No. 201PA12 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

MARGARET DICKSON, *et al.* *Plaintiffs*, v. ROBERT RUCHO, *et al*. *Defendants*.	)	**From Wake County** (*Consolidated*)
NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP; *et al.* *Plaintiffs*, v. THE STATE OF NORTH CAROLINA, *et al.* *Defendants*.	)	

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LEGISLATIVE DEFENDANTS' BRIEF

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LEGISLATIVE DEFENDANTS' BRIEF
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ISSUES PRESENTED

I. DID THE TRIAL COURT ERRONEOUSLY DETERMINE THAT N.C. GEN STAT. § 120-133 WAIVES THE GENERAL ASSEMBLY'S RIGHTS UNDER THE COMMON LAW BEYOND THE LEGISLATIVE CONFIDENTIALITY OTHERWISE RECOGNIZED BY CHAPTER 120, ARTICLE 17, OF THE GENERAL STATUTES?

II. EVEN IF THE TRIAL COURT CORRECTLY HELD THAT A WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE CAN BE IMPLIED UNDER N.C. GEN. STAT. § 120-133, THE TRIAL COURT ERRED BY FAILING TO LIMIT ANY SUCH WAIVER TO COMMUNICATIONS AND DOCUMENTS CREATED PRIOR TO THE ENACTMENT OF THE 2011 PLAN.

STATEMENT OF THE CASE

Plaintiffs Margaret Dickson, *et al.* ("the *Dickson* plaintiffs") filed their complaint on 3 November 2011, seeking to have the redistricting plans for the North Carolina Senate, the North Carolina House of Representatives and the United States House of Representatives declared invalid on a variety of State and federal constitutional and statutory grounds. The *Dickson* plaintiffs amended their complaint on 12 December 2011. (R Vol. I, pp. 101-218) Similarly, plaintiffs North Carolina State Conference of Branches of the NAACP, et al., ("the *NAACP* plaintiffs") filed their complaint on 4 November 2011, also seeking to have the redistricting plans declared invalid. The *NAACP* plaintiffs amended their complaint on 9 December 2011. (R Vol. I, pp. 2-100).

Following the filing of the complaints in November 2011, the Chief Justice of North Carolina entered an order, pursuant to N.C. Gen. § 1-267.1, creating a three-judge panel of the Superior Court consisting of the Hon. Paul C. Ridgeway, the Hon. Joseph N. Crosswhite and the Hon. Alma L. Hinton to hear both actions. By order of the three-judge panel on 19 December 2011, the two cases were

consolidated for all purposes. On 6 February 2012, the three-judge panel entered its order allowing in part and denying in part defendants' motion to dismiss. (R Vol. II, pp. 353-56)

On 29 February 2012, plaintiffs filed their motion to compel, seeking to have defendants produce in discovery certain documents that defendants asserted were subject to the attorney-client privilege or were attorney work product. (R Vol. III, pp. 357-499) The motion came on for hearing before the three-judge panel on 13 April 2012, and on 20 April 2012, the court entered its order allowing the motion to compel. (R Vol. III, pp. 571-83) The legislative defendants gave timely notice of appeal on 24 April 2012. (R Vol. III, pp. 584-85) On 11 May 2012, this Court entered its order issuing its writ of supersedeas and setting an expedited schedule for this appeal. The record on appeal was timely filed pursuant to that order on 31 May 2012.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This is an appeal pursuant to N.C. Gen. Stat. § 1-277(a) from an order of the three-judge panel requiring the legislative defendants to produce documents that the legislative defendants assert are protected by attorney-client privilege and/or are attorney work product. This Court has held that "[t]he trial court's determination of the applicability of the [attorney-client] privilege or disclosure affects a substantial right and is therefore immediately appealable." *In re*

Investigation of Death of Eric Miller, 357 N.C. 316, 343, 584 S.E.2d 772, 791 (2003); *see also Sharpe v. Worland*, 351 N.C. 159, 522 S.E.2d 577 (1999). This is undoubtedly so because, absent a right of immediate appeal, the protection of the privilege and the value of any later appeal would be lost were parties required to produce communications protected by the privilege.

Appeal lies directly to this Court pursuant to N.C. Gen. Stat. § 120-2.5. *See Pender County v. Bartlett*, 361 N.C. 491, 497, 649 S.E.2d 364, 368 (2007) (interpreting N.C. Gen. Stat. § 120-2.5 to apply to "any appeal" from a three-judge panel in redistricting cases), *aff'd sub nom*. *Bartlett v. Strickland*, 556 U.S. 1 (2009).

