No. 425A21-1 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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HOKE COUNTY BOARD OF EDUCATION; et al., Plaintiffs

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Plaintiff-Intervenor

and

RAFAEL PENN, et al., Plaintiff-Intervenors

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION, Defendants

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Realigned Defendant

From N.C. Court of Appeals
P21-511

From Wake
95CVS1158

* * * * * * * * * * * * * * *

ORDER

This matter is before the Court on the State Controller's motion to dissolve or lift a stay of the writ of prohibition previously issued by this Court, and legislative-intervenors' motion for leave to brief additional issues, motion to confirm reinstatement of the writ of prohibition, and conditional petition for writ of certiorari.

On 4 November 2022, this Court issued its opinion in No. 425A21-2, *Hoke County Board of Education, et al. v. State of North Carolina, et al.*, 382 N.C. 386, 879 S.E.2d 193 (2022). Prior to the issuance of that opinion, the State moved to consolidate that case, No. 425A21-2, with this case, No. 425A21-1. The State's motion to consolidate was resolved by this Court's 4 November 2022 order, which stated in relevant part:

> Now, on our own motion, the Court hereby treats the Writ of Prohibition filed 30 November 2021 by the Court of Appeals in 425A21-1 as consolidated with 425A21-2 to the extent necessary for the Court to address the arguments pertaining to the Writ made by the parties here; further, we hereby stay the Writ of Prohibition pending any further filings in 425A21-1 pertaining to issues not already addressed in the opinion filed on this day in 425A21-2. The State's motion to consolidate is otherwise dismissed as moot.

Upon review of the Controller's motion to lift the stay and the arguments set forth therein, this Court concludes that the motion constitutes a "filing[ ] in 425A21-1 pertaining to issues not already addressed in the opinion" filed 4 November 2022. Specifically, the Controller argues that there are many issues presented in this case that were left unaddressed in the Court's earlier opinion in No. 425A21-2. The Controller further argues that "it would be fundamentally unfair for a court to subject him, his staff, and the recipient agency staff to criminal and civil liability before the basic elements of procedural due process were met including notice, an opportunity to respond, counsel, and the right to an appeal including a hearing on these issues."

Because the Controller's motion is a further filing in 425A21-1 pertaining to

issues not already addressed by this Court, and because the Controller has made a sufficient showing of substantial and irreparable harm should the stay remain in effect, we lift the stay, thereby reinstating the writ of prohibition, until this Court has an opportunity to address the remaining issues in this case.

In addition, this Court notes that legislative-intervenors properly intervened as of right in the related case, No. 425A21-2. However, they did not move to intervene in the case at hand, No. 425A21-1, and this Court's 4 November 2022 order does not relieve them of this procedural requirement. Therefore, we dismiss legislative-intervenors' filings for failure to intervene.

By order of the Court in Conference, this the 3rd day of March 2023.

/s/ Allen, J.
For the Court

Justice Morgan and Justice Earls dissent as set out in the attached statement.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of March 2023.

Grant E. Buckner
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Mr. Robert Neal Hunter, Jr., Attorney at Law, For Combs, Linda, State Controller - (By Email)
Hon. W. David Lee, Senior Resident Judge - (By Email)
Mr. Amar Majmundar, Special Deputy Attorney General, For State of N.C. - (By Email)
Mr. Matthew Tulchin, Special Deputy Attorney General, For State of N.C. - (By Email)
Ms. Tiffany Y. Lucas, Deputy General Counsel, For State of N.C. - (By Email)
Mr. Thomas J. Ziko, Attorney at Law, For State Board of Education - (By Email)
Mr. Neal A. Ramee, Attorney at Law, For Charlotte-Mecklenburg Schools - (By Email)
Mr. David Noland, Attorney at Law, For Charlotte-Mecklenburg Schools - (By Email)
Mr. H. Lawrence Armstrong, Attorney at Law, For Hoke County Board of Education, et al. - (By Email)
Ms. Melanie Black Dubis, Attorney at Law, For Hoke County Board of Education, et al. - (By Email)
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Justice EARLS dissenting.

