No. 261A18-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE	)	
Plaintiffs-Appellees,	)	From Wake County 18 CVS 9806 No. COA19-384
v.	)	
TIM MOORE, in his official capacity, and PHILIP BERGER, in his official capacity,	)	
Defendants-Appellants	)	

****

BRIEF OF NORTH CAROLINA PROFESSORS OF PROFESSIONAL RESPONSIBILITY
BOBBI JO BOYD, KENNETH BROUN, KAMI CHAVIS, PHYLLIS CRAIG-TAYLOR, ERIC FINK, ERIC MULLER, ELLEN MURPHY, SUZANNE REYNOLDS, AMY RICHARDSON, & KENNETH TOWNSEND
AS AMICI CURIAE

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INTRODUCTION

In its September 28, 2021, Order, this Court asked the parties in *N.C. NAACP v. Moore* certain procedural and other questions recusal in a court of last resort. As teachers of professional responsibility and judicial ethics at the six law schools of this state, we offer two conclusions, one on the necessity of recusal under these facts; and the other, on this Court's ability to act, as illustrated by seventy years of North Carolina case law.[1]

On the need to recuse, we believe that the recusals of Associate Justices Barringer and Berger raise issues fundamental to the integrity of our legal system and judicial process: specifically, the requirement of an independent judiciary and the rights of litigants to an impartial hearing. Under these requisites, the law determines impartiality not by whether the judge believes he or she can be impartial, but instead by whether a reasonable person could reasonably question the judge's impartiality. The North Carolina Code of Judicial Conduct codifies this standard, and the case law on point confirms.

On the process questions, we conclude that this Court, in exercising its power to ensure both judicial independence and impartiality, has heard the facts on recusal and entered orders of disqualification for seventy years.[2] While it has not exercised this power to disqualify an appellate judge or justice, there is no

[1] No person or entity—other than amicus curiae, its members, and its counsel—have directly or indirectly written this brief or contributed money for its preparation.

[2] See *infra* pp. 10-11 for the discussion of *Ponder v. Davis*, 233 N.C 699, 65 S.E.2d 356 (1951) and also for the distinction between recusal and disqualification.

principled reason to distinguish between the power to disqualify a trial and an appellate judge.

Accordingly, we offer as *amici* our opinions that (1) the North Carolina Code of Judicial Conduct and the norms of judicial ethics require disqualification of both associate justices; and (2) absent voluntary recusal by both associate justices when disqualification is clear on the merits, this Court can and should act to prevent undermining public confidence in the judiciary.

I. The North Carolina Code of Judicial Conduct and the Norms of Judicial Ethics Require Disqualification of Both Associate Justices.

North Carolina, like every state, has adopted standards to govern the conduct of all judges. By the authority of N.C. Gen. Stat. § 7A-10.1, the Supreme Court prescribes the standards for judges, reflected in the North Carolina Code of Judicial Conduct ("the Code").[3]

The standards in the Code codify long-cherished principles that fulfill the requirement of an independent judiciary. In 1951, without a Code or other direct statutory authority, this Court found error when a judge failed to recuse himself from a case involving a disputed election when the judge had actively campaigned for the party claiming victory. In a decision vacating all rulings that

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[3] NORTH CAROLINA CODE OF JUDICIAL CONDUCT (2020).
Pertinent to this motion, Canon 3(C)(1)(d)(i) of the Code provides:

> C. Disqualification.
>
> (1) 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:
>
> ***
>
> (d) The judge…or a person within the third degree of relationship…:
>
> (i) Is a party to the proceeding….

the trial court had issued, this Court explained, "A fair jury in jury cases and an impartial judge in all cases are prime requisites of due process." *Ponder v. Davis*, 233 N.C. 699, 704, 65 S.E.2d 356, 359 (1951). Due process demands that "every man should know that he has had a fair and impartial trial, or, at least, that he should have no just ground for the suspicion that he has not had such a trial." *Id.* at 705, 65 S.E.2d at 361, quoting *Kentucky Journal Publ'g Co. v. Gaines*, 139 Ky. 747, 758, 110 S.W. 268, 272 (1908). As the *Ponder* Court explained, while the individual parties' interests in a particular case are important, disqualification emanates even more powerfully from the public policy "that the courts shall maintain the confidence of the people." *Id.* at 705, 65 S.E.2d at 360, quoting *U'Ren v. Bagley*, 118 Or. 77, 83, 245 Pac. 1074, 1076 (1926).