STATEMENT OF THE FACTS

On 27 and 28 July 2011, the North Carolina General Assembly enacted new redistricting plans for the North Carolina House of Representatives, North Carolina Senate, and the United States House of Representatives ("the 2011 Plans"). The General Assembly enacted the 2011 Plans in July to ensure adequate time to obtain preclearance under Section 5 of the Voting Rights Act ("*VRA*") as well as to give state and county elections officials enough time to implement the new districts.[1]

[1] The Congressional Redistricting Plan, S.L. 2011-402, became law on 27 July 2011. The Senate Redistricting Plan, S.L. 2011-403 also became law on 27 July 2011. The House Redistricting Plan, S.L. 2011-404, became law on 28 July 2011. Technical corrections to all three plans were made law on 7 November 2011. *See* S.L. 2011-416, S.L. 2011-414, and S.L. 2011-413.

During the public hearing and legislative process leading up to the enactment of Senate, House, and Congressional redistricting plans, the leaders of the General Assembly, President Pro Tem Phil Berger, Speaker Thom Tillis, Senate Redistricting Chair Robert Rucho, and House Redistricting Co-Chairs David Lewis, Nelson Dollar and Jerry Dockham ("the legislative defendants"), received legal advice from the Attorney General's office and two outside law firms, Ogletree Deakins and Jones Day.[2] Alexander McC. Peters and Tiare B. Smiley were assigned by the Attorney General to provide advice to the legislative leaders. Thomas A. Farr and Phillip J. Strach from Ogletree Deakins were employed to provide legal advice to the leaders, along with Michael Carvin and Michael McGinley from Jones Day.[3] The purpose of this legal advice was to prepare for seeking preclearance of the plans under Section 5, as well as to prepare for any lawsuits that might be filed challenging the 2011 Plans. (R Vol. III, pp. 453-56.)

On 2 September 2011, the Attorney General of North Carolina and the defendants filed a lawsuit in the United States District Court for the District of Columbia. *State of North Carolina v. Holder*, No. 11-cv-01592-RWR (D.D.C. 2011). The lawsuit sought judicial preclearance under Section 5 of the *VRA* for the

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[2] The other two defendants in the consolidated cases are the State of North Carolina and the North Carolina State Board of Elections.

[3] The Jones Day firm was primarily hired to assist in obtaining preclearance of the 2011 Plans under Section 5 of the *VRA*. (R. Vol. III, pp.418-19.)

2011 Plans. The Attorney General of North Carolina and the defendants simultaneously sought administrative preclearance of the plans with the United States Attorney General. The lawyers referenced above provided legal advice for both proceedings and were named as counsel for the lawsuit filed in the District of Columbia.[4] On 1 November 2011, the United States Attorney General administratively precleared all three plans. This action by the Attorney General mooted the civil lawsuit filed by the State in the District of Columbia and the case was dismissed on 8 November 2011.

On 8 November 2011, the *Dickson* plaintiffs served requests for production of documents on defendants. (R Vol. III, pp. 364-75.) These requests sought the production of specified documents that were created before redistricting plans were adopted in July 2011. On 13 January 2012, after receiving an extension of time to respond, defendants served written objections and responses to plaintiffs' discovery requests. (R Vol. III, pp. 388-401.) By these responses, together with supplemental responses, the legislative defendants produced tens of thousands of pages of documents responsive to the requests, primarily in electronic format but also in the form of hard copies. Of the many thousands of documents that are

[4] By the time the 2011 Plans were enacted, Tiare B. Smiley was involved in other litigation and was preparing for retirement from the Attorney General's Office and was no longer providing legal advice to the legislative defendants. She was replaced on defendants' legal team by Special Deputy Attorney General Susan K. Nichols.

responsive to plaintiffs' requests, the legislative defendants have objected to the production of and withheld only a specific set of documents, which are a small fraction of the total number of responsive documents. The legislative defendants objected on the grounds that the documents are protected from disclosure by the attorney-client privilege or work-product doctrine.

On 24 February 2012, in response to concerns of counsel for plaintiffs, defendants served Amended Objections, providing additional information regarding the basis for defendants' claims of privilege. The Amended Objections identified the sender and the recipient of the communications at issue, as well as the subject of the communications. In particular, defendants specified the following categories of communications for which the legislative defendants were claiming privilege:

1. Emails to and from Tom Farr, Phil Strach, Alec Peters, and Tiare Smiley to or from Bob Rucho, David Lewis, Thom Tillis, Phil Berger or their legislative staff members acting on their behalf or at their direction regarding legal advice on the impact of census data on redistricting plans.

