IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:15-CV-00399-TDS-JEP

SANDRA LITTLE COVINGTON, *et al.*, Plaintiffs, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE SCOTT FALMLEN TESTIMONY**

Pursuant to Local Rule 7.2 and Federal Rule of Evidence 401, Plaintiffs, by and through their undersigned counsel, submit the following memorandum in support of their motion in limine to exclude trial testimony of Mr. Scott Falmlen.

NATURE OF THE MATTER

Again, Defendants are chasing an irrelevant theory instead of defending the merits of the case. In their pretrial disclosures, Defendants listed Scott Falmlen as a witness they "may call…if the need arises." (D.E. # 73). Defendants failed to depose him during the discovery period but sought to do so after the close of discovery. (D.E. # 67). This Court denied that request. (D.E. # 72). Since Defendants did not obtain the information they sought from the unrelated parties (Wilson and Dickson) or from the thirty-one plaintiffs they did depose, Defendants have now subpoenaed Mr. Falmlen for trial. Mr. Falmlen was served with the subpoena on April 4, 2016.

STATEMENT OF FACTS

Plaintiffs in this action are represented by the Southern Coalition for Social Justice

("SCSJ"), a 501(c)(3) organization based in Durham, North Carolina, and Poyner Spruill, LLP, a law firm based in Raleigh, North Carolina. Lawyers at SCSJ and Poyner Spruill agreed to take on this cause at no cost to Plaintiffs. Compensation for the attorneys' services is dependent on the generosity of citizens and entities concerned about the race-based decision making by their elected representatives in the General Assembly. There is no single funder of this lawsuit. Indeed, as a non-profit legal services organization, SCSJ performs almost all of its work on a pro bono basis in every case. In compliance with its obligation as a 501(c)(3) organization, SCSJ does not engage in partisan political activities. Most importantly, even demonstrating a single funder of the various redistricting lawsuits that have been filed, which is not the case here, still does not meet the standards Defendants must meet to establish that Plaintiffs in this case are bound by a lawsuit that they were not parties to in a different court.

There have been four suits filed challenging the legislative and congressional districts enacted by the North Carolina General Assembly in 2011. There is no third party controlling this case and any other lawsuit. None of Defendants' extensive discovery of Plaintiffs, their backgrounds, their community and professional associations, and their social media habits, through written discovery and deposition testimony, has uncovered any evidence of the kind of control necessary to establish res judicata under state law. Yet, still, Defendants seek to continue their fishing expedition at trial by calling Mr. Falmlen as a witness.

QUESTION PRESENTED

I. SHOULD THE COURT PRECLUDE DEFENDANTS FROM CALLING SCOTT FALMLEN TO TESTIFY WHEN HIS TESTIMONY IS IRRELEVANT TO THIS CASE AND THE COURT HAS ALREADY HELD IT IS IRRELEVANT?

ARGUMENT

I. THE SUBJECT MATTER OF MR. FALMLEN'S PURPORTED TESTIMONY IS NOT RELEVANT TO ANY ISSUE IN THIS CASE.

Defendants' motivation in calling Mr. Falmlen as a witness is to pursue their res judicata theory, which requires privity between the state-court plaintiffs and these plaintiffs, or an applicable exception. Defendants apparently assume that Mr. Falmlen has information about the imagined third party that as Defendants assume is controlling both cases. This Court has on three separate occasions rejected Defendants' efforts to pursue this theory. It has done so for good reason. There is no factual support for Defendants' theory, and it is not relevant to this case. Additionally, Defendants' continual efforts to tie this case to the other cases is a waste of time for the parties, counsel, and this Court.

Any testimony about who funded both state-court cases, the *Harris* case, and this case is not relevant. Under Federal Rule of Evidence 401, evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence," and "the fact is of consequence in determining the action." The second element of the test is significant here.