The Code codifies this principle, requiring disqualification when "the judge's impartiality may reasonably be questioned." The Code asks not whether the judge can, in fact, be impartial: instead, it demands disqualification when the reasonable citizen may reasonably question the judge's impartiality. Two of the settings that most objectively require disqualification because of reasonable questions about impartiality involve: (1) a judge who is a party to the case; and (2) a judge who is related in a close degree of kinship to a party in the case.[4] *N.C. NAACP v. Moore* presents each of these settings.

As to the first setting, this Court has recognized the maxim that "no judge should sit in his own case," *Ponder*, 233 N.C. at 703, 65 S.E.2d at 359, citing

[4] NORTH CAROLINA CODE OF JUDICIAL CONDUCT, CANON 3(C)(1)(d)(i) (2020).

Moses v. Julian, 45 N.H. 52 (1863); and because the reasonable citizen would most certainly question the judge's impartiality, the law demands disqualification. Because of the rectitude of this result, the issue easily resolves itself. In fact, to date, there are no appellate cases analyzing the requirement of disqualification when the judge is a party.

The second setting, close kinship, is equally as clear, and also requires disqualification. The law has strictly enforced disqualification in close kinship situations and judges themselves have agreed and voluntarily recused.[5] As a result, few appellate cases deal with such disqualification. The relevant cases, requiring resort to those from the early 20th century, strictly construe the prohibition.

For example, the Kentucky Court of Appeals reviewed cases from Alabama, Florida, Georgia, and New Hampshire and concluded strict construction was required to protect the public's perception of judicial impartiality. *Petrey v. Holliday*, 178 Ky. 410, 419 (1927). In *Petrey,* the Kentucky Court dissolved an injunction ordered by the trial judge whose nephew was not himself a party but was a major shareholder of a corporate party. In reaching its decision, that Court used language foretelling the later observation of this Court in *Ponder*:

> The judge is not the only one concerned in the just and correct course of justice. Nor, indeed, are the litigants the only ones to be consulted. The public generally have the right to feel that there is no favoritism in the courthouse; that there all men stand equal before

[5] See e.g., *Lake v. State Health Plan for Teachers & State Employees*, 2018 N.C. LEXIS 627, 817 S.E.2d 198 (2018).

> the law; and that there justice will be dispensed to all with an even hand.

Petrey, 178 Ky. at 423.

While early cases pointed out that kinship with a party within the fourth degree (great aunts/uncles, great nieces/nephews, first cousins) required disqualification, see *Moses v. Julian*, 45 N.H. 52, 56 (1863) (examining cases), more recently, courts have applied the strict requirement for disqualification to cases within the third degree (great grandparents and great grandchildren, aunts/uncles, nieces/nephews). The Code requires the same.[6]

Indeed, this Court recently recognized disqualification of its own members because of relationships with parties. In 2018, in the first order signed by this Court in *Lake v. State Health Plan for Teachers & State Employees*, 2018 N.C. LEXIS 627, 817 S.E.2d 198 (2018), this Court entered an order disqualifying then Chief Justice John Martin of the Court of Appeals and then Associate Justices Newby and Ervin. The *Lake* litigation involves a plaintiffs' class of over 222,000 members of teacher and state employee retirees and, if deceased, their estates or personal representatives. The reasons for voluntarily recusing themselves, as reported in a later matter, were that: (1) then Associate Justice Newby's mother, a retired teacher, was a class member; and (2) Associate Justice Ervin's deceased paternal grandfather, his deceased father, his mother, and his brother-in-law held qualifying state employment. *Lake*, 376 N.C. 661, 663, 852 S.E.2d 888 (2021). By voluntarily recusing themselves, the justices appeared to recognize

[6] NORTH CAROLINA CODE OF JUDICIAL CONDUCT, CANON 3(C)(1)(d)(i) (2020).

that regardless of the size of any potential recovery by the class, the strict application of disqualification for kinship required no less. By the time the class came before this Court in 2021, after further inquiry and changes in the membership of the Court, the relationship disqualifications extended also to Associate Justices Morgan (deceased maternal grandmother); Berger (mother-in-law and wife's deceased maternal grandmother); and Barringer (mother). With close kinship disqualifications required for five of seven justices, the disqualifications threatened to deprive the parties of a quorum to hear their appeals. Only after this extraordinary development, this Court, in an opinion authored by Associate Justice Berger, acknowledged not only the need to disqualify but also procedures available to respond and permit the appeal.[7]

