

SUPREME COURT OF NORTH CAROLINA

JABARI HOLMES, FRED CULP,)
DANIEL E. SMITH, and PAUL)
KEARNEY, SR.,)

Plaintiffs-Appellees,)

v.)

TIMOTHY K. MOORE *in his official*)
capacity as Speaker of the North)
Carolina House of Representatives;)
PHILLIP E. BERGER *in his official*)
capacity as President Pro Tempore of)
the North Carolina Senate; DAVID R.)
LEWIS, *in his official capacity as*)
Chairman of the House Select)
Committee on Elections for the 2018)
Third Extra Session; RALPH E.)
HISE, *in his official capacity as*)
Chairman of the Senate Select)
Committee on Election for the 2018)
Third Extra Session; THE STATE OF)
NORTH CAROLINA; *and* THE)
NORTH CAROLINA STATE BOARD)
OF ELECTIONS,)

Defendants-Appellants.)

From Wake County
18-CVS-15292
No. COA 22-16

**PLAINTIFFS-APPELLEES' MOTION FOR
DISQUALIFICATION OF JUSTICE BERGER, JR.**

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**PLAINTIFFS-APPELLEES’ MOTION FOR
DISQUALIFICATION OF JUSTICE BERGER, JR.**

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiffs-Appellees Jabari Holmes, Fred Culp, Daniel E. Smith, and Paul Kearney, Sr., respectfully move Associate Justice Philip Berger, Jr. to disqualify himself from participating in the rehearing of this case. Disqualification is appropriate pursuant to Canon 3C of the North Carolina Code of Judicial Conduct. Justice Berger, Jr.'s duties of impartiality and judicial integrity may reasonably be questioned because his father is Philip Berger Sr., Senate President *Pro Tempore* of the North Carolina General Assembly, a named Defendant in this matter.

BACKGROUND

This matter arises from a constitutional challenge to North Carolina's voter ID law, Senate Bill 824 (2018 N.C. Sess. Law 144) ("S.B. 824"), which was enacted over the veto of Governor Roy Cooper by a lame-duck Republican super-majority on 19 December 2018. At that time, Senator Berger was the President *Pro Tempore* of the North Carolina Senate, where he voted repeatedly in favor of S.B. 824 and to override Governor Cooper's veto.¹

Plaintiffs immediately challenged the law as unconstitutional following its enactment. After a three-week trial in April of 2021, a majority of the three-judge panel below concluded that S.B. 824 was unconstitutional and permanently enjoined its implementation. The panel majority found that the evidence at trial was

¹ See N.C. Gen. Assembly, Sen. Phil Berger Vote History 2017-2018 Session, <https://www.ncleg.gov/Legislation/Votes/MemberVoteHistory/2017/S/64> (last visited 17 February).

“sufficient to show that the enactment of S.B. 824 was motivated at least in part by an unconstitutional intent to target African American voters,” and “that the Defendants ha[d] failed to prove . . . that S.B. 824 would have been enacted in its present form if it did not tend to discriminate against African American voters.” (R p 1000).

Legislative Defendants timely appealed the trial court decision striking down S.B. 824 as discriminatory. Thereafter, Plaintiffs sought and obtained, by order of this Court dated 2 March 2022, discretionary review prior to a determination by the Court of Appeals. The matter was then scheduled for oral argument on 3 October 2022 at the historic Chowan County Courthouse in Edenton. On 16 December 2022, a 4-3 majority of this Court affirmed the trial court’s judgment that S.B. 824 was unconstitutional because it was formulated with an impermissible intent to discriminate against African-American voters. Justice Berger, Jr. authored the dissent.

Following the November 2022 election, this Court’s judicial composition changed effective 1 January 2023. Associate Justices Trey Allen and Richard Dietz replaced two of the justices who were part of the four-justice majority that voted to affirm the trial court’s judgment in this case. On 20 January 2023, Legislative Defendants, pursuant to Rule 31 of the North Carolina Court of Appeals, petitioned this Court for rehearing, arguing, *inter alia*, that the majority erred when affirming the trial court’s decision. On 3 February 2023, this Court, in a 5-2 split decision, granted the petition. This matter was then assigned a new docket number and

scheduled for oral argument on 15 March 2023 before the current Court.

STANDARD OF REVIEW

Canon 3C(1)(d) of the North Carolina Code of Judicial Conduct governs the disqualification of judges based on the appearance of impartiality, including when a judge has a close familial relationship with a party to a case. This Canon provides, in relevant part:

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 instances where ... [t]he judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person ... [i]s a party to the proceeding, or an officer, director, or trustee of a party ... [i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding[.]

A judge's impartiality may also be reasonably questioned in cases in which a "judge has a personal bias or prejudice concerning a party[.]" Canon 3(C)(1)(a). If there is sufficient force to the allegations contained in a disqualification motion to proceed to findings of facts, or if a reasonable person knowing all of the circumstances would have doubts about the judge's ability to rule on the motion to disqualify in an impartial manner, the judge should either disqualify herself or refer the motion to another judge. *See In re Faircloth*, 153 N.C. App. 565, 570 (2002). A judge should be disqualified if there is "sufficient force in the allegations contained in [the] motion to proceed to find facts." *N. Carolina Nat. Bank v. Gillespie*, 291 N.C. 303, 311 (1976). The party moving for recusal has the burden of objectively demonstrating that there are actual grounds for disqualification. *In re Nakell*, 104 N.C. App. 638, 647 (1991). But, once the movant presents evidence of "sufficient force" to require findings of fact,

the judge whose recusal is requested should disqualify themselves. *See, e.g., N. Carolina Nat. Bank*, 291 N.C. at 311.