2. Emails to and from Tom Farr, Phil Strach, Alec Peters, and Tiare Smiley to or from Bob Rucho, David Lewis, Thom Tillis, Phil Berger or their legislative staff members acting on their behalf or at their direction regarding legal requirements for a fair process under section 5 of the Voting Rights Act.

3. Emails to and from Tom Farr, Phil Strach, Alec Peters, and Tiare Smiley to or from Bob Rucho, David Lewis, Nelson Dollar, Thom Tillis, Phil Berger or their legislative staff members acting on their

behalf or at their direction regarding legal advice in preparation for meetings of the House and Senate Redistricting Committees.

4. Emails to and from Tom Farr, Phil Strach, Michael Carvin, Michael McGinley, Alec Peters, and Tiare Smiley to or from Bob Rucho, David Lewis, Nelson Dollar, Thom Tillis, Phil Berger or their legislative staff members acting on their behalf or at their direction regarding legal requirements for legislative and congressional districts.

5. Emails to and from Tom Farr, Phil Strach, Michael Carvin, Michael McGinley, Alec Peters, and Tiare Smiley to or from Bob Rucho, David Lewis, Nelson Dollar, Thom Tillis, Phil Berger or their legislative staff members acting on their behalf or at their direction regarding legal advice regarding any public statements about redistricting or proposed redistricting plans.

6. Emails to and from Tom Farr, Phil Strach, Michael Carvin, Michael McGinley, Alec Peters, and Tiare Smiley to or from Bob Rucho, David Lewis, Thom Tillis, Phil Berger or their legislative staff members acting on their behalf or at their direction regarding legal advice on the preclearance process for redistricting plans.

7. Emails to and from Tom Farr, Phil Strach, Michael Carvin, Michael McGinley, Alec Peters, and Tiare Smiley to or from Bob Rucho, David Lewis, Nelson Dollar, Thom Tillis, Phil Berger or their legislative staff members acting on their behalf or at their direction regarding legal advice for the redistricting session of the General Assembly.

(R Vol. III, pp. 413-17.)

The legislative defendants further clarified that the phrase "legislative staff members" was limited to the following individuals: Jason Kay, Tracy Kimbrell, Jim Blaine, and Brent Woodcox. *Id.* Mr. Kay is the General Counsel for Speaker Tillis. Ms. Kimbrell is the General Counsel for the Senate President *Pro Tempore*

Berger and Mr. Blaine is Chief of Staff for the President *Pro Tempore*. Mr. Woodcox serves as the redistricting counsel for the President *Pro Tempore* and the Chairman of the Senate Redistricting Committee, Senator Bob Rucho.

On 29 February 2012, plaintiffs filed a motion seeking to compel defendants to produce the documents withheld on the basis of attorney-client privilege and the work product doctrine. (R Vol. III, pp. 357-63.) In their motion, plaintiffs contended that N.C. Gen. Stat. § 120-133, enacted in 1983, constitutes a waiver by the General Assembly of the common law attorney-client privilege and work product doctrine for redistricting communications once the relevant redistricting act becomes law.[5] Plaintiffs contended that N.C. Gen. Stat. § 120-133 therefore compelled the production of documents prepared by counsel for the legislative defendants, including outside counsel and the Attorney General's Office.

On 11 April 2012, the legislative defendants filed a response to plaintiffs' motion, denying that N.C. Gen. Stat. § 120-133 waives, or even addresses, the common law attorney-client privilege or the work product doctrine, or that the statute applies to the Attorney General's Office. (R Vol. IV, pp. 507-70). The defendants' response included an engagement letter executed in 1991 between the

[5] No court has ever construed the scope of the waiver established by N.C. Gen. Stat. § 120-133. Therefore, this case presents a question of first impression nearly thirty years after the enactment of the contested statute despite its implementation in a manner so as to preserve the attorney-client privilege by the General Assembly and the Attorney General during these years. *See infra* at 27-32. The fact that the question has only arisen now indicates the novelty of plaintiffs' contentions.

North Carolina House of Representatives and its outside counsel (the Ferguson Stein law firm) under which counsel agreed to provide legal advice concerning redistricting. (R Vol. IV, pp. 529-30.) In this engagement letter, the General Assembly, its legislative counsel, and its outside counsel, all agreed that N.C. Gen. Stat. § 120-133 did not apply to communications covered by the common law attorney-client privilege.[6] The legislative defendants in the instant case also provided the superior court with their engagement letter for their outside counsel (Ogletree Deakins) which was modeled on the 1991 engagement letter signed by then Speaker Dan Blue and the Ferguson Stein law firm. (R Vol. IV, pp. 532-35.)