We now turn to the facts on disqualification of Associate Justices Barringer and Berger. Associate Justice Barringer became a formal party to this action while serving as a senator in the General Assembly at the time in question through the naming of Defendant Philip Berger, Sr., in his official capacity. The plaintiff's complaint alleges that all members of the General Assembly acted as "usurpers" to place the two constitutional amendments at issue on the November 18, 2018, ballot while a super-majority existed. Plaintiff's Complaint, ¶¶ 49, 51, 58, and 50. Because Associate Justice Barringer, as part of an unlawfully constituted legislature, voted to place on the ballot legislation that would amend the North Carolina Constitution, her role was more than nominal. Her

[7] The procedures discussed in *Lake* are not required in this case. For the discussion of waiver and the Rule of Necessity, see *Lake*, 376 N.C. 661, 852 S.E.2d 888 (2021).

participation in this case therefore would violate the Code[8] and the maxim that "no judge may sit on his own case."

In the case of Associate Justice Berger, the plaintiff's suit names Senator Berger, Sr. not only because of his official capacity as President Pro Tempore of the North Carolina Senate, but also because of his leadership role in marshalling the amendments to a vote and his votes as a member of the Senate. Plaintiff's Complaint, ¶¶ 49, 51, and 21. As a result, the Code[9] requires Associate Justice Berger's disqualification to avoid his sitting in a case against his father, a scenario certain to result in any judge's impartiality reasonably being questioned.

We acknowledge that the Rules of Civil Procedure require that suits challenging the conduct of legislators require naming the Speaker of the House of Representatives and the President Pro Tempore of the Senate as defendants in their official capacities. However, plaintiff's suit does far more: it challenges the conduct and motives of the leadership of the General Assembly who brought the amendments to a vote and the legislators who voted in favor of placing the amendments on the ballot. Plaintiff's Complaint, *passim*. In light of these allegations, the real defendants are the actors whose conduct caused the amendments to be on the ballot.

Additionally, we highlight that to disqualify in this case would establish only a narrow rule limited by the unique time period and extraordinary actions about which the plaintiff complains. The facts focus on the unusual status of the

[8] NORTH CAROLINA CODE OF JUDICIAL CONDUCT, CANON 3(C)(1)(d)(i) (2020).

General Assembly between June 2017, when the Supreme Court issued a final ruling declaring the General Assembly unlawfully constituted, *(Covington v. North Carolina ("Covington I"),* 316 F.R.D. 117, 117 (M.D.N.C. 2017), *aff'd*, 137 S.Ct. 2211 (2017) (per curiam)), until January 1, 2019, when the lawfully redistricted General Assembly took office. The plaintiff's allegations challenge only this limited time period and within that limited time, only the power of the General Assembly to propose constitutional amendments. See Plaintiff-Appellant New Brief, p. 15. If future lawsuits challenge the substance of ordinary legislation passed between June 2017 and January 1, 2019, we believe different considerations would apply.

The cases we have consulted to reach this opinion on recusal and disqualification often acknowledge, with great respect, the judges' sincere beliefs that their oaths of offices required them to participate. We likewise acknowledge the outstanding public service of Associate Justices Barringer and Berger, both in their current capacities and in the other ways they have served the people of this state. Without doubting the sincerity of their beliefs that their oaths of office require them to participate, we nevertheless reach the conclusions expressed in this brief.

As teachers of legal and judicial ethics, our class discussions on the topics of recusal never involve a judge sitting on her own case or the participation of a judge related in the first degree of kinship to one of the parties. Rather, our discussions focus on the more nuanced questions of personal bias or prejudice,

relationships with the lawyers in the case, financial interests, and, more recently, political contributions to judges. In fact, we might well introduce the topics of sitting on one's own case or on the case of a parent or child with "It goes without saying" and concluding with "requires recusal." We believe that what we teach our students – that when a reasonable citizen has reason to doubt the impartiality of a judge, the judge is disqualified from hearing the case – applies to the motions in this case. We respectfully maintain that any other conclusion falls outside the norms that to date have guided these considerations.