ARGUMENT

Plaintiffs-Appellees respectfully contend that Justice Berger Jr. must disqualify himself from rehearing this case because his father is not only a named Defendant but a legislative leader who directed actions that are in dispute in this case and which speak to the unconstitutionality of S.B. 824. Under these circumstances, disqualification is plainly required under Canon 3C(1)(d)(i) and 3C(1)(d)(iii).

First, Justice Berger, Jr.’s father, Senator Berger, Sr., is a named Defendant in this case, also known as “a party to the proceeding.” Canon 3C(1)(d)(i). Senator Berger, Sr. and Justice Berger, Jr. have a parent-child relationship, a familial relationship of the first degree. The plain text of Canon 3C(1)(d)(i) is unequivocal and requires the disqualification of Justice Berger, Jr. from rehearing the issues raised in Defendants’ rehearing petition and by this Court’s order granting the same. Canon 3C(1)(d)(i) requires disqualification in situations where the appearance of impartiality is far more attenuated than here, such as when “a person within the third degree of relationship” to the judge “[i]s a party to the proceeding. In *Lake v. State Health Plan for Tchrs. & State Emps.*, 852 S.E.2d 888 (N.C. 2021), for example, this Court announced the disqualification of five of its seven justices because they had numerous relatives who “are or may be” members of a plaintiff class of 222,000 public employees in a class action dispute over health benefits. The same result—recusal—is appropriate here.

That Senator Berger, Sr. is named as a Defendant in his official capacity as Senate President *Pro Tempore*, rather than his personal capacity, does not matter. Canon 3C(1)(d)(i) makes no distinction between family members who are named in their personal as opposed to official capacity.² Given Justice Berger Jr.'s direct familial relationship with a named party to this case, recusal would be warranted even if Justice Berger Jr. declared his impartiality and even if he had no actual bias in favor of either side. *See State v. Fie*, 320 N.C. 626, 628-29 (1987); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886 (2009) (“Due process may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties”) (internal citations omitted).

Second, Justice Berger, Jr. must recuse himself because he is undoubtedly aware that his father, Senator Berger, Sr., has an interest that could be “substantially affected by the outcome of the proceeding,” Canon 3(C)(d)(1)(iii). Plaintiffs proved at trial that S.B. 824 was enacted with the intent to discriminate against African American voters. Senator Berger, Sr. voted multiple times with his Republican colleagues in the Senate to move S.B. 824 to enactment.³ Senator Berger, Sr., has personal and professional interests that could be “substantially affected by the

² Assuming *arguendo* that the Canon recognized such a distinction, disqualification would still be appropriate because Senator Berger, Sr. meets the definition of being “an officer” of a party under Canon 3(C)(d)(1) given that Section 14(1) of Article II of the N.C. Constitution defines the President *Pro Tempore* as an “officer of the Senate.”

³ *See* N.C. Gen. Assembly, Sen. Phil Berger Vote History 2017-2018 Session, <https://www.ncleg.gov/Legislation/Votes/MemberVoteHistory/2017/S/64> (last visited 17 February).

outcome of the proceeding,” if this Court’s 16 December 2022 decision is to remain in place, thus finding he personally supported an intentionally discriminatory bill. A reasonable person would have grounds to question Justice Berger, Jr.’s objectivity if he were asked to serve as judge of his father’s prior legislative actions with these serious stakes in play. Such questions of impartiality are compounded in this rehearing procedural posture where a majority of this Court has already affirmed the trial court’s findings that the legislature that passed S.B. 824, of which Senator Berger was both a leader and member, did so with an impermissible discriminatory purpose and where Justice Berger, Jr. has already authored an opinion defending the legislature’s actions, and, indirectly, the actions of his father.

Senator Berger, Sr. remains the President *Pro Tempore* of the Senate and continues to be a vocal spokesperson defending S.B 824 and voter ID in general to this day. And he has personally criticized North Carolina courts that have blocked S.B. 824’s implementation as “activist courts . . . usurp[ing] the will of the people.”⁴ As a named Defendant, Senator Berger, Sr. has decision-making power over the direction of this matter and a significant stake in the outcome of the rehearing as it relates to his political agenda in the General Assembly. With such professional interests at stake for Senator Berger, Sr., Justice Berger, Jr.’s continued involvement in the matter casts an appearance of impropriety over the entire Court. *See State v.*

⁴ On 10 February 2023, Senator Berger tweeted, “It’s past time for North Carolina’s voter ID law to be implemented. Voter ID laws remain popular and increase confidence in elections, yet Democrats and activist courts continue to usurp the will of the people.” <https://twitter.com/SenatorBerger/status/1624053076444192774>.

Fie, 320 N.C. at 627 (“[A] party has a right to be tried before a judge whose impartiality cannot reasonably be questioned.”).

In sum, Justice Berger, Jr. should disqualify himself from participating in a case requiring him to judge his father’s actions. Without recusal or disqualification of Justice Berger, Jr., Plaintiffs will be denied a fair judicial process and denied their fundamental rights because “an impartial judge” is a “prime requisite[] of due process.” *Ponder v. Davis*, 233 N.C. 699, 704 (1951); see *Caperton*, 556 U.S. at 876 (“It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process.”) (internal citations omitted).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Justice Berger, Jr. disqualify himself from participating in this case. At the very least, if Justice Berger, Jr. will not disqualify himself, in the interest of ensuring the appearance of an impartial judiciary in North Carolina, he should refer this motion to the full Court for disposition without his participation pursuant to this Court’s Order of 23 December 2021 concerning recusal or disqualification of a Justice.

Respectfully submitted, this the 3rd day of March, 2023.

SOUTHERN COALITION FOR
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N.C.R. App. P. 33(b) Certification:
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed to the electronic-filing site at <https://www.ncappellatecourt.org> and served upon all parties by electronic mail and, if requested, by United States Mail, addressed to the following:

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