

1 STATE OF NORTH CAROLINA
2 NEW HANOVER COUNTY

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 003915

2021 DEC 21 P 2:26

4 DAVID A. PERRY,

5 PLAINTIFF,

NEW HANOVER CO.

BY

REPLY TO THE DEFENDANT'S ANSWER
TO COMPLAINT

6 vs.

7
8 NEW HANOVER COUNTY BOARD OF
EDUCATION;

9
10 NEW HANOVER COUNTY SHERIFF'S
OFFICE;

11 DEFENDANTS;

12
13 HERE COMES THE PLAINTIFF, David A. Perry, Pro Se, who, pursuant to NC
14 Rules of Civil Procedure, G.S. 1A-1, Rule 7(a), hereby requests that this Court accept this reply
15 to the Defendant, New Hanover County Board of Education's Answer to Complaint, which was
16 filed with this Court on December 15, 2021.

17
18 **FIRST DEFENSE (Mootness)**

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20 The Defense's claim that this case should be dismissed on the basis of mootness is
21 wholly without merit. The Plaintiff agrees that on December 7, 2021 the New Hanover County
22 Board of Education voted 4-3 to lift its mask mandate in most situations, and that this likely will
23 mean that the Plaintiff will be able to attend the December 21, 2021 interim meeting of the board
24 without a mask. However, this fact alone does not make the Plaintiff's claims moot.

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26 It is generally true that a claim that is moot then it should be dismissed. However,
27 there are five well-known exceptions where courts should NOT dismiss a moot claim.

28 1) The defendant has voluntarily ceased an illegal practice
REPLY TO THE DEFENDANT'S ANSWER TO COMPLAINT - 1

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NEW HANOVER COUNTY
BY: *Jeanne M. Heckart*
Deputy Clerk of Superior Court

- 1 2) The action is capable of repetition yet evading review
- 2 3) The claim contains an issue of public interest
- 3 4) The class action claims are not moot
- 4 5) The action contains collateral legal consequences.

5
6 The first three exceptions to mootness are clearly evident in this case.

7 All federal and state courts agree that “It is well settled that a defendant’s
8 voluntary cessation of a challenged practice does not deprive a ... court of its power to determine
9 the legality of that practice.” Thomas v N.C. Dept of Human Resources, 124 N.C. App 698, 706,
10 478 S.E.2d 816, 821 (1996) Id (quoting City of Mesquite v. Alladin’s Castle Inc., 455 U.S. 283,
11 289, 71 L.Ed.2d 152, 159 (1982)). If this exception to mootness did not exist then there would be
12 nothing to stop an unscrupulous defendant from voluntarily ceasing a challenged practice once
13 being sued, getting the case dismissed, and then reinstating the same challenged practice. In
14 this case, there have been no changes to state or federal law that would prohibit the Defendant
15 from almost immediately reinstating their mask mandate and requiring the Plaintiff to wear a
16 mask in order to attend future meetings of the school board.

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19 North Carolina Courts have recognized that actions that are “capable of repetition
20 yet evading review” should not be dismissed on the grounds of mootness (See Matter of Jackson,
21 352 S.E.2d 449 (1987) – “However, the case is similar to that category of cases which federal
22 courts, in determining the existence of federal jurisdiction in otherwise moot cases, term ‘capable
23 of repetition yet evading review.’ See, e.g., Moore v. Ogilvie, 394 U.S. 814, 89 S. Ct. 1493, 23
24 L. Ed. 2d 1 (1969)). There are two requirements for this exception to apply:

- 25 (1) the challenged action [is] in its duration too short to be fully litigated prior to its
26 cessation or expiration, and (2) there [is] a reasonable expectation that the same
27

1 complaining party would be subjected to the same action again. (See Crumpler v.
2 Thornburg, 375 S.E.2d 708 (1989))