II. Absent Voluntary Recusal by Both Associate Justices when Disqualification is Clear on the Merits, This Court Can and Should Act to Prevent Undermining Public Confidence in the Judiciary.

We also conclude that in response to these violations of the Code and the norms governing recusal, as explained in this Part II, North Carolina law provides a process. When the judge fails to recuse, the motion converts to a motion for an order of disqualification. Once the movant provides that grounds for disqualification exist, then another judge hears the motion to disqualify. If the judge fails to recuse when sufficient grounds exist, or if another judge wrongfully denies the motion to disqualify, then the appropriate appellate court hears the motion to disqualify de novo and enters the correct order. For this reason, we conclude that this Court can and should entertain the motions to recuse and enter orders disqualifying Associate Justices Barringer and Berger. We trace below the development of this body of law, drawing almost exclusively on precedent from this Court, from (a) the conversion of recusal to disqualification,

(b) the process of hearing the motion to disqualify, and (c) the power of the appellate courts to enter an order of disqualification.

A. Under North Carolina Law, if a Judge Improperly Fails to Recuse when Sufficient Grounds Exist, or if Another Judge Improperly Decides a Motion to Recuse, the Motion to Recuse Becomes a Motion Seeking an Order of Disqualification.

The terms "recusal" and "disqualification" connote differences in who decides whether a judge can participate in a matter. To "recuse" suggests that the judge on her own motion has identified one or more reasons that she should not participate, or that the judge herself entertains the motion to disqualify and decides that she should not participate. *E.g., State v. Hartley*, 193 N.C. 304, 136 S.E. 868 (1927) (denying the writ of certiorari and noting propriety of duly elected court recorder to recuse himself when his brother brought criminal libel charges against the defendant). To "disqualify" suggests that someone other than the judge whose participation is in question entertains the motion and concludes that that judge should not participate. *E.g., Ponder,* 233 N.C. 699, 65 S.E.2d 356 (referring to "recuse" for action of trial judge, "disqualification" for motion of defendant). This brief follows that distinction, while noting the modern trend to treat "recuse" and "disqualify" synonymously.[10]

In North Carolina, if a judge fails to recuse when sufficient grounds exist, or if another judge entertains the motion, the issue becomes one of disqualification,

[10] See RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 2.08, at 604 (2d ed. 2007) (noting that traditionally judicial and scholarly authority distinguished between "recusal" and "disqualification" but using the terms interchangeably throughout his treatise). Indeed, the Code uses the broader term "disqualification" to cover both concepts.

not of recusal. In the seminal case of *Ponder v. Davis,* this Court found that North Carolina common law provides for disqualification of judges on uncontroverted allegations by the defendant of legitimate grounds to recuse. In *Ponder,* the defendant moved that the matter be heard before another judge, alleging that the resident judge had actively campaigned for the plaintiff in the election that the lawsuit contested. Chief Justice Stacy, without remanding the matter of disqualification, pronounced that the judge who failed to recuse was disqualified to hear the case, vacated the orders and judgments, and remanded the case for further action consistent with his opinion. 233 N.C. at 706-07, 65 S.E.2d at 361.

B. Once a Movant has Demonstrated that Grounds for Disqualification Exist, then a Judge Other than the Judge Whose Disqualification is Sought Must Resolve the Issue.

The law of North Carolina not only *authorizes* a judge other than the subject of the motion decide the issue, but upon sufficient allegations, *requires* that someone else decide the matter. In *Bank v. Gillespie,* 291 N.C. 303, 230 S.E.2d 375 (1976), the defendant alleged facts supporting bias and prejudice toward the defendant. The judge entertained the motion, finding facts that he entered on the record, deciding against disqualification, and granting summary judgment for the plaintiff, which the Court of Appeals affirmed. 28 N.C. App. 237, 220 S.E.2d 862. The Supreme Court reversed the judgment, observing that when the allegations about disqualification require factfinding, the judge must disqualify himself or refer the matter to another judge. 291 N.C. at 311, 230 S.E.2d at 330.

Even absent a need for factfinding, the motion to disqualify may require resolution by another judge. As this Court has said, when the moving party has demonstrated objectively that grounds for disqualification exist, that showing triggers the need for another judge to decide the issue. *Lange v. Lange*, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003) (vacating and remanding the order that did not recuse in a motion alleging prejudice and bias, concluding that the retirement of the judge in question did not render the issue moot).

