

SUPREME COURT OF NORTH CAROLINA

HOKE COUNTY BOARD OF
EDUCATION; et al.,
Plaintiffs-Appellees,

and

CHARLOTTE-MECKLENBURG BOARD
OF EDUCATION,
Plaintiff-Intervenor-Appellee,

and

RAFAEL PENN, et al.,
Plaintiff-Intervenors-Appellees,

v.

STATE OF NORTH CAROLINA and
STATE BOARD OF EDUCATION,
Defendants-Appellees,

and

CHARLOTTE-MECKLENBURG BOARD
OF EDUCATION,
Realigned Defendant-Appellee,

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-Appellants.

From the North Carolina
Court of Appeals
No. COA 22-86

From Wake County
95 CVS 1158

**MOTION BY THE CONTROLLER OF THE STATE OF NORTH
CAROLINA TO DISSOLVE OR LIFT STAYS ENTERED IN THIS
MATTER REGARDING THE WRIT OF PROHIBITION
PREVIOUSLY ENTERED BY THE COURT OF APPEALS**

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COMES, Nels Roseland, Controller of the State of North Carolina, pursuant to Rule 37 of the Rules of Appellate Procedure and respectfully moves this Court to lift the stays imposed in its 4 November 2022 Order and Opinion restraining the enforcement of the Writ of Prohibition granted to the Controller by the North Carolina Court of Appeals on 30 November 2021.

This motion is made because the stays previously entered hinder the proper operations of the Controller's Office until the legal issues discussed hereinafter, which were unresolved in this Court's 4 November 2022 Order and Opinion, are resolved. Maintaining the stays will allow the Controller's Office to operate under the fiscal and budgetary statutes until such time as the Court resolves the issues addressed. In an order entered in this case on 4 November 2022, the Court stayed the writ of prohibition entered by the Court of Appeals "*pending any further filings in 425A21-1 pertaining to issues not already addressed in the opinion filed this day in 425A21-2.*" ((4 November 2022 Order at p 3 (emphasis added)). Petitioner thus understands, if the motion is granted, the stay will be lifted and the writ of prohibition automatically

reinstated. In the alternative, and to the extent necessary to do so, Petitioner moves that the stay be lifted. Petitioner understands the appellate rules are silent on the legal standard for granting such motions. However, good cause exists and the motion is made to allow the protective action to be taken given the fact that the need for relief is urgent and outweighs any benefit existing in maintaining the status quo. This action is taken in good faith and not for the purpose of delay but is necessary given the unique status of this case.

Procedural History

On 24 November 2021, the Controller, a non-party to the proceedings in *Hoke County Board of Education et al v. State of North Carolina* (425A21-2) (hereinafter referred to as the superior court case), filed a Petition seeking a Writ of Prohibition against Judge W. David Lee. This case was captioned in the Court of Appeals, *In Re the 10 November 2021 Order of Judge W. David Lee in Hoke County Board of Education, et al. v. State of North Carolina, et al.*, 95 CVS 1156 (425A21-1) (hereinafter referred to as the appellate case). This petition for writ invoked the original jurisdiction of the appellate division pursuant to N.C. Gen. Stat. § 7A-32 and N.C. Const. art. IV, § 1. Personal

service of the Petition was made on Judge Lee¹ by the Sheriff, registered mail, and by electronic mail.

The portion of the 10 November 2021 Order to which the Controller objected was denominated the “transfer provision” and reads as follows:

The Office of State Budget and Management and the current State Budget Director (“OSBM”), the Office of the State Controller and the current State Comptroller (“Controller”), and the Office of the State Treasurer and the current State Treasurer (“Treasurer”) shall take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the Comprehensive Remedial Plan, from the unappropriated balance within the General Fund to the state agents and state actors with fiscal responsibility for implementing the Comprehensive Remedial Plan as follows:

- (a) Department of Health and Human Services (“DHHS”): \$189,800,000.⁰⁰;
- (b) Department of Public Instruction (“DPI”): \$1,522,053,000.⁰⁰; and
- (c) University of North Carolina System: \$41,300,000.⁰⁰.