I agree that the Legislative-Intervenors' motions and petition for a writ of certiorari should be dismissed. However, I dissent from this Court's extraordinary, unprincipled, and unprecedented action allowing the Controller's motion in this matter. Today's order abandons the concepts of respect for precedent, law of the case, stare decisis, and the rule of law all in the name of preventing the State from complying with its constitutional duty to provide a sound basic education to the children of this state.

Though this motion is styled as a motion to "dissolve or lift stays entered . . . by the Court of Appeals," in substance it is an attempt to make an end run around the Rules of Appellate Procedure regarding rehearing and merely seeks rehearing on issues this Court has already decided. In fact, the Controller's position represents a stunning reversal from prior arguments to this Court, as the Controller previously argued that the issues related to the Controller's collateral attack on the trial court's order necessarily would be addressed in *Leandro IV*. Controller's Resp. Br. at 3, n.1, *Hoke Cnty. Bd. Of Educ. v. State,* 382 N.C. 386 (2022) (No. 425A21-2) (stating that "the resolution of the second case [425A21-2] will resolve the issues arising from the first case [425A21-1]") [hereinafter Controller's Resp. Br.]. And indeed, as detailed below, those issues were addressed in the Court's opinion in *Leandro VI.* Yet the Controller now asserts that many issues were left unaddressed in the Court's opinion

and repeats the illogical argument already rejected by this Court that, by complying with the ruling of the North Carolina Supreme Court, the Controller could be subject to criminal and civil liabilities.[1] The new Court majority adopts this tortured misrepresentation of the proceedings to date without so much as a mention of any of the arguments made by the other parties to the case.

However, as the record reflects all too well, the only issues not already addressed in *Leandro IV* relate to whether Plaintiffs were denied a meaningful opportunity to be heard when the Court of Appeals majority shortened the time for Plaintiffs to respond to the Controller's filing in that court and used what the dissent identifies as a "shadow docket" to grant relief. Order on Writ of Prohibition at 2 (P21-511) (2022). These procedural issues were not expressly addressed in *Leandro IV* but were made irrelevant by this Court's ruling. Contrary to the Controller's new argument, the Court made clear in its Consolidation Order that it was addressing the merits of both the trial court's November 2021 and April 2022 Orders and the 30 November 2021 Writ of Prohibition issued by the Court of Appeals. 4 November 2022 Order of the North Carolina Supreme Court in *Hoke Cnty. Bd. of Educ. v. State*, Nos. 425A21-1 and 425A21-2 [hereinafter 4 November 2022 Order]. If the Controller believed in good faith that the Court failed to properly or adequately consider an issue in the case, he had but one option; that is, to petition for rehearing pursuant to N.C.

[1] This was previously argued by the Controller and rejected by this Court by our Order directing him to comply with the trial court's transfer directive. *See* Controller's Resp. Br. at 12-13.

R. App. P. 31(a).

Although the Controller has failed to seek rehearing under Rule 31 of the North Carolina Rules of Appellate Procedure, this motion asks the Court to do exactly that: to decide again, and in a contrary manner, issues that were already decided in *Leandro IV*. This is not allowed under our appellate rules. *See, e.g.*, *Nowell v. Neal*, 249 N.C. 516, 521(1959) (stating "the appropriate method of obtaining redress from errors committed by this Court" is a petition for rehearing).

To be clear, Rule 31 is the only mechanism by which a party can ask this Court to rehear or address issues they allege the Court has not properly or adequately considered. N.C.R. App. P. 31. Rule 31 petitions have a firm deadline, which cannot be extended. *See* N.C.R. App. P. 27 (c) (The "Court may not extend the time for . . . filing . . . a petition for rehearing"). The deadline to seek rehearing in this case, as in all other cases, expired "fifteen days after the mandate of the court [was] issued." *See* N.C.R. App. 31(a). The Controller's motion effectively raises rehearing despite being time barred from doing so. *See* N.C.R. App. 31(a). The North Carolina Rules of Appellate Procedure do not allow for such gamesmanship. The Controller cannot legitimately request a "do over" with a newly constituted Court in order to obtain a different result. And even more importantly, this Court cannot legitimately allow such a procedure.