On 20 April 2012, the court below granted plaintiffs' motion to compel the production of written communications between defendants and their outside counsel.[7] (R Vol. IV, pp. 571-81.) The court ruled that while communications between members of the General Assembly and legal counsel "may have originally been cloaked with privilege, by enacting N.C. Gen. Stat. § 120-133, the General Assembly *expressly* waived any and all such privileges once those redistricting

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[6] Indeed, the 1991 engagement letter shows that the 1991 legislative leadership, whose interpretation of N.C. Gen. Stat. § 120-133 was relied upon by the current legislative leaders, was represented by the same law firm (Ferguson Stein) that today represents the *NAACP* plaintiffs in this consolidated action.

[7] The Court ruled that N.C. Gen. Stat. § 120-133 does not apply to the Attorney General's office and denied plaintiffs' motion to the extent it sought the disclosure of confidential communications between the legislative defendants and the Attorney General's office. *See* N.C. Gen. Stat § 120-129(2) ("legislative employee" does not include members of the Council of State). Plaintiffs did not appeal from this ruling.

plans were enacted into law" (emphasis added). (R Vol. IV, p. 576). Based upon this conclusion, the court held that "documents concerning redistricting" became public records when the 2011 plans were enacted. (*Id.*) Nowhere in its order did the court limit the time frame for the statutory waiver except to the extent that no waiver occurs until redistricting plans are enacted. (R Vol. IV, pp. 576-77.) As a result, the order can be construed as waiving any privilege for "documents concerning redistricting" created prior to the enactment of redistricting plans as well as documents created *after* the enactment of redistricting plans.

Despite its broad interpretation of the waiver established by N.C. Gen. Stat. § 120-133, the trial court ruled that the statute preserves some element of the attorney-client privilege and work product doctrine. The court limited the permissible scope of the attorney-client privilege and work product doctrine to documents prepared "solely in connection with redistricting litigation." The court failed to identify a specific point when the attorney-client privilege or work product doctrine might apply, suggested that the privilege and doctrine might apply only to "documents created after the litigation was commenced" or "documents created after the final General Assembly and Congressional redistricting plans were pre-cleared by the United States Department of Justice," and invited the parties to negotiate "a reasonable means of identifying categories of documents that ought to remain confidential." (R Vol. IV, pp.579-80.)

ARGUMENT

I. STANDARD OF REVIEW

Ordinarily, orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion. *Insurance Co. v. Sprinkler Co.*, 266 N.C. 134, 143, 146 S.E.2d 53, 62 (1966). But where, as here, an appellant contends that the order appealed from is affected by errors of law, and raises questions involving statutory interpretation, *de novo* review applies. *See In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) ("Questions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo.") (citing *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998) and *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 642, 256 S.E.2d 692, 696 (1979)).

II. THE TRIAL COURT ERRONEOUSLY DETERMINED THAT N.C. GEN. STAT. § 120-133 WAIVES THE GENERAL ASSEMBLY'S COMMON LAW RIGHTS BEYOND THE LEGISLATIVE CONFIDENTIALITY OTHERWISE RECOGNIZED BY CHAPTER 120, ARTICLE 17, OF THE GENERAL STATUTES.

A. Article 17 Builds on General Principles of Legislative Immunity and Recognizes Confidentiality Requirements for Legislative Communications.

The principle of legislative immunity has deep roots in the common law. *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951); *Vereen v. Holden*, 121 N.C. App. 779, 782, 468 S.E.2d 471, 473 (1996). Legislative immunity was formally incorporated into the United States Constitution by the "Speech and Debate

Clause." *See* U.S. Const. art. I, § 6; *Tenney*, 341 U.S. at 372-73. North Carolina elected to preserve the common law legislative immunity, as applied to members of the General Assembly, by adopting statutory protections almost identical to those given to members of Congress. *See* N.C. Gen. Stat. § 120-9. Prior to 1983, there were no statutes or cases restricting immunities available to members of the General Assembly under the common law.

In 1935, the General Assembly enacted public disclosure requirements applicable to state agencies and local governments under the Public Records Act. The purpose of that law was to make "public records" more available to the general public. *See* S.L. 1935-265. In 1975, the Public Records Act was amended in pertinent part to limit the scope of the traditional common law attorney-client privilege, as it applied to those governmental bodies covered by the Public Records Act. *See* S.L. 1975-662; N.C. Gen. Stat. § 132-1.1; *News and Observer v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992). The Public Records Act was amended again that year to establish a more specific definition of the term "public record." S.L. 1975-787; N.C. Gen. Stat. § 132-1.