3 In this case the Defendant, the New Hanover County Board of Education meets at least twice per
4 month (once for their regular meeting, and once for their interim meeting) and they could also
5 call additional “special meetings” if they so desire. Nothing in state or federal law would prohibit
6 them from reinstating their mask mandate at a moment’s notice. In addition, state law (Senate
7 Bill 654) currently requires them to reevaluate their mask policy once per month. There is simply
8 not enough time to fully litigate the challenged action of this case. Finally, the situation with
9 COVID-19 is extremely fluid. The primary reason the school board decided to lift the mask
10 mandate at its December 7, 2021 meeting was that COVID-19 infection and hospitalizations
11 rates were down. It is a reasonable expectation that any uptick in those rates would cause the
12 Defendant to reinstitute their mask mandate and apply it to school board meetings.
13
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15 North Carolina Courts have recognized that claims that contain “an issue of
16 public interest” should not be dismissed on the basis of mootness (See Leak v. High Point
17 Council, 25 N.C App 394, 397, 213 S.E.2d 386, 388 (1975) – “where the question involved is a
18 matter of public interest the court has the duty to make a determination.”). This lawsuit meets
19 that definition. The lawsuit is based on the NC Open Meetings law (N.C.G.S. 143) and the very
20 existence of that legislation is because the General Assembly recognized that “the public policy
21 of North Carolina that the hearings, deliberations, and actions of these bodies be conducted
22 openly” is in the public interest. Furthermore, this lawsuit is also based on all of our First
23 Amendment rights of assembly and petition. This case has also attracted a great deal of local
24 press coverage. There are simply thousands of local citizens who agree with the Plaintiff and
25 might wish to attend a local government meeting without being forced to wear a mask. It is
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1 important for this Court to determine the legality and constitutionality of these types of
2 restrictions on our freedom.

3
4 Finally, this case not only seeks prospective injunctive relief, but also seeks
5 retrospective relief, pursuant to G.S. 143-318.16A(a), by having this Court declare all actions of
6 the New Hanover County School Board (from 45 days prior to the initiation of this lawsuit =>
7 the date the violations of the NC Open Meetings permanently cease). As the General Assembly
8 contemplated when they crafted this law, the “public at large” (and not just the Plaintiff) suffers
9 damage when government bodies disobey North Carolina law and exclude members of the
10 public from fully participating in meetings of government bodies. Such punitive relief provides a
11 deterrent to government bodies from ignoring the NC Open Meetings law. Dismissing this case
12 now would deny the punitive retrospective relief that is necessary in this case.
13

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15 **SECOND DEFENSE (Objection to Form of Plaintiff’s Complaint)**

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17 The Defense argument that the Plaintiff’s claims should be dismissed for failing
18 to number every single paragraph in its **Petition for Declaratory Judgement & Relief** is
19 without merit. NC Rules of Civil Procedure, G.S. 1A-1, Rule 10(b) does indeed state that
20 “Averments of claim or defense shall be made in numbered paragraphs.” However, the Plaintiff
21 did indeed number all of its claims in the “Allegations” section of the complaint. This section of
22 the Complaint contains the heart of the Plaintiff’s individualized claims. The other sections of
23 the Complaint only provide context, state facts that are in the public record, or provide legal
24 argument. It should be noted that if the Defendant truly found it “difficult and confusing” to
25 respond the Plaintiff’s Complaint then they should have filed a motion for more definite
26 statement, pursuant to NC Rules of Civil Procedure, G.S. 1A-1, Rule 12(e) a long time ago.
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1 NC, but then denies all else. The residency of the Plaintiff is a matter of public record and any
2 attempt to deny that fact is simply a stalling tactic.

3 In the Standing section of this Answer, the Defense again complains about
4 unnumbered paragraphs, labels the entire paragraph as legal conclusions, and issues a blanket
5 denial of any remaining allegations contained within in it. Again, the Plaintiff's residency is a
6 matter of public record. The Plaintiff agrees that the rest of this section is legal conclusions.
7 There was no need for the Defendant to provide an answer to it.
8

9 In the Parties section of this Answer, the Defense admits to the makeup of the
10 New Hanover County Board of Education at the time this lawsuit was initiated. The Defense also
11 says that it lacks sufficient knowledge to ascertain the "facts" asserted for the other parties in this
12 case, and therefore denies them. Again, the makeup of the other parties is a matter of public
13 record. There is no reason to deny anything in this section unless the Defense is motivated to
14 employ stall tactics.
15

16 In the Facts section of this Answer, the Defense again complains about
17 unnumbered paragraphs, feigns ignorance of the facts presented in that section of the Plaintiff's
18 complaint, and issues a blanket denial of everything contained within it. All of the facts
19 presented in this section the Plaintiff's Complaint are public record. Furthermore, many (but not
20 all) of the items presented in this part of the Complaint refer to the specific conduct of the
21 defendants in this case. The Defendant should have detailed specific knowledge of what
22 happened at the New Hanover County Board of Education to specifically affirm or deny the
23 individual facts presented. Offering up blanket denials is simply a stall tactic.
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1 In the Allegations section of this Answer, the Defense spends most of its time
2 either saying that the allegations in the Plaintiff's Complaint were a legal conclusion or offering
3 blanket denials.