First and foremost, the Controller misconstrues this Court's 4 November 2022 Order. In that Order, this Court "stay[ed] the Writ of Prohibition pending any further

filings in 425A21-1 pertaining to issues not already addressed in this opinion filed on this day in 425A21-2." 4 November 2022 Order. The Controller asserts "the stay was issued because the Writ of Prohibition *may* interfere with the rights of the parties in the superior court proceedings." The Controller also notes the Order is ambiguous because it "anticipates the Controller may need to make additional filings to protect his rights as well."

However, this Court explicitly stated its reasons for staying the Writ of Prohibition at least three times in *Leandro IV*, 382 N.C. 129 (2022). The Court explained that the case was remanded for further proceedings and instructed the trial court to "recalculat[e] the amount of funds to be transferred in light of the State's 2022 Budget" and subsequently "order those State officials to transfer those funds to the specified State agencies." *Leandro IV*, 382 N.C. at 391. Accordingly, "[t]o enable the trial court to do so" this Court "stay[ed] the 30 November 2021 Writ of Prohibition issued by the Court of Appeals." *Id*. To be sure, this Court then reiterated this reasoning two additional times. *Leandro IV*, 382 N.C. at 429, 476.

Even more fundamentally, the central question resolved by this Court in *Leandro IV* was whether the judiciary has the inherent authority to compel compliance with state constitutional guarantees when the responsible branches of government fail to act. *See, e.g., Leandro IV,* 382 N.C. at 429. The Order granting the Writ of Prohibition addressed the exact same question. It is impossible to reconcile

our decision in *Leandro IV*, that yes, the judiciary has that authority, *Id.,* with the Court's decision today to reinstate the Writ of Prohibition.

The Controller asks this Court to rehear issues about the Court's personal jurisdiction over him. This issue, along with any due process concerns the Controller raises in his motion, were addressed by the Court in *Leandro IV*. There, this Court rejected those concerns by noting that "[a] court cannot reasonably add as a party to a case every state official who may be involved in implementing a remedy; instead, the interests of those officials are represented by that agency, branch, or the State as a whole." *Leandro IV*, 382 N.C. at 466. Indeed, these issues were also a source of disagreement between the majority and dissent. *See id*. ("the dissent contends that affirming the November 2021 Order would violate the rights of the Controller. But as an executive branch official, the Controller's interests have been adequately represented throughout this litigation."); *see also id*. at 529-30 (Berger, J., dissenting).

The Controller also asks this Court to rehear issues that were addressed by the Remedial Order affirmed in *Leandro IV*. These questions pertain to how the transfer of funds complies with the State Budget Act. But in *Leandro IV* this Court stated that "the Controller . . . [was] directed to treat the . . . funds as an appropriation from the General Fund as contemplated within [N.C.G.S] 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers. *Leandro IV*, 382 N.C. at 423 (quoting Remedial Order). N.C.G.S. 143C-6-4(b)(2)(a) of the State

Budget Act allows a "State agency," with "approval of the Director of the Budget" to "spend more than was apportioned in the certified budget by adjusting the authorized budget" where "[r]equired by a court . . . order." Thus, this Court's reference to that section addresses the administrative issues the Controller raises.

Additionally, while the Controller asks this Court to lift or dissolve the stay of the Writ of Prohibition, granting the motion will lead to an absurd result. First, lifting the stay is premature given our Court's reason for staying the Writ of Prohibition, which was to "enable the trial court to comply with" the order "reinstat[ing] the trial court's order directing certain state officials to transfer the funds required to implement years two and three of the CRP." *Leandro IV*, 382 N.C. at 466. Thus, the stay must remain until the transfer directive is reinstated. That has not happened.

Next, lifting the stay will result in two contradictory appellate court orders—the Court of Appeals' Writ of Prohibition and this Court's *Leandro IV* Opinion and Order—being in effect simultaneously. While this Court's opinion requires further proceedings, mandates entry of the remedial order, and confirms the trial court has jurisdiction, the Writ of Prohibition divests the trial court of jurisdiction, prevents further trial court proceedings, and prohibits entry of the trial court's remedial order. But because an earlier Court of Appeals decision must yield to on point precedent from this Court, lifting or dissolving the stay cannot have the effect the movant wants. *See State v. Leaks*, 240 N.C. App. 573 (2015) ("[t]his Court is bound to follow the precedent of our Supreme Court [.]") (citing *State v. Scott*, 180 N.C. App. 462, 465

(2006). The trial court must follow this Court's *Leandro IV* opinion, despite the requested relief being granted.

