



North Carolina Court of Appeals

Phone: (919) 831-3600
Fax: (919) 831-3615
Web: <https://www.nccourts.gov>

Eugene H. Soar, Clerk
Court of Appeals Building
One West Morgan Street
Raleigh, NC 27601

Mailing Address:
P. O. Box 2779
Raleigh, NC 27602

From Wake County
(24CV013058)

No. P24-318

DR. DARREN MASIER

v.

NORTH CAROLINA STATE UNIVERSITY

ORDER

The following order was entered:

By majority vote, the petition for writ of supersedeas filed in this cause by petitioner North Carolina State University on 14 May 2024 seeking to stay the order allowing respondent's "Petition for Relief Pursuant to Rule 27(a)," as amended, entered by Judge Hoyt G. Tessener on 7 May 2024 is decided as follows: The petition is denied as to decretal paragraph 1, which grants respondent's motion for pre-suit discovery; decretal paragraph 4, which requires petitioner to permit respondent and respondent's representatives entry into Poe Hall for purposes of inspection and testing; decretal paragraph 5, which restricts the information gathered to litigation related to the amended petition; decretal paragraph 6, which orders petitioner to share with respondent all testing results; decretal paragraph 7, which retains the superior court's jurisdiction to resolve remaining issues; and decretal paragraph 8, which grants respondent's amended petition. The petition is allowed as to decretal paragraph 2, which requires petitioner to produce the documents requested in respondent's amended petition, and decretal paragraph 3, which requires petitioner to produce witness(es) for deposition. Decretal paragraphs 2 and 3 are hereby stayed pending disposition of petitioner's appeal or until further order of this Court.

By order of the Court this the 5th of June 2024.

Judge Concurring in part and Dissenting in part— Petitioner petitions our Court for a writ of supersedeas to stay the trial court order allowing Respondent to engage in discovery prior to the filing of any action, pursuant to Rule 27 of our Rules of Civil Procedure. Petitioner essentially argues that Respondent has failed to show that he is entitled to relief under Rule 27 and that Petitioner otherwise is protected by sovereign immunity. For the following reasoning, in my discretion, my vote is to allow the writ of supersedeas in its entirety.

First, granting the writ preserves the status quo while Petitioner's appeal is before our Court, in which Petitioner challenges the trial court's order requiring Petitioner to respond to certain discovery requests, including Respondent's access to Poe Hall to conduct testing. By denying the writ in its entirety, much of Petitioner's appeal is mooted. I note Respondent's concern that Petitioner may change the character of Poe Hall, which might disturb the status quo in one respect.

However, I am not convinced, as Respondent claims that he has not worked in the building since 2013 anyway. Further, Petitioner has already performed extensive testing, showing the state of Poe Hall in 2023. See *In re I-35x Bridge Collapse Site Inspection*, 243 F.R.D. 349 (2007) (denying Rule 27 inspection of a collapsed bridge where the government is already conducting a thorough investigation to preserve evidence).

Second, Petitioner has shown a likelihood of success in its appeal. There is a likelihood that it will be determined in this appeal that use of Rule 27 procedures in this case is inappropriate because it appears Respondent wants to use the procedures to find out information to aid in the drafting of a complaint and to figure out whom else, in addition to Petitioner, to sue. Though our Rule 27 has not been subject to much jurisprudence in our State, federal courts and other state courts with a similar rule/procedure allowing for pre-action discovery have instructed that Rule 27 is not to be used as a means to ascertain evidence to aid in the drafting of a complaint or to determine whether a cause of action exists and, if so, against whom the action should be instituted. See, e.g., *In re Hall*, 688 A.2d 81 (N.J. 1997) (explaining the law in other state and under the federal rule); *Petition of North Carolina*, 68 F.R.D. 410 (1975) (explaining that Rule 27 is not to be used simply to aid in drafting a complaint or to determine whether a cause of action exists or to identify potential defendants); *In re I-35x*, *supra*.