Plaintiffs have extensively briefed and explained why Defendants' res judicata theory does not apply. Under state law, *res judicata* and collateral estoppel only apply if the prior action involved the same parties or those in privity with the parties and the same issues. *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973). In the context of collateral estoppel and *res judicata*, the term privity indicates a mutual or successive relationship to the same property rights. *Moore v. Young*, 260 N.C. 654, 133 S.E.2d 510 (1963). In the instant situation, the parties in the two prior state court cases (*Dickson v. Rucho* and *NC NAACP v. North Carolina*) and the prior federal case (*Harris v. McCrory*) are not the same parties as Plaintiffs in this case. There is also no evidence of privity as understood under North Carolina law in this case, as there is no mutual or successive relationship to the same property rights.

Moreover, an exception to the shared identity or privity requirement, known as the *Lassiter* exception, does not apply here. That exception provides that:

> [A] person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party **if** he has a proprietary interest or financial interest in the judgment or in the determination of a question of fact or a question of law with reference to the same subject matter, or transactions; if the other party has notice of his participation, the other party is equally bound.

Thompson v. Lassiter, 246 N.C. 34, 39, 97 S.E.2d 492, 496 (1957) (emphasis added); *see also Workman v. Rutherford Elec. Membership Corp.*, 170 N.C. App. 481, 491-92, 613 S.E.2d 243, 250 (2005); *Smoky Mountain Enterprises, Inc. v. Rose*, 283 N.C. 373, 196 S.E.2d 189 (1973); *Williams v. Peabody*, 217 N.C. App. 1, 719 S.E.2d 88 (2011).

In determining whether the exception to privity exists, courts employ a three part test: (1) does a non-party to the original action, against whom *res judicata* is being asserted, exercise "control" of the original lawsuit and the present lawsuit; (2) does the non-party to the original action have "a proprietary interest or financial interest in the judgment;" and (3) does the non-party to the original action have an interest "in the determination of a question of fact or a question of law with reference to the same subject matter, or transactions?" *Lassiter*, 246 N.C. at 39, 97 S.E.2d at 496; *see also Peabody*, 217 N.C. App. at 10; 719 S.E.2d at 95. All three elements must be satisfied in order to establish the applicability of the *Lassiter* exception and therefore bar a second suit. *Peabody*, 217 N.C. App. at 14, 719 S.E.2d at 97-98.

Again, there is no third-party controlling this lawsuit and any other lawsuit. As Plaintiffs have stated before, this argument relies on the unproven assumption and impermissible inference that Plaintiffs' counsel are violating the Rules of Professional Conduct. It is also unsupported by the facts and law. In *Carolina Power & Light Co. v. Merrimack Mut. Fire Ins. Co.*, 238 N.C. 679, 79 S.E.2d 167 (1953), the North Carolina Supreme Court held that an insurance company and claimants did not control multiple cases, despite collaboration on the cases and the hiring of the same counsel, because it and the claimants had not 'openly and actively,' and with respect to some interest of their own, 'assumed and managed' the prosecution" of the earlier case. *Id*. at 693, 79 S.E.2d at 176-77. Just as in *Carolina Power*, here, there is no such control.

Moreover, to satisfy the *Lassiter* exception, Defendants would have to prove that the alleged "puppeteer" controls not only this litigation, but also both state court actions. In the years of litigation in state court, there was never any suggestion or any facts tending to show that some non-party controlled the litigation.

More importantly, the *Lassiter* exception has never been extended to the position Defendants apparently are taking here: that a non-party to this case can bind these Plaintiffs to a prior decision. The *Lassiter* exception requires that res judicata be asserted against a current party. *See Lassiter*, 246 N.C. at 39, 97 S.E.2d at 496. Defendants' argument requires that this narrow exception be extended beyond precedent.