To the extent the Controller purports to identify issues that could arise in subsequent proceedings, these issues have already been decided, or, if they have not, are not ripe for decision. For example, the Controller's motion raises a number of questions unrelated to the trial court's transfer directive. Instead, these questions relate to the particulars of disbursing the funds moving forward. Furthermore, this Court is asked to determine whether the trial court's order is contrary to the General Statutes and whether state and local agency officials who transfer funds can be liable civilly or criminally under N.C.G.S. § 14C-10.1. These questions are addressed by the Remedial Order, which was affirmed by *Leandro IV*. 382 N.C. at 423, 2022-NCSC-108, ¶ 77. To the extent that any of the presented questions might require judicial intervention in the future, proper procedure requires they first be presented to a superior court judge as this Court does not receive testimony or facts, *Nale v. Ethan Allen*, 199 N.C. App. 511, 521 (2009) ("It is not the role of the appellate courts to make findings of fact."); *Cutter v. Wilkerson*, 544 U.S. 709, 718 n.7 (2005) ("we are a court of review, not of first review"), or issue advisory opinions. *Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 408 (2003) ("It is no part of the function of the courts to issue advisory opinions."); *see also, Leandro IV*, 382 N.C. at 510 (Berger, J., dissenting) ("[i]t is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions.").

Finally, the majority accepts the outlandish proposition that, although all of these issues were fully briefed,[2] the Controller argued before this Court at oral argument, and the Court issued its ruling in *Leandro IV* resolving all of the issues in the appeal, somehow the basic elements of procedural due process have not been afforded to the Controller and therefore the Court of Appeals' Writ of Prohibition effectively overruling *Leandro IV* must go into effect. Rather, allowing this motion strikes another nail in the coffin for the rule of law. Our legal system is based on the premise that this Court's orders and opinions will be treated as final and binding interpretations of North Carolina law and its constitution. The "law of the case" has long been a tenant of our jurisprudence. *See, e.g., In re J.A.M.,* 375 N.C. 325, 332 (2020) ("Our decision in *J.A.M. II* constitutes 'the law of the case' and is binding as to the issues decided therein . . . Accordingly, we overrule respondent's arguments insofar as they concern the trial court's prior adjudication of neglect.") (citing *Shores v. Rabon,* 253 N.C. 428, 429 (1960) (per curiam)); *Hayes v. City of Wilmington*, 243 N.C. 525 (1956) ("[W]hen an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case,

[2] For example, issues regarding the Court's personal jurisdiction over the Controller, the General Assembly, and procedural due process requirements were previously briefed by the Controller. Controller Resp. Br. at 12-16, 18-22. In that same filing, the Controller represented that "[u]nlike the other parties, [Controller] requests the Court to simply affirm the 28 April Order and dismiss the remainder of the appeals including any further appellate review of the Writ of Prohibition." Controller's Resp. Br. at 3. The fact that this Court denied that request does not give the Controller the right to come back to this Court asking us to reverse that decision.

both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions . . . are involved in the second appeal"). Without principled explanation or justification, the majority abandons this rule.

"Today, education is perhaps the most important function of the state and local governments . . . It is the very foundation of good citizenship. *Leandro IV*, 382 N.C. at 476 (*quoting Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount. Whether the State meets this challenge remains to be determined." *Id.* (quoting *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 649 (2004) ("Leandro II")). Unfortunately, we have waited much too long to see whether the State will abide by its constitutional mandate to provide our children, including at-risk children struggling in under-resourced schools, with a basic, sound education. Thus far, at least twenty-eight classes of students "have already passed through our state's school system without benefit of relief." *Leandro IV*, 382 N.C. at 475. Not only is it true that justice delayed is justice denied, but denying adequate educational opportunities "entails enormous losses, both in dollars and in human potential, to the State and its citizens." *Id.* If our Court cannot or will not enforce state constitutional rights, those rights do not exist, the constitution is not worth the paper it is written on, and our oath as judicial officers to uphold the constitution is a meaningless charade. For the reasons stated herein, I dissent.

Justice MORGAN joins in this dissenting opinion.