the General Assembly's repeal of the districts declared unlawful by the federal courts, there would have been nothing left for this Court to remand to the Superior Court. Instead, because this Court found it necessary to remand the case to the Superior Court (and not the North Carolina Court of Appeals) to make an initial ruling on whether the case is over, like the plaintiff in *Gardner*, the Legislative Defendants have a "vested" or substantive right to have this matter heard first in this Court pursuant to the statute that was in

effect when the case was commenced and when this Court issued its first two decisions.

The vested or substantive right of the Legislative Defendants to have this appeal heard directly by this Court is further supported by the decision in *Christenbury Eye Center v. Medflow, Inc.*, 783 S.E.2d 264 (N.C. App. 2016). The issue there was whether the Court of Appeals could exercise jurisdiction in an appeal from the Business Court. On 1 October 2014, the General Assembly enacted legislation directing that all appeals from the Business Court be filed with the North Carolina Supreme Court. The Court of Appeals concluded that the only question was "whether the 2014 amendments to N.C. Gen. Stat. §7A-27(a)(2) apply to the present appeal." *Id*. at 266. The Court of Appeals then held that the amendment did in fact apply because the case before the Court of Appeals had not been designated as a Business Court case until 29 October 2014, or almost a month after the pertinent amendments. In contrast to the facts in *Christenbury*, the right to a direct appeal to this Court in redistricting cases was established years before this case was filed. This Court has already heard and decided three appeals in this case – including one appeal that was decided more than ten months after the repeal of N.C. Gen. Stat. § 120-2.5.

Moreover, this case arises in the unique setting of a remand proceeding in which this Court posed questions to the Superior Court, not the Court of Appeals.

This Court held oral argument in this matter on 28 August 2017 and issued an order remanding this matter to the Superior Court on 28 September 2017 (and amended that order on 9 October 2017) after the United States Supreme Court's remand on 30 May 2017. All of these actions were taken after the repeal of N.C. Gen. Stat. § 120-2.5 in December 2016. Despite the statute having already been repealed, this Court remanded the case directly to the Superior Court rather than the Court of Appeals. This represents an acknowledgement by this Court that it retains jurisdiction over appeals in this case even following the repeal of N.C. Gen. Stat. § 120-2.5 and that the statute remains in effect for this case. And, in any event, it would make little sense for the Court of Appeals to consider in the first instance the answers to questions posed by this Court.

Plaintiffs have exercised their substantive right to have three appeals heard in this litigation by this Court. The Legislative Defendants retain that same right to have their appeal of the Superior Court's rulings on questions posed by this Court heard in the first instance by this Court.

2. <u>In the alternative, this Court should transfer this appeal to the North Carolina Court of Appeals</u>.

Should this Court conclude that the Legislative Defendants no longer have a vested right to a direct appeal to this Court, or that the unique posture of this case in which this appeal is addressing answers to questions this Court posed directly to the Superior Court does not warrant review of those answers in the first instance by

this Court, then Legislative Defendants request that this Court direct that their appeal be heard in the first instance by the Court of Appeals. Such a result is warranted because the notice of appeal filed by Legislative Defendants is the functional equivalent of a notice to the Court of Appeals. *Stephenson v. Bartlett*, 359 N.C. 286, 610 S.E.2d 715 (2005) ("*Stephenson IV*"); *Stephenson v. Bartlett*, 177 N.C. App. 239, 528 S.E.2d 442 (2006) ("*Stephenson V*").

Following the decision in *Stephenson III*, the *Stephenson* plaintiffs filed a motion with the Superior Court seeking their attorney's fees and costs. On 19 November 2004, the Superior Court denied the *Stephenson* plaintiffs' motion for attorney's fees. The *Stephenson* plaintiffs then gave their notice of appeal to the North Carolina Supreme Court. The North Carolina Supreme Court denied the motion by the *Stephenson* plaintiffs for a direct appeal to the Supreme Court. *See Stephenson V*, 177 N.C. App. at 240, 628 S.E.2d at 443 (*citing Stephenson IV*).

Thereafter, the *Stephenson* plaintiffs did not file a new notice of appeal stating that their appeal had been taken to the Court of Appeals but the parties simply proceeded in the Court of Appeals. During oral arguments before the Court of Appeals, that Court raised the question of whether it had jurisdiction to hear the appeal of the *Stephenson* plaintiffs from the Order by the Superior Court denying plaintiffs' motion for attorney's fees. The Court of Appeals concluded that it did in fact have jurisdiction to hear the appeal. *Stephenson V*, 177 N.C. App. 241-43,

628 S.E.2d at 443-45. The Court of Appeals reached its conclusion despite the *Stephenson* plaintiffs' failure to specify the Court of Appeals "as the 'Court to which an appeal is taken' per Rule 3(1), N.C. R. App. P." *Id*. at 243, 628 S.E.2d at 444-45. The Court of Appeals held that "the intent to appeal to this Court can be fairly inferred from plaintiffs' notice of appeal and the notice achieved the functional equivalent of an appeal to this Court." *Id*. The Court of Appeals further noted that the *Stephenson* defendants were "not misled" by plaintiffs' notice, "as they inferred from the notice that the appeal would proceed in this Court." *Id*.

Given the history of this case, where the North Carolina Supreme Court has already decided appeals on three different occasions, and where Legislative Defendants simply took the case back to the Court that had asked the questions on remand, it was reasonable for the Legislative Defendants to file a notice of appeal designating the Supreme Court as the Court to which an appeal would be taken. This is true even assuming the Legislative Defendants do not have a vested right to do so. As in *Stephenson V*, the notice of appeal filed by the Legislative Defendants is the "functional equivalent" of an appeal to the Court of Appeals. And like the defendants in *Stephenson V*, plaintiffs have not been misled or prejudiced in any way by the Legislative Defendants' notice of appeal. *See also Phelps Staffing, LLC v. S.C. Phelps Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011).

CONCLUSION

Based upon the foregoing, the Legislative Defendants request that plaintiffs' motion to dismiss be denied, or, in the alternative, that the Court treat this response as a Petition for Writ of Certiorari pursuant to Rule 21, N.C. R. App. P., and grant the petition. Alternatively, since the notice filed by Legislative Defendants is the functional equivalent to a notice to the Court of Appeals, Legislative Defendants request that the Court transfer this appeal to the North Carolina Court of Appeals. Finally, and alternatively to the requests above, pursuant to Rule 2, N.C. R. App. P., Legislative Defendants request that this Court hear this appeal in the first instance or transfer the appeal to the Court of Appeals.

Respectfully submitted this the 21st day of May, 2018.

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

This is to certify that the undersigned has this day served the foregoing LEGISLATIVE DEFENDANTS' RESPONSE TO PLAINTIFFS-APPELLEES' MOTION TO DISMISS APPEAL in the above titled action upon all other parties to this cause by:

[ ] Hand delivering a copy hereof to each said party or to the attorney thereof;

[ ] Transmitting a copy hereof to each said party via facsimile transmittal;

[X] By email transmittal;

[X] Depositing a copy here of, first class postage pre-paid in the United States mail, properly addressed to:

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This the 21st day of May, 2018.

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