Second, Defendants cannot show any non-party against whom preclusion is being sought has a proprietary interest in both cases. In *Cline v. McCullen*, 148 N.C. App. 147, 557 S.E.2d 588 (2001), the Court of Appeals found that a second action was barred because the plaintiff in *Cline* had a "substantial interest" in the prior case: a fifty-percent interest in the prior plaintiff's bail bond commissions, a financial stake that constituted a proprietary interest in the judgment. *Id.* at 151, 557 S.E.2d at 591. In addition, the plaintiff was aware of Tindall's earlier lawsuit because he had attended a law office meeting with Tindall and defendant's counsel to discuss Tindall's case. The court further found that plaintiff was "actively involved in the discussions that took place in that meeting." *Id.* at 150-51, 557 S.E.2d at 591. There is no similar evidence in this case, and Defendants will not find any such evidence by calling Mr. Falmlen to testify. There has not even been any allegation that any of the Plaintiffs has "a proprietary interest or

financial interest in the [original] judgment." This is a necessary element, and in none of the four pending cases are plaintiffs seeking monetary damages.

Finally, by continuing to press this irrelevant issue, Defendants are wasting limited pre-trial and trial time. Defendants are chasing a theory that is not supported by the facts. The discovery in this case has made clear that there is no third-party controller of the various lawsuits. No witness in any deposition has testified that such a controller exists. Defendants should not be able to waste trial time to call a witness to testify to this same point.

Plaintiffs have fifteen hours of trial time to use for the merits of this case. The case involves twenty-eight legislative districts, thousands of pages of documents, and multiple witnesses who can testify about the challenged districts and the improper use of race in drawing them. Defendants' tactics force Plaintiffs to waste valuable trial time on irrelevant matters and detract from the real issues of this case.

II. ANY INQUIRY INTO WHO DONATED FUNDS TO ANY OF THE PENDING LAWSUITS VIOLATES THE FIRST AMENDMENT RIGHTS OF THOSE WHO DONATED.

Questioning Mr. Falmlen about the identities of the individuals who donated in support of the litigation would require Mr. Falmlen to violate the First Amendment rights of those funders. The U.S. Supreme Court held in *NAACP v. Alabama* that compelling disclosure of information that would infringe upon one's constitutional freedom to associate and maintain "*privacy in one's associations*" must be held to a higher standard. 357 U.S. 449, 462 (1958) (emphasis added). *See also In re Motor Fuel Temperature*

Sales Practices Litig., 641 F.3d 470, 479 (10th Cir. 2011) ("[T]he Supreme Court has recognized a privilege, grounded in the First Amendment right of association, not to disclose certain associational information when disclosure may impede future collective expression.").

While *NAACP v. Alabama* addressed the disclosure of membership lists, the existence of a First Amendment privilege "turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities." *Perry v. Schwarzenegger*, 591 F.3d. 1147, 1162 (9th Cir. 2010) (holding that disclosure of internal campaign communications would constitute a substantial intrusion on First Amendment interests). It is consistent with Supreme Court jurisprudence, then, that disclosure of the identity of persons who have participated in funding this litigation and the funding methods they used should not be compelled. Anonymous donations to non-profit organizations are permitted under IRS regulations. Those donors will stop contributing if they cannot protect the confidentiality of their associations.

In order to overcome this privilege, Defendants "must show that the information sought is *highly* relevant to the claims or defenses in the litigation." *Perry*, 591 F.3d at 1161 (emphasis added). As discussed above, the identity of individuals responsible for financing the instant litigation has no bearing on whether there is privity between the current plaintiffs and different plaintiffs in previous redistricting litigation. The information sought by defendants, therefore, is too "attenuated from the issue" to

overcome the asserted intrusion on First Amendment interests. *Id.*; *see also Tree of Life Christian Schools v. City of Upper Arlington*, No. 2:11-cv-00009, 2012 U.S. Dist. LEXIS 32205, at *9 (S.D. Ohio Mar. 12, 2012) (district court denied defendants' attempt to depose the confidential donor of plaintiffs as "the disclosure Defendant seeks will have a chilling effect on Plaintiff's *First Amendment* associational rights.").

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court preclude Defendants from calling Scott Falmlen to testify.

This the 10th day of April, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 10th day of April, 2016.

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