There is no indication that the General Assembly ever intended that the requirements of the Public Records Act would be generally applicable to itself, or that anything in the law waived the right of members of the General Assembly or state or local government agencies to assert legislative or attorney-client privilege.

Thus, prior to 1983, there were no reported North Carolina decisions regarding legislative immunity or legislative privilege. It therefore may be reasonably inferred that prior to 1983, statutory protections and the common law rules regarding legislative immunity fully applied, with no exceptions, to members of the General Assembly. *See* N.C. Gen. Stat. § 4-1 (common law remains in full force until it is abrogated or repealed).

In 1983, the General Assembly enacted Article 17 of Chapter 120 of the General Statutes, dealing with the "Confidentiality of Legislative Communications." At its heart, Article 17 makes drafting and information requests to a legislative employee from a legislator, as well as documents prepared by legislative employees at the request of a legislator, confidential. N.C. Gen. Stat. §§ 120-130 and 120-131. Notably, these provisions specifically provide that the confidential information is not a public record as defined by N.C. Gen. Stat. § 132-1. N.C. Gen. Stat. §§ 120-130(d); 120-131(b). Also notably, Article 17 speaks of drafting and information requests, not of legal advice.

In N.C. Gen. Stat. § 120-129, the General Assembly defined the term "document," as that term should be interpreted for purposes of Article 17, in a manner that is very similar to the definition used to define "public records" under the Public Records Act. *Compare* N.C. Gen Stat. §120-129(1) *with* N.C. Gen. Stat. § 132-1. "Legislative employee" is defined to include employees of the General

Assembly and consultants or counsel to members and committees who are paid by State funds; members of the Council of State are specifically excluded from the definition. N.C. Gen. Stat. § 120-129(2). "Legislator" is defined to include members of the State Senate and State House. N.C. Gen. Stat. § 120-129(3).

Article 17 also provides that legislative employees normally cannot be compelled to testify about information they acquired during a committee hearing, during the legislative process, or as a result of communications made confidential pursuant to N.C. Gen. Stat. §§ 120-130 and 120-131. *See* N.C. Gen. Stat. § 120-132. Violation of the confidentiality requirements imposed by Article 17 "shall be grounds for disciplinary action in the case of employees, for referral to the academic institution for appropriate discipline in the case of law student externs, and for removal from office in the case of public officials." N.C. Gen. Stat. § 120-134.

After providing statutory confidentiality for documents and information already encompassed by the common law of legislative privilege, the General Assembly then enacted a statutory exception to this confidentiality:

> Notwithstanding any other provision of law, all drafting and information requests to legislative employees and documents prepared by legislative employees for legislators concerning redistricting the North Carolina General Assembly or the Congressional Districts are no longer confidential and become public records upon the act establishing the relevant district plan becoming law. Present and former legislative employees

> may be required to disclose information otherwise protected by G.S. 120-132 concerning redistricting the North Carolina General Assembly or the Congressional Districts upon the act establishing the relevant district plan becoming law.

N.C. Gen. Stat. § 120-133.

By comparing the language in N.C. Gen. Stat. § 120-133 with other sections of Article 17, it is apparent that the legislature intended that the waiver of confidentiality with regard to redistricting matters be expressly limited to the confidentiality otherwise recognized by Article 17. *See* N.C. Gen. Stat. § 120-131; 120-132.

B. The Attorney-Client Privilege and the Work Product Doctrine are Common Law Rights Available to Members of the General Assembly and Staff Independent of the Legislative Confidentiality Recognized by Article 17.

The common law attorney-client privilege is "one of the oldest and most revered in law." *Miller*, 357 N.C. at 328. "It is the oldest of privileges for confidential communication known to the common law." *UpJohn Company v. United States*, 449 U.S. 383, 389 (1981). Its purpose is to "encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Id.* The benefit of the attorney-client privilege "outweighs the risks of truth-finding posed by barring full disclosure in Court." *Miller*, 357 N.C. at 329.

Prior to 1981, the Supreme Court of the United States assumed that the attorney-client privilege applied to corporations. *United States v. Louisville & Nashville R. Co.*, 236 U.S. 348, 736 (1915). This assumption was confirmed in 1981 by the Court's decision in the *UpJohn* case. Similarly, it must be assumed that the common law attorney-client privilege applies to "government clients." Restatement (Third) of the Law Governing Lawyers § 74 (2000). Like private sector clients, the attorney-client privilege "aids government entities and employees in obtaining legal advice founded on a complete and accurate factual picture." *Id*. Thus, "courts have generally construed open-meeting, open-files, whistle-blower, and similar statutes as subject to the attorney client privilege, recognizing that otherwise governments would be at unfair advantage in litigation, in handling claims and in negotiations." *Id*.