Most recently, this Court reaffirmed the need for an independent review when a reasonable person would doubt the judge's impartiality to rule on the motion, and in doing so, acknowledged that the appellate court reviews the motion de novo and enters its own order when it finds an abuse of discretion. *Topp v. Big Rock Found., Inc.*, 221 N.C. App. 64, 74, 726 S.E.2d 884, 890 (2012) (Hunter, Robert C., dissenting), *rev'd and dissent adopted*, 366 N.C. 369, 736 S.E.2d 173 (2013) (per curiam) (involving trial judge who vacationed with counsel for one of the defendants during pendency of action). The Court of Appeals has followed this rule on a number of occasions. See, for example, *State v. Hill* 45 N.C. App. 136, 263 S.E.2d 14 (1980) (vacating the judgments and awarding a new trial in part because the trial judge should have referred the motion to recuse to another judge).

C. The Appellate Courts have the Power to Enter an Order of Disqualification.

This Court has made clear that the appellate courts of this state have the power to enter orders of disqualification. In *Ponder*, Chief Justice Stacy, writing

for the Court, considered the uncontroverted allegations on disqualification and concluded that the judge in question, who did not recuse himself, "was disqualified to hear the case" and remanded other matters, but not the matter of disqualification. 233 N.C. at 706-07, 65 S.E.2d at 361.

Over thirty years later, in *State v. Fie*, 320 N.C. 626, 628, 359 S.E.2d 774, 775-76 (1987), the judge whose disqualification was at issue had written a letter to the district attorney requesting that the grand jury consider criminal charges against the defendants, basing the request on testimony the judge had heard in another trial. Another judge heard the motion to disqualify but denied it, and the Court of Appeals affirmed. This Court then decided, de novo, that the other judge erroneously denied disqualification, and that because the sitting judge appeared to have prejudged the defendants, the law required a new trial. 320 N.C. at 628, 359 S.E.2d at 775-76. The *Fie* Court reversed the Court of Appeals and ordered a new trial before a different judge. *Id.* See also *Topp*, 221 N.C. App. at 74, 726 S.E.2d at 890 (Hunter, Robert C., dissenting), *rev'd and dissent adopted*, 366 N.C. 369, 736 S.E.2d 173 (2013) (recognizing the power of the Court to hear the denial of the motion to recuse de novo).

The North Carolina Court of Appeals underscores the clarity of this rule of law. In *McClendon v. Clinard*, 38 N.C. App. 353, 247 S.E.2d 783 (1978), the court observed that the trial judge should have referred the motion to recuse to another judge. Instead of vacating the order denying the motion, however, the appellate

court exercised its power to decide the matter de novo and ruled that the judge was disqualified. *Id.* at 356, 247 S.E.2d at 785.

Applied to this case, we believe this law puts disqualification before this Court to decide. Because Associate Justices Barringer and Berger did not recuse themselves, the motion converted to a motion to disqualify. *Ponder,* 233 N.C. 699, 65 S.E.2d 356. Because Section C(1)(d)(i) of the Code requires disqualification, this appellate court reviews the motion de novo and enters its own order. *Fie*, 320 N.C. at 628, 359 S.E.2d at 776; *Topp*, 221 N.C. App. at 74, 726 S.E.2d at 890 (Hunter, Robert C., dissenting), *rev'd and dissent adopted*, 366 N.C. 369, 736 S.E.2d 173 (2013).

Seventy years in the making, this Court has made the process we describe part of the common law of North Carolina. Instead of "involuntary recusal" or the exercise of extraordinary constitutional powers, the facts before the Court ask this body to resort to the well-established common law that able jurists have developed painstakingly over the decades. We realize that the Court is in the uncomfortable position of applying this law to two of its own members, but we conclude that the law of North Carolina contemplates no less.

CONCLUSION

For the foregoing reasons, the amici respectfully believe that this Court should enter orders of disqualification for Associate Justices Barringer and Berger.

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WORD COUNT CERTIFICATION

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, I hereby certify that the foregoing brief, which is prepared using a proportional font, is less than 3,750 words (excluding the cover, indices, table of authorities, signature blocks, certificates of service, and this certificate of compliance) as reported by the word processing software.

Respectfully submitted this 2nd day of November, 2021

/s/ Ellen Murphy

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CERTIFICATE OF SERVICE

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