Here, the trial court justifies its order in part based on its findings that Respondent "is presently unable to bring suit because of information only in the possession of" Petitioner. As initially enacted, Rule 27 did allow for such requests to aid in drafting a complaint. "Section (b) [Now Deleted]. — This section deals with discovery for the purpose of obtaining information to prepare a complaint." N.C. Gen. Stat. § 1A-1, Rule 27, cmt 1967. Rule 27, however, was amended in 1975 in order to remove the procedure because of liberalized pleadings allowed under our Rules of Civil Procedure:

Whatever may have been the justification for this procedure under the former code pleading practice in North Carolina, the adoption of the liberalized pleading requirements of Rule 8 would appear to have eliminated the necessity for retaining it.

N.C. Gen. Stat. § 1A-1, Rule 27, cmt to 1975 amend.

The trial court justifies its order in part based on its finding that Respondent "could lose rights to claims against third parties pursuant to statutes of repose, statute of limitations and for other reasons." However, again, the purpose of Rule 27 is not to help plaintiffs to find defendants.

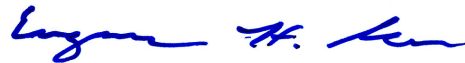
Further, there is a likelihood that it will be determined that Rule 27 procedures are inappropriate because there seems to be no impediment/inability to commence an action. That is, I do not see any impediment for Respondent to bring a tort action in the Industrial Commission against Respondent and to conduct discovery in that action. I understand the trial court's concerns regarding Respondent's poor health. However, under the federal rule, "a bare assertion that [the potential plaintiff] is gravely ill is generally insufficient to satisfy the inability prong of Rule 27(a)" unless the discovery is necessary to uncover information required to file the complaint. *Powers v. Planned Parenthood*, 677 A.2d 534 (Me. 1996) (citing federal treatise). For example, if the potential claim was for medical malpractice and discovery was necessary for Respondent to satisfy Rule 9(j) in drafting his complaint, a Rule 27 order might be appropriate.

Finally, there is at least some likelihood of success that it will be determined that the trial court lacked jurisdiction to enter the order against Petitioner, which enjoys sovereign immunity. The Rules of Civil Procedure do apply to tort claims against the State in the Industrial Commission. However, it is unsettled whether a court of general jurisdiction, such as the superior court has jurisdiction to enter a Rule 27 order, where G.S. 143-291(e) provides that the Industrial Commission "is the sole and exclusive forum for hearing" tort claims against the State. I do note that Rule 27 provides that an order thereunder may be sought "in the appropriate court" where the petitioner has a cognizable action "in any court" and that G.S. 143-291(a) provides that the

Industrial Commission "is hereby constituted a court for the purpose of hearing and passing upon tort claims" against the State. However, it is unresolved whether the State intended its waiver of sovereign immunity for tort claims extends to Rule 27 petitions in a forum other than the Industrial Commission.

Third, I do not believe that Respondent has shown irreparable harm for the order to be stayed during the pendency of the appeal in our Court. Again, Respondent has not worked in Poe Hall since 2013 and Petitioner has already conducted extensive testing. Petitioner, however, would suffer irreparable harm if it is determined that the State has not waived sovereign immunity for Rule 27 orders entered by a forum other than by the Industrial Commission.

WITNESS my hand and the official seal of the North Carolina Court of Appeals, this the 5th day of June 2024.



Eugene H. Soar
Clerk, North Carolina Court of Appeals

Copy to:

Mr. Joseph S. Dowdy, Attorney at Law, For North Carolina State University - (By Email)

Mr. David F. Kirby, Attorney at Law, For Dr. Darren Masier - (By Email)

Ms. Mary Kathryn Kurth, Attorney at Law - (By Email)

Mr. F. Bryan Brice, Jr., Attorney at Law - (By Email)

Winston S. Kirby, For Dr. Darren Masier - (By Email)

Mr. Todd S. Roessler, Attorney at Law, For North Carolina State University - (By Email)

Stephen R. Berlin, For North Carolina State University - (By Email)

Mr. Dustin T. Greene, Attorney at Law, For North Carolina State University - (By Email)

Ms. Catherine Cralle Jones, Attorney at Law, For Dr. Darren Masier - (By Email)

The Honorable Clerk of District Court, Wake County