In *UpJohn*, the Supreme Court ruled that a corporation's attorney-client privilege applied to decision makers and their staff who communicate with the corporation's legal counsel pursuant to the direction of the decision makers. This is because a corporation must use its employees to ensure that the corporation's attorney acquires all of the information necessary for the attorney to provide legal advice. *UpJohn*, 449 U.S. at 390-95. The decision in *UpJohn* regarding the scope of attorney-client privilege corresponds with the rationale used by the Court to explain that legislative privilege extends to a legislator's staff. *Gravel*, 408 U.S.

606, 617 (1972) (for purposes of legislative privilege, legislative staff are the alter ego of their legislator). Just as a legislator's legislative privilege must be extended to encompass his staff, it is equally necessary and proper for a legislator's attorney-client privilege to be similarly extended. *UpJohn*, *supra*.[8]

Like the attorney-client privilege, the work product doctrine has its roots in the common law. *Hickman v. Taylor*, 329 U.S. 495, 509-511, n.9 (1947). This doctrine has been formally recognized in N.C. Gen. Stat. § 1A-1, Rule 26(b)(3)(2011). The doctrine "protect[s] the mental processes of the attorney from outside interference and provide[s] a privileged area in which he can analyze and prepare his client's case." *Wachovia Bank v. Clean River Corp.*, 178 N.C. App. 528, 533, 631 S.E. 2d 879, 883 (2006) (quoting *State v. Prevatte*, 356 N.C. 178, 218, 570 S.E. 2d 440, 462 (2002)).

The work product doctrine also "maintain[s] the adversarial trial process and [ensures] that attorneys are properly prepared for trial by encouraging written preparation." *Evans v. United Services Auto Ass'n*, 142 N.C. App. 18, 28-29, 541 S.E. 2d 782, 789 (2011). Without this protection, attorneys would be "deterred from adequately preparing for trial because of fears that the fruits of their labors will be freely accessible by opposing counsel." *Id*. at 29, 541 S.E.2d at 789

[8] To date, plaintiffs have not contested the proposition that the legislators' attorney-client privilege and any work product created by their counsel encompass communications with the legislators' personal counsel and senior staff.

(citations omitted). After all, "[d]iscovery was hardly intended to enable a learned profession to perform its function either without wits or on wits borrowed from the adversary." *Willis v. Duke Power Co.*, 291 N.C. 19, 36, 229 S.E. 2d 191, 201 (1976) (quoting *Hickman*, 329 U.S. at 516).

The court below acknowledged that the legislative defendants retained, in some measure, the right to assert the common law attorney-client privilege and the work product doctrine. (R. Vol. IV, pp. 579-80.) Plaintiffs, in their Response in Opposition to the legislative defendants' Petition for Writ of Supersedeas and Motion for Stay ("Plaintiffs' Opposition"), agreed with this conclusion by the superior court. ("Plaintiff's Opposition pp. 12-13.) Therefore, there is no dispute regarding whether the attorney-client privilege or the work product doctrine apply to members of the General Assembly and their senior staff. However, the trial court's all-encompassing interpretation of N.C. Gen. Stat. § 120-133 found a waiver of the attorney-client privilege and work product doctrine in a statute that does not even mention those privileges. The trial court's order focuses on the broad language used to define "documents" and treats that language as sweeping all information within the reach of the statute, even if it is information that is otherwise privileged or protected. Such an approach ignores this Court's jurisprudence regarding strict construction of statutes affecting common law rights.

C. The Superior Court's Order Violates a Basic Rule of Construction that Statutes in Violation of the Common Law Must be Strictly Construed.

While N.C. Gen. Stat. § 120-133 expressly waives legislative confidentiality to a limited extent, nothing in that statute or Article 17 expressly or implicitly waives the attorney-client privilege or work product doctrine, both of which are grounded in the common law.