OSBM, the Controller, and the Treasurer, are directed to treat the foregoing funds as an appropriation from the General Fund as contemplated within N.C. Gen. Stat. § 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers;

Any consultation contemplated by N.C. Gen. Stat. § 143C-6-4(b1) shall take no longer than five (5) business days after issuance of this Order”

¹ Rule 38(c) of the Rules of Appellate Procedure provides Judge Robinson and now Judge Ammons would be automatically substituted for Judge Lee in the Writ.

The Petition advanced four legal issues in support of the Writ: I. The Court lacked jurisdiction over the Controller; II. The Order is contrary to the express language of the General Statutes; III. The Order is contrary to the express language of the Constitution; and, IV. The Order is Contrary to the Controlling Precedents of the Appellate Division. Some of the parties in the superior court case filed briefs and motions in the Court of Appeals seeking to prevent the issuance of the Writ of Prohibition. Subsequently, the Court of Appeals decided to issue the Writ without resolving two of the legal issues framed (Issues I and II).

A Writ of Prohibition was entered on 30 November 2021. Subsequently Judge Lee was removed as the special judge to hear the case and Judge Robinson was appointed by the Chief Justice to hear the superior court case. On 15 December 2021, Plaintiffs in the superior court case filed a Notice of Appeal, Petition for Discretionary Review and Petition for Writ seeking the Supreme Court's review of the Court of Appeals' 30 November 2021 Writ of Prohibition. These petitions and other pleadings were then placed in a file numbered (425A-21-1) and given the same caption as the superior court case. These appeals and petitions have not yet been acted on by the Supreme Court. (See Exhibit A Docket Sheet.)

Concurrently, the superior court case was appealed to the Court of Appeals and, subsequently, the superior court case was removed to this Court

on by-pass motion from the Attorney General and other parties to the superior court case.

The Attorney General requested these two actions be consolidated pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure. However, this Court did not immediately rule on this motion. On 21 March 2022, this Court directed all matters, including the filing of briefs involving both cases, to be held in abeyance until further order of the Court. (See ¶3 Order of 22 November 2022 in 425A21-1 and 425A-21-2). The matters involving the superior court case were remanded to the trial court by order of this Court on 21 March 2022 under the Court's terms of this Order, requiring Judge Robinson to address intervening events involving appropriations enacted after Judge Lee's Order was made. After the hearing, Judge Robinson amended the 10 November 2021 Order removing the "transfer provision" which engendered the need for the Writ under the law of the case doctrine. Judge Robinson's Order also calculated the effect the appropriation acts had on the "transfer provisions." His Order was subsequently appealed.

The Controller did appear at the hearings before Judge Robinson to ensure the trial court enforced the Writ of Prohibition obtained in the Court of Appeals. In addition, the Controller and his staff filed extensive affidavits and briefs describing the operation of the Controller's office and how money is distributed to agencies under the regular accounting and budget statutes and

procedures dealing with appropriated funds. These affidavits were included in the record on appeal in the superior court case. The affidavits outline the statutory and legal issues presented by a “judicial” appropriation order which are not presented in a legislative appropriation. These representations and legal issues made the trial court aware of the legal difficulties presented in Judge Lee’s 18 November Order should the trial court reaffirm the transfer provision.

Judge Robinson’s Order amended the 18 November 2021 Order of Judge Lee omitting the “transfer provision” portion of the Order. This deletion was based in part on the Writ of Prohibition entered by the Court of Appeals and his finding that the Writ was the “law of the case.” Because the trial court removed the transfer provision based on the law of the case doctrine, the court did not have to address the alternative legal issues raised by the Controller regarding the accounting and budget statute issues which the judicial appropriation presented.

Subsequently, this Court ordered the superior court case 425A-21-2 for oral argument on 28 August 2022 but did not resolve the state’s consolidation motion at the time of the oral argument. The Court did hear arguments which touched on some, but not all, the issues involved in the Writ of Prohibition at its hearing in August, 2022.

The Court issued its opinion in the superior court case (425A-21-2) on 4 November 2022 and an order in the appellate case (425A-21-1) staying the Writ of Prohibition. This Court has never called the appellate case 425A-21-1 for briefing or a hearing on the merits of the legal issues raised and not addressed by the Court of Appeals, and the additional legal issues raised and not addressed at the trial court by the Controller at the time of the hearing on the trial court's 22 April 2022 Order.

