

SUPREME COURT OF NORTH CAROLINA

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I. BEVERLY LAKE, JOHN B. LEWIS, JR., )  
EVERETTE M. LATTA, PORTER L. MCATEER, )  
ELIZABETH S. MCATEER, ROBERT C. HANES, )  
BLAIR J. CARPENTER, MARILYN L. )  
FUTRELLE, FRANKLIN E. DAVIS, THE ESTATE )  
OF JAMES D. WILSON, THE ESTATE OF )  
BENJAMIN E. FOUNTAIN, JR., FAYE IRIS Y. )  
FISHER, STEVE FRED BLANTON, HERBERT )  
W. COOPER, ROBERT C. HAYES, JR., STEPHEN )  
B. JONES, MARCELLUS BUCHANAN, DAVID B. )  
BARNES, BARBARA J. CURRIE, CONNIE )  
SAVELL, ROBERT B. KAISER, JOAN ATWELL, )  
ALICE P. NOBLES, BRUCE B. JARVIS, )  
ROXANNA J. EVANS, JEAN C. NARRON, and all )  
others similarly situated. )

v. )

Gaston County )

STATE HEALTH PLAN FOR TEACHERS AND )  
STATE EMPLOYEES, a corporation, formerly )  
known as the North Carolina Teachers and State )  
Employees' Comprehensive Major Medical Plan, )  
TEACHERS AND STATE EMPLOYEES' )  
RETIREMENT SYSTEM OF NORTH CAROLINA, )  
a corporation, BOARD OF TRUSTEES OF THE )  
TEACHERS AND STATE EMPLOYEES' )  
RETIREMENT SYSTEM OF NORTH CAROLINA, )  
a body politic and corporate, JANET COWELL, in )  
her official capacity as Treasurer of the State of )  
North Carolina, and THE STATE OF NORTH )  
CAROLINA )

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DISCLOSURE PURSUANT TO CANON 3D OF THE  
CODE OF JUDICIAL CONDUCT

This case arises from a challenge brought by a class of over 222,000 individuals consisting, as described in the class certification order entered by Judge Edwin G. Wilson, Jr., in the Superior Court, Gaston County, on 11 October 2016, of (1) “[a]ll members (or their Estates or personal representatives if they have deceased since July 1, 2009) of the N.C. Teachers’ and State Employees’ Retirement System (“TSERS”) who retired before January 1, 1988; (2) TSERS members (or their Estates or personal representatives if they have deceased since July 1, 2009) who retired on or after January 1, 1988, who were hired before October 1, 2006 and have 5 or more years of contributory services with the State and (3) surviving spouses (or their personal representatives if they have deceased since July 1, 2009) of (i) deceased retired employees, provided the death of the former plan member occurred prior to October 1, 1986; and (ii) deceased teachers, State employees, and members of the General Assembly who are receiving a survivor’s alternate benefit under any of the State-supported retirement programs, provided the death of the former plan member occurred prior to October 1, 1986,” to legislation enacted by the General Assembly requiring class members to pay a premium to order to obtain coverage under what plaintiffs describe in their complaint as the Regular State Health Plan. This case is currently before the Court on discretionary review of a decision of the Court of Appeals reversing an order entered by the trial court on 19 May 2017 granting partial summary judgment in favor of plaintiffs on the grounds that the State had breached its contract with the members of the plaintiff class and requiring the State, among

other things, to (1) provide premium-free coverage under certain provisions of the State Health Plan to members of the plaintiff class and to (2) reimburse members of the plaintiff class for premiums that they had paid in order to obtain such coverage prior to the entry of the trial court's order. *Lake v. State Health Plan*, 264 N.C. App. 174, 825 S.E.2d 645 (2019). In light of the number of individuals potentially affected by the outcome of the present appeal and the amount of money that is potentially at issue in this case, the justices of the Supreme Court of North Carolina have, prior to consideration of this case on the merits, elected to provide the parties and their counsel with the following information:

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1. According to Canon 3C(1)(d)(i) of the North Carolina Code of Judicial Conduct, "[a] judge should disqualify himself/herself in a proceeding in which the judge's impartiality could reasonably be questioned," including a case in which "[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 . . . ." In addition, Canon 3D, which addresses "remittal of disqualification," provides that "a judge potentially disqualified by the terms of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's potential disqualification" and that, "[i]f, based on such disclosure, the parties and lawyers, on behalf of their clients and independently of the judge's participation, all agree that the judge's basis for potential disqualification is immaterial or insubstantial, the judge is no longer disqualified, and may participate in the

proceeding,” with any such agreement” to be “signed by all lawyers” and to be “incorporated in the record of the proceeding.”