In interpreting a statute, the prime role for the Court is to give effect to legislative intent. *State v. Anthony*, 351 N.C. 611, 614, 528 S.E.2d 321, 322 (2000). Legislative intent is first ascertained from the plain words of the statute. *Id.* Further, when two statutes deal with a common subject matter, one in general terms and one in more definite terms, they should be read together to effectuate a consistent legislative policy. *In re Halifax Paper Co.*, 259 N.C. 589, 594, 131 S.E.2d 441, 445 (1963). Thus, it is the duty of the Court to reconcile different statutes dealing with the same subject and to harmonize their interpretation. *Id*. A similar rule applies to the interpretation of different provisions of the same statute. Therefore, different sections of a statute must be considered and interpreted as a whole. *Fishing Pier v. Town of Carolina Beach*, 274 N.C. 362, 370, 163 S.E.2d 363, 369 (1968); *In re Hickerson*, 235 N.C. 716, 721, 71 S.E.2d 129, 132 (1952).

These rules of statutory construction apply with special force to statutes that purport to repeal or modify rights established by the common law. This is because

the common law remains in full force and effect in the State of North Carolina except to the extent it has been "abrogated" by statute. N.C. Gen. Stat. § 4-1. The Court must therefore harmonize the common law with any statutes that purport to abrogate or modify common law rights. *Price v. Edwards*, 178 N.C. 493, 500, 101 S.E. 33, 36-37 (1920) ("[A]cts of the legislature in derogation of the common law *will not be extended by construction*.") (emphasis added). Because "the common law forms the basis of the Anglo-Saxon system of jurisprudence, and furnishes the rule of decision except so far as it has been changed by statute, the common law in regard to a particular matter is presumed to be in force until it affirmatively appears that it has been abrogated or modified by statute." *Id.* Therefore, any statutory limits to the common law must be strictly construed. *Id.*[9]

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[9] For this reason alone, the trial court's conclusion that the General Assembly "expressly" waived legislative privilege, attorney-client privilege, and work product protection, is clearly erroneous. Other than the limited waiver of legislative privilege explicitly addressed by Article 17, nothing therein mentions or even addresses post-enactment legislative privilege, or the attorney-client privilege or work product doctrine at all. It is an odd construction of the statute, to say the least, that holds that the statute "expressly" waives privileges it does not even mention. On this issue, North Carolina law is consistent with federal law which also requires legislative waivers of common law privileges to be explicitly addressed in the enactment. *See Helstoski*, 442 U.S. at 490-91 (holding that "waiver [of an individual congressman's Speech and Debate immunity] can be found only after explicit and unequivocal renunciation of the protection"). Similarly, the United States Supreme Court has required unequivocal renunciation of common law privileges and immunities in other contexts. *Cf. Coleman v. Court of Appeals of Maryland,* 132 S.Ct. 1327, 1333 (2012) (requiring that "Congress must 'mak[e] its intention to abrogate [states' sovereign immunity] unmistakably clear in the language of the statute.'"). Whatever one may say about the language

Applying these rules of construction to Article 17, the General Assembly did not intend to abrogate the common law attorney-client privilege or work product doctrine because it referenced neither in any of the provisions of Article 17.

This Court was presented with a strikingly similar statutory construction issue in *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E. 2d 620, 624 (2006). There, this Court was confronted with the issue of whether Chapter 50 of the General Statutes expressly or impliedly altered when the statute of limitations for alienation of affection claims – a common law tort – begins to accrue. Chapter 50 broadly covers matters such as divorce and alimony, and, even more specifically, it defines "marital misconduct" as including only "'acts that occur during the marriage and prior to or on the date of separation.'" *Id.* (citation omitted).

Despite the broad language of Chapter 50, this Court held that it must strictly construe Chapter 50 to the extent it could be read as affecting the common law tort of alienation of affections. While recognizing the General Assembly's authority to modify the common law, this Court refused to interpret the statutes enacted by the legislature as covering or affecting portions of the common law not expressly included within the statute. Thus, in *McCutchen*, the Court noted that

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of Article 17 generally, and N.C. Gen. Stat. § 120-133 specifically, nothing in those enactments unequivocally renounces the protection of the attorney client privilege, the work product doctrine, or the post-enactment legislative privilege.

"[e]ven when viewed broadly, nothing in the divorce, alimony, and child support provisions of Chapter 50 pertains to alienation of affections" and such provisions were therefore deemed "irrelevant" to the issue of the limitations period for that tort. *Id*. Similarly, Article 17 does not mention or purport to address the attorney-client privilege and work product doctrine, and is therefore "irrelevant" to the application of those privileges to the documents sought in plaintiffs' motion to compel.

D. The Superior Court's Order Construing N.C. Gen. Stat. § 120-133 Violates the Doctrine of *Expressio Unis Est Exclurio Alterius*.