Grounds for Dissolving the Stay

The appellate case is still pending in the court under this Court's original jurisdiction. The Court's 22 November Order and Opinion stays are interim orders as relates to the resolution of the appellate case. Under Rule 37 of the Rules of Appellate Procedure, because this case (425A-21-1) has not been called for argument, the Controller may file a motion to lift the stay under Appellate Rule 37(a) which reads as follows: "Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument."

Case no. 425A-21-1, the appellate case, has never been called for argument.² The *post-hoc* nature of the Court's reasoning contained in the Order of 4 November 2022 does not comply with Appellate Rule 40 which would

² Controller recognizes Extraordinary Writs hearings are discretionary with this Court .

have required both cases to be consolidated *before* the hearing in August. The plain language of the rule requires cases to be consolidated for purposes of the arguments in the Supreme Court. Nevertheless, both the 4 November 2022 Order and Opinion did not vacate, reverse, or void the Writ of Prohibition or grant certiorari or supersedeas but only stayed the Writ.

The 4 November 2022 Order, by its terms, is a stay of a specific proceeding within the appellate case. Here the stay was issued because the Writ of Prohibition *may* interfere with the rights of the parties in the superior court proceedings. However, there is an ambiguity in the order because it anticipates the Controller may need to make additional filings to protect his rights as well. “We hereby stay the Writ of Prohibition pending any further filing in 425A21-1 pertaining to issues not already addressed in the opinion filed on this day in 425A21-2. The State’s motion to consolidate is otherwise dismissed as moot.”

The following issues were not addressed in the opinion filed on 4 November 2022 and raised in the Petition filed in Court of Appeals.

1. Whether the Court lacked personal jurisdiction over the Controller?
2. Whether the Court Order is contrary to the express language of the General Statutes?

3. Whether state and local agency officials, who are not parties to the superior court case and who transfer the funds or spend the funds are liable under N.C. Gen. Stat. § 143C-10-1 for civil and criminal penalties provided therein? The rights of the “state actors” required to implement the order need to be explicitly addressed.

The additional issues which were raised in the trial court and not addressed by the 4 November 2022 Order and Opinion are as follows:

1. Who is the person or agency to whom the “the total amount of funds necessary to effectuate years 2 & 3 of the CRP (Comprehensive Remedial Plan) from the unappropriated balance within the General Fund to the state agencies and state actors with fiscal responsibility for implementing the CRP is to be sent? Under normal procedures involving legislatively approved appropriation awards (pursuant to N.C.G.S § 143C-6-1), agencies who receive the awarded funds submit detailed accounting and funding requests to OSBM who then approves transactions into the North Carolina State Accounting System (managed by the State Controller per N.C.G.S. § 143B-426.39(1)) which when approved by both OSBM and OSC serve as a budgetary control to ensure the requesting party who requests the funds is the appropriate party and secondly the requested amounts do not

exceed or overspend the legislatively determined levels of funding. These budgetary controls which ensure the correct party receives the awarded funds in the correct amounts is not addressed in the November 2022 order.

2. How is the Controller to treat the foregoing funds as “contemplated within 143-C-6-4(b)(2)(a) since that statute requires “consultation” between parties who are not litigants in this lawsuit and not within the Controller’s management, *e.g.* the Department of Public Instruction, the Department of Health and Human Resources and the University of North Carolina?

The following statutory issues were not addressed in the opinion or the court below and present legal issues for disbursement of funds not yet answered.

1. Are “judicially appropriated” funds subject to N.C. Gen. Stat. § 143C01-2(b) which requires reversion to the general fund for amounts not expended by the agency who is to receive them?
2. Do the local school boards and counties have to comply with the provisions of N.C. Gen. Stat. § 115C-433 and N.C. Gen. Stat. § 115C-422, “The School Budget and Fiscal Control Act,” when receiving these funds?

3. What is the sequential cash flow process to be used in disbursing the funds ordered?
4. Are the Controller's responsibilities under N.C. Gen. Stat. § 143B-426.39 (1),(3),(4), (5) suspended for purposes of this Order? Is the State Controller expected by the Court to approve and specify accounting detailed school funding allocations for the various purposes captured in the CRP? If the State Controller is expected by the Court to perform detailed judicial compliance and oversight of Leandro related financial accounting directives, will he be provided additional administrative funding by the Court to perform these compliance and reporting functions?