2. Pursuant to Canon 3D of the North Carolina Code of Judicial Conduct, the members of the Court, after making reasonable inquiry, hereby disclose the following information pertaining to members of their families who are within the third degree of kinship by blood or marriage and either are or may be members of the plaintiff class and who do not live in their immediate households:

a. Chief Justice Newby’s mother is a retired teacher who taught in the Randolph and Guilford County public school systems and at Guilford Technical Community College.

b. Justice Ervin’s deceased paternal grandfather served as a member of this Court and as a special judge of the Superior Court, his deceased father retired from a position as a Superior Court Judge, his mother taught in the Burke County public school system and at the western North Carolina School of the Deaf, and his brother-in-law is a retired special agent with the State Bureau of Investigation.

c. Justice Morgan’s deceased maternal grandmother retired from her position as a teacher in the New Bern public schools.

d. Justice Berger’s mother-in-law is a retired teacher who taught in the Forsyth County public school system and his wife’s deceased maternal grandmother retired after teaching in the Yadkin and Durham County public school systems.

e. Justice Barringer's mother is a retired lunchroom cashier formerly employed by the Shelby City and Cleveland County public schools and her maternal aunt is a retired teaching assistant and bus driver formerly employed by the Shelby City Schools.

None of the family members identified in Paragraph No. 2 are serving as class representatives in this case.

3. Although the justices believe that they have, after reasonable inquiry, identified all of the members of their families within the third degree of kinship who are or may be members of the plaintiff class, they are unable to state definitively that other members of their families within the third degree of kinship are not also members of the plaintiff class.

4. The Court is mindful of its constitutional responsibilities as the judicial tribunal of last resort in North Carolina. *See* N.C. Const. art. VI (vesting the Supreme Court of North Carolina with appellate jurisdiction and supervisory authority over all of the state courts in North Carolina). Pursuant to Canon 3D, the justices identified in Paragraph No. 2 are disqualified from participating in the consideration and decision of this case based upon one or more of the family relationships set forth above unless the parties and their lawyers file a written agreement stipulating that each justice's basis for disqualification is immaterial or insubstantial. In view of the fact that a minimum of four justices is necessary to constitute a "quorum for the transaction of the business of the court," N.C.G.S. § 7A-10(a) (2019), the parties to

this proceeding will be denied an opportunity to be heard for lack of a quorum in the absence of further action by the parties or the Court.

5. According to the Rule of Necessity, “actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant’s constitutional right to have a question properly presented to such a court.” *Boyce v. Cooper*, 357 N.C. 655, 655, 588 S.E.2d 887, 888 (2003) (quoting *United States v. Will*, 449 U.S. 200, 214, 66 L. Ed. 2d 392, 405–06 (1980)); *see also Bacon v. Lee*, 353 N.C. 696, 717–18, 549 S.E.2d 840, 854–55 (2001) (holding that the Governor of North Carolina is permitted to consider a clemency petition submitted by a death-sentenced individual despite his prior service as Attorney General); *Long v. Watts*, 183 N.C. 99, 102, 110 S.E. 765, 767 (1922) (holding that the Court was required to hear a case challenging the application of a statewide income tax upon judicial salaries despite the potential impact of the resulting decision upon the members of the Court).

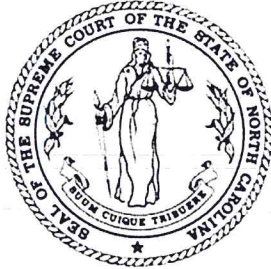
6. Prior to addressing whether the Rule of Necessity should be invoked in this proceeding and in order to give the parties a full and fair opportunity to be heard concerning the manner in which the Court should proceed in this case, the Court invites counsel on behalf of the parties to submit to the Court no later than 1 February 2021 either written objections to the participation of the justices identified herein or written consent of the parties and their counsel to the participation of the justices in the consideration and decision of this case on the grounds that the potential basis or

bases for disqualification disclosed under Canon 3D is or are immaterial or insubstantial.

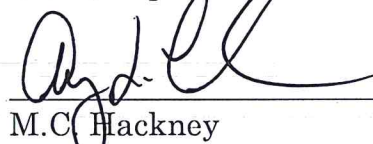
By order of the Court in conference, this the 26<sup>th</sup> day of January 2021.

  
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 26<sup>th</sup> day of January 2021.



AMY FUNDERBURK  
Clerk, Supreme Court of North Carolina

  
M.C. Hackney  
Assistant Clerk, Supreme Court of  
North Carolina

Copy to:

North Carolina Court of Appeals

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And State Employees, et al - (By Email)

Mr. Robert M. Curran, Special Deputy Attorney General - (By Email)

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