

STATE OF NORTH CAROLINA
COUNTY OF WAKE

NORTH CAROLINA LEAGUE, OF
CONSERVATION VOTERS, INC., *et al.*,
Plaintiffs

and

COMMON CAUSE,
Plaintiff-Intervenor,

v.

REPRESENTATIVE DESTIN HALL, in
his official capacity as Chair of the House
Standing Committee on Redistricting, *et*
al.,
Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 015426

Filed this the 24th day of December, 2021
with the Honorable A. Graham Shirley Pursuant
to Rule 5(e) of the North Carolina Rule of Civil
Procedure

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STATE OF NORTH CAROLINA
COUNTY OF WAKE

REBECCA HARPER, *et al.*,
Plaintiffs

v.

REPRESENTATIVE DESTIN HALL, in
his official capacity as Chair of the House
Standing Committee on Redistricting, *et*
al.,
Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 500085

**ORDER ON PRESIDENT *PRO TEMPORE* PHILIP E. BERGER'S, SENATOR
WARREN DANIEL'S, SENATOR PAUL NEWTON'S, AND SPEAKER TIMOTHY K.
MOORE'S MOTION FOR A PROTECTIVE ORDER**

THIS MATTER came before the undersigned three-judge panel upon the Motion for Protective Order Quashing Notices of Deposition of President *Pro Tempore* Philip E. Berger, Senator Warren Daniels, Senator Paul Newton, and Speaker Timothy K. Moore, filed by

President *Pro Tempore* Philip E. Berger, Senator Warren Daniels, Senator Paul Newton, and Speaker Timothy K. Moore (collectively, “Movants”) pursuant to Rules 7(b) and 26(c) of the North Carolina Rules of Civil Procedure on December 22, 2021.

Procedural and Factual Background

In this litigation, Plaintiffs seek a declaration that the North Carolina Congressional, North Carolina Senate, and North Carolina House of Representatives districts established by an act of the General Assembly in 2021, N.C. Sess. Laws 2021-174 (Senate Bill 750), 2021-173 (Senate Bill 739), and 2021-175 (House Bill 976), violate the rights of Plaintiffs under the North Carolina Constitution. Plaintiffs seek to enjoin the future use of the 2021 congressional and state legislative districts.

On December 13, 2021, after receiving an order from the Supreme Court of North Carolina directing this Court to resolve all Plaintiffs’ claims on the merits by January 11, 2022, this Court entered a Case Scheduling Order giving the parties until December 31, 2021 to conduct any depositions.

On December 14, 2021, Harper Plaintiffs served notices of deposition to President *Pro Tempore* Philip E. Berger, Senator Warren Daniels, Senator Paul Newton, and Speaker Timothy K. Moore. In response, Movants asserted a legislative privilege from being called to testify at the noticed depositions, and on December 22, 2021, Movants filed the present motion, requesting this Court to enter a protective order providing that the depositions sought by Harper Plaintiffs’ Notices of Depositions for Movants not be had based on the grounds that (1) each of the Movants is entitled to legislative immunity, and (2) the willingness of non-moving Legislative Defendants to submit to depositions renders depositions of Movants unnecessary.

Harper Plaintiffs submitted a written response to the motion on December 23, 2021.

The Movants and Harper Plaintiffs have informed the Court of their respective positions on the Motion, and the matter is now ripe for resolution by the Court.

Movants' Motion for Protective Order

After considering the Movants' Motion and the responses to that motion, as well as the matters contained therein, the Court, in its discretion, rules upon Movants' motion as follows:

Before the Court is one motion – Movants' Motion for Protective Order based upon an assertion of legislative privilege. "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action" N.C.G.S. § 1A-1, Rule 26(b)(1) (emphasis added). As Movants argue in their motion, this Court "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown . . . may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense." N.C.G.S. 1A-1, Rule 26(c). "Individuals . . . are entitled to absolute immunity for all actions taken in the sphere of legitimate legislative activity" and, once asserted, it "shield[s] the individual from the consequences of the litigation results and provide[s] a testimonial privilege." *Northfield Dev. Co. v. City of Burlington*, 136 N.C. App. 272, 281-82, 523 S.E.2d 743, 749, *aff'd in part, review dismissed in part on other grounds*, 352 N.C. 671, 535 S.E.2d 32 (2000). *Northfield* makes clear that **individuals** are entitled to the immunity and have a testimonial privilege. *Id.* The defendants in this case are separately named and are individual parties; one legislator invoking the privilege does not invoke the testimonial privilege for all legislators. The question in *Common Cause v. Lewis* was whether two individual defendants who, along with ten other individuals who had asserted the legislative privilege throughout the majority of a discovery period, could withdraw from a Motion for


Protective order at the last minute in order to waive the privilege. As a result of their earlier assertion of the privilege their depositions had been cancelled. The court held that the two individual defendants in *Common Cause* were estopped from withdrawing from the Motion for Protective order as allowing them to withdraw at such a late stage would work an unfair advantage or result. Such is not the case here and the assertion of legislative privilege constitutes good cause under Rule 26(c) to warrant the issuance of the requested protective order.

Nothing in this Order should be construed as a limitation on the ability of Representative Hall or Senator Hise to waive their personal legislative privilege and testify at deposition or at trial.

Conclusion

WHEREFORE, the Court, for the reasons stated herein and in the exercise of its discretion and for good cause shown, hereby ORDERS that Movants' Motion for Protective Order is GRANTED and President *Pro Tempore* Philip E. Berger, Senator Warren Daniels, Senator Paul Newton, and Speaker Timothy K. Moore shall not be called to testify at the noticed depositions.

SO ORDERED, this the 24 day of December, 2021.



A. Graham Shirley, Superior Court Judge

/s/ Nathaniel J. Poovey

Nathaniel J. Poovey, Superior Court Judge

/s/ Dawn M. Layton

Dawn M. Layton, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via e-mail transmission addressed as follows:

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 24th day of December 2021.

/s/ Kellie Z. Myers
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