

NORTH CAROLINA COURT OF APPEALS

TAMIKA WALTER KELLY, KRISTY MOORE,)
AMANDA HOWELL, KATE MEININGER,)
ELIZABETH MEININGER, JOHN SHERRY,)
AND RIVCA RACHEL SANOGUEIRA,)

PLAINTIFFS,)

) FROM WAKE/COUNTY
) NO. 20-CVS-8346

v.)

THE STATE OF NORTH CAROLINA,)
NORTH CAROLINA STATE EDUCATION)
ASSISTANCE AUTHORITY,)

DEFENDANTS,)

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,)
collectively on behalf of the General Assembly)
and in their capacities as agents of the State,)

LEGISLATIVE INTERVENOR-)
DEFENDANTS)

JANET NUNN, CHRISTOPHER and)
NICHOLE PEEDIN, and KATRINA POWERS,)

INTERVENOR-DEFENDANTS.)

**LEGISLATIVE INTERVENORS-DEFENDANTS-APPELLANTS'
RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR
EXTENSION OF TIME TO FILE RESPONSE**

As a normal course of practice, counsel for Legislative Intervenor-Defendants-Appellants Philip E. Berger and Timothy K. Moore routinely grant requests for extensions of time to file briefs for various reasons, out of professional courtesy to the schedules of fellow members of the bar. However, in this instance, they feel compelled to file this Response in Opposition to Plaintiff-Appellees' Motion for an additional 21 days in which to file their Response to Legislative Intervenors-Defendants-Appellants' Motion to Stay Discovery Pending Appeal because Plaintiffs are unwilling to stay their onerous discovery in the meantime. If Plaintiffs' counsel are truly under a time crunch to finish their work, then they should have granted Legislative-Appellants' minor request that they not take depositions during their busy legal schedules. They refused; therefore, this Court should not give them additional time that they should have given themselves.

In their Motion for an extension until April 19, Plaintiffs-Appellees state that Attorney Smith has a brief due on March 25 and a mediation on March 31. (Mot. at 1.) They also state that Attorney Brook has an amicus brief due April 1 and an opening brief due April 7. *Id.* Yet, on April 7 and 8, they have scheduled three depositions of independent school headmasters. (*See Miller Aff. in Support of Parent-Appellants Mot. to Temporarily Stay Discovery at 6, ¶ 17*). When Legislative Appellants requested that a condition of the extension include a temporary stay of discovery during the extension, counsel for Plaintiff-Appellees refused. *Id.* at 99 (Exhibit H).

For that reason, Legislative Intervenors fear that the real reason (or an additional reason at the very least) for the Motion for Extension of Time is to continue to press onerous discovery requests upon hapless schools who participate in the Opportunity Scholarship Program—and who are third parties to this case—to dissuade them from continuing their participation. In an effort to stop the harassment of an endless number of these schools by forcing their administrators to sit for depositions that may be rendered unnecessary or overbroad depending on the outcome of the pending appeal, Legislative Intervenors filed with this Court a Motion to Stay Discovery Pending Appeal on March 16, 2022. Similarly, on March 18, 2022, Parent-Intervenor-Defendant-Appellants filed a Motion to Temporarily Stay Discovery / Petition for Writ of Supersedeas to Temporarily Stay Discovery and Rule 23(e) Motion to Stay Discovery Pending Resolution of this Petition. If this Court were to grant Plaintiffs’ Motion for Extension of Time to Respond without staying discovery during the delay, in essence, the Court would be temporarily denying the Motion to Stay Discovery. To avoid that unique and unjust outcome, this Court should deny the Motion for Extension of Time.

It is not always proper to grant a motion for extension of time merely on the ground that it is “equitable and appropriate.” *Gandhi v. Gandhi*, 244 N.C. App. 208, 212, 779 S.E.2d 185, 187 (2015). Indeed, in this instance, granting the extension is not equitable because it will cause harm to nonparties by subjecting them to discovery that should be stayed pending appeal. Permitting Plaintiffs to make an end-run around Legislative Intervenors’ motion to stay discovery is not a valid reason for them

to obtain an extension of time in which to respond. *See Baker v. Am. Airlines, Inc.*, 430 F.3d 750, 756 (5th Cir. 2005) (“[G]iven the wide latitude in discovery and the fact that the parties were (or should have been) aware of the schedule and its implications, the district court was within its discretion to enforce the schedule and deny an extension of time to respond.”).

For the foregoing reasons, this Court should exercise its discretion by enforcing the schedule in the rules and denying the Motion for Extension of Time to Respond. In the alternative, it should make a temporary stay of discovery until April 19, 2022, a condition of its granting the Motion for Extension of Time.

Respectfully submitted,

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Pursuant to Rule 33(b) I certify that all the attorneys listed have authorized me to list their names on this document as if they had personally signed it.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been sent to the attorneys below, per agreement of the attorneys, by sending an e-mail to the addresses below on this 22nd day of March, 2022.

/s/ Matthew F. Tilley
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