The Controller's function is part of a larger network of safeguards the General Assembly enacted to prevent errors, fraud waste and abuse in government spending. The Controller, acting in concert with the Legislative Fiscal Research Division staff and the Office of State Budget and Management has procedural safeguards built into the distribution process where the recipient of funds does not simply receive a check for the full amount of several years' appropriation. The money is released as it is needed and applied for. There is a cash flow process the Order as it stands does not recognize. Furthermore, the recipient of the funds must indicate what the use is for the funds and in what amounts over time, so the Controller can ensure that no

surplus funds are awarded. In a typical legislative appropriations act, detailed school funding formulas, parameters and allocations are delineated prescribing which of the over 100 school districts receive funds by various amounts, and these allocation details are not addressed in the November 2022 order.

The Controller has control of the funds to ensure proper accounting code treatment between various agency budget codes and accounts as required by N.C. Gen. Stat. § 143B.436 (1), (3), (4), and (5). Put differently, the Controller must know not only the agency that is receiving the money but what amounts of funds need to be transferred to the agency budget code to fund approved expenditures. These details are typically coordinated in conjunction with the Office of State Budget and Management and the Legislative Fiscal Research Division Staff, so expenditures can be tracked and accounted for by purpose, location, and spending level. The Comprehensive Remedial Plan is ambiguous on these details to determine who specifically benefits, by what amount and in which school district.

From the Controller's view, it would be fundamentally unfair for a court to subject him, his staff, and the recipient agency staff to criminal and civil liability before the basic elements of procedural due process were met including notice, an opportunity to respond, counsel, and the right to an appeal including a hearing on these issues. The proceedings below and in the Appellate Division

in handling the appeal of this case deny him these procedural rights. More importantly, forcing the Controller to participate in subsequent hearings in the superior court case, in which he has no rights as a party in order to have some say in a subsequent appeal is problematic and paradoxical as a matter of substantive law.

While this movant does not believe it is necessary to do so, if the Court believes otherwise, the Controller asks this Court employ Rule 2 of the Rules of Appellate Procedure to suspend the rules to address his motion. In the alternative, the Controller asks this Court to lift the stay until such time as the trial court has finished its hearings on remand of the companion case *Hoke County, et al, v, State of North Carolina* (425A21-2), which was consolidated with this case for oral argument and was remanded to the trial court for further hearings.

The public interest is always served by following the Constitution and all the statutes regarding the handling of public funds. This Court has general equitable authority over the trial courts to supervise their operations.

The Court has remanded the superior court case for resolution by a new judge on issues involving subsequent appropriations. It would be expeditious for this Court to lift the stay or issue a new Writ of Prohibition regarding the additional statutory issues discussed in this motion. It is more likely than not this Court will have to address whatever declaratory results are reached by

the lower court on remand of the superior court case and lifting the stay will serve the public interest and allow the parties to ensure all statutes regarding the distribution of public funds are observed.

The Office of the Controller's role is to ensure that money, however appropriated, goes to the agency in appropriate amounts for approved expenditures in a timely manner. Granting large sums of money to agencies without appropriate safeguards to ensure the funds will be spent for the purposes intended is problematic for the Controller and the public. Proper accounting for the funds, timely sequential release of the funds for the purposes intended is critical to ensure the goals intended by the declaratory judgment of this Court will be achieved.

Relief Sought

The Controller asks this Court to exercise its supervisory authority to dissolve the stay of the Writ of Prohibition previously entered in this matter. In the alternative, the Controller asks this Court to lift the stay until such time as this Court can review the issues raised by the Controller at the prior proceedings and such additional issues as this Court orders to be resolved by the trial court in the superior court case regarding the handling of funds judicially appropriated, as discussed *ante*.

In addition, the Controller asks this Court for such other relief as the Court may determine to be deemed just and proper. ³

Respectfully submitted this 8th day of February, 2023.

HIGGINS BENJAMIN, PLLC

Electronically Submitted

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³ Pursuant to Rule 37, The Movant has notified the other parties to both this action and the superior court action by email of his intent to file a motion to lift the stay. Based upon their prior litigation positions, the movant represents to the court the parties will not consent to the motion as is and may want to be heard on this motion.

CERTIFICATE OF SERVICE

The undersigned certifies that on February 8, 2023, a copy of the foregoing was served electronically and U.S. Mail on the following:

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