4
5 1) The Defendant admits that a mask mandate was in effect at the school board meetings,
6 and that members of the public were only allowed to take off their face masks when
7 speaking during the public comment section of the meetings. The Defendant also
8 correctly states that the meetings were broadcast live on You Tube but denies all other
9 allegations. What is there to deny? The heart of the Plaintiff's first allegation is that the
10 school board made no exceptions for members of the public who wanted to physically
11 attend the meeting but could not or would not wear a mask.

12
13 2) The Defendant admits that they enlisted the aid of the New Hanover County Sheriff's
14 Office in enforcing their mask policy by asking them to remove individuals from the
15 meeting who were not obeying that policy. The Defendant then issues a blanket denial
16 for all else. The Plaintiff contends that the Defendant, the New Hanover County Board
17 of Education, instructed members of the Sheriff's Office to deny entry to members of the
18 public who were not wearing masks. The Defense has failed to specifically plead to that
19 allegation.
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21 3) The Plaintiff concurs that the third allegation is legal conclusion.

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23 4) The Plaintiff concurs that the fourth allegation is mostly legal conclusion. However, the
24 Defendant has not specifically answered to the allegation as to whether they have
25 provided a physical location for the public to meet when electronic meetings are
26 conducted by the school board.
27
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- 1 5) The Plaintiff concurs that the fifth allegation forms a legal conclusion. However, the
2 Defendant has failed to specifically answer the allegation that non-physical attendees
3 who wish to provide comment during the public comments section of the meeting, are
4 required to leave their comment on voicemail, and that this voicemail is not played back
5 live during the course of the meeting.
- 6
- 7 6) The Plaintiff concurs that the sixth allegation is legal conclusion
- 8 7) The Plaintiff concurs that the seventh allegation is legal conclusion
- 9 8) The Plaintiff concurs that the eighth allegation is legal conclusion
- 10
- 11 9) The Defendant says it lacks sufficient knowledge of whether the ninth allegation is true
12 or not. The Plaintiff concurs that the 2nd part of this allegation makes a legal conclusion
13 but wonders why any denial of the allegation by the Defendant is necessary.
- 14
- 15 10) The Plaintiff concurs that the tenth allegation forms a legal conclusion. However, the
16 Defendant has failed to specifically answer the allegation that they have failed to provide
17 an exemption to their mask mandate for members of the public who have been vaccinated
18 against COVID-19.
- 19
- 20 11) The Plaintiff concurs that the eleventh allegation forms a legal conclusion. However, the
21 Defendant has failed to specifically answer whether it has even considered, never mind
22 implemented, any of the alternate measures suggested by the Plaintiff.
- 23
- 24 12) The Plaintiff concurs that the twelfth allegation forms a legal conclusion. However, the
25 Defendant has failed to specifically answer the allegation that have not provided any
26 exemptions for their mask mandate policy at school board meetings.

27 It is the firm belief of the Plaintiff that there are little to no facts to be disputed in
28 this case, and that the case should be decided on its legal merits. Unnecessarily drawing this

1 process out with blanket denials of basic facts, or an unneeded and lengthy discovery process, is
2 not in the interests of justice and a waste of this Court's time.

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5 **FOURTH DEFENSE (Standing)**

6 The Defendant, the New Hanover County Board of Education, filed a Motion to
7 Dismiss in this case on October 27, 2021. In addition to seeking this Court to dismiss the case on
8 the basis of "failure to state a claim upon which relief can be granted" (under Rule 12(b)(6)),
9 Defense counsel also sought to have the case dismissed on the basis of a lack of subject matter
10 jurisdiction. As explained in Page 6 of the Defendant's Brief in Opposition to Preliminary
11 Junction and in Support of Motion to Dismiss (which was filed on October 29, 2021) the basis
12 for this subject matter jurisdiction argument was a lack of standing by the Plaintiff. On
13 November 2, 2021, this Court conducted a hearing on the Defendant's Motion to Dismiss and it
14 was denied by Order of Judge Harrell. It would not be proper for this Court to relitigate any
15 defense based on standing. If Defense Counsel is aggrieved with the Order of Judge Harrell,
16 then the proper course is for them to bring the matter to the NC appellate court system.

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19 The Plaintiff concedes that it may only be the intent of the Defendant to preserve
20 this defense for appeal. If that's the case, then the Plaintiff has no issue with it. However, it
21 should be noted that the Plaintiff has submitted a Motion for Supplemental Pleadings. Assuming
22 this motion is granted, it is clear that the Defendant tried to physically enter the school board
23 meeting of November 9, 2021 and was denied entry by the defendants for not wearing a mask.
24 So even if the appeals court ruled that the Plaintiff did not have standing unless he physically
25 was denied entry to school board meeting, such personal standing certainly exists now.