Standing alone, the Court's obligation to strictly construe statutes in derogation of the common law requires the reversal of the superior court's ruling that N.C. Gen. Stat. § 120-133 operates to waive attorney-client privilege or the work product doctrine. Nonetheless, the trial court's order also violates a related rule of construction for statutes that purport to modify the common law: *expressio unius est exclurio alterius* (statutes that list the situation to which they apply imply the exclusion of situations not included in the list). *Miller*, 357 N.C. at 325, 584 S.E. 2d at 780.

In *Miller*, there was evidence that the decedent had conspired with his lover to kill his lover's spouse. After state investigators commenced an investigation, the decedent sought legal advice from an attorney. Shortly after his meeting with counsel, the decedent committed suicide. The State then petitioned the superior

court to conduct an *in camera* hearing to determine whether the decedent's attorney-client privilege could or should be waived. On that same day, decedent's wife filed a response with the superior court requesting permission to waive her deceased husband's attorney-client privilege. The wife and the State argued that the wife had been given the legal authority to waive her husband's attorney-client privilege based upon the authority granted to her by statute to administer her deceased husband's estate. *Id.* at 319-21, 324, 584 S.E. 2d at 777-80.

This Court in *Miller* entered an order requiring that the decedent's attorney ("respondent") make an appearance. *Id.* at 320, 584 S.E. 2d at 777. The respondent filed a motion to dismiss the State's petition. *Id.* The superior court denied respondent's motion to dismiss and ordered respondent to provide an affidavit containing information relevant to the murder investigation. *Id.* The order provided that the affidavit would be filed under seal and that the superior court would conduct an *in camera* review. *Id.* at 320, 584 S.E. 2d at 777-78. The superior court then stayed its order and designated the matter for immediate appeal. *Id.* at 320, 584 S.E.2d at 778. The question on appeal was whether the statutes providing authority to the decedent's executrix to administer the decedent's estate also gave her the implied authority to waive the decedent's attorney-client privilege. *Id.* at 321, 584 S.E. 2d at 778. The superior court had inferred that the executrix had the implied authority to waive the decedent's attorney-client

privilege because of her statutory authority to resolve claims filed against the decedent's estate under N.C. Gen. Stat. § 32-27(23). *Id*. at 324-25, 584 S.E. 2d at 780.

This Court rejected the trial court's interpretation of the relevant statute, noting that the statute granting authority to an executrix contained thirty-three other powers in addition to the authority to settle civil claims. *Id*. at 325, 584 S.E.2d at 780. None of these sections mentioned the attorney-client privilege and therefore gave no express authority to the executrix to waive the decedent's attorney-client privilege. *Id.*

This Court then observed that "[u]nder the doctrine of *expressio unius est exclurio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not included in the list." *Id*. (citations omitted). Based upon this doctrine, the Court found "no basis under any concept of statutory construction to support the State's position that the statute 'empower[ed]' the executrix to waive a decedent's attorney client privilege." *Id*. Therefore, when a statute does not include an express waiver of a common law right, it is error to imply such a waiver. *See id.*; *see also McCutchen*, 360 N.C. at 285, 624 S.E. 2d at 624 (2006) (statutes related to divorce, alimony or child support do modify or alter a common law claim for alienation of affection); *Evans v. Diaz*, 333 N.C. 774, 779-80, 430 S.E.2d 244, 247 (1993) (finding that statute that did not expressly

address common law rights and defenses could not be properly interpreted to modify such rights and defenses).

Like the statute that confers express authority upon an executrix, Article 17 expressly lists the situations to which it applies. Nowhere in the Article is there any mention of the attorney-client privilege or the work product doctrine. Instead, the Article states that it only applies to the "Confidentiality of Legislative Communications." *See Smith Chapel Baptist Church v. City of Durham,* 350 N.C. 805, 812, 517 S.E.2d 874, 879 (1999) ("While plain language of the statutes is sufficient to determine its meaning, this Court has stated that the title of an act should be considered in ascertaining the intent of the legislature.") (citing *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 764 (1992)). In describing when legislative employees can be compelled to testify about information acquired during committee hearings or the legislative process, the statute expressly states that such disclosures are "subject to G.S. 120-9 [North Carolina's statutory version of the federal Speech and Debate clause], G.S. 120-133, and the common law of legislative privilege and legislative immunity ." N.C. Gen. Stat. § 120-132(c). Nowhere in the statute is there any mention of how any waiver required by N.C. § 120-132(c), or N.C. Gen. Stat. § 120-133, affects the common law attorney-client privilege or work product doctrine. The waiver of confidentiality contained in N.C. Gen. Stat. § 120-133 is a waiver of the

confidentiality otherwise imposed by N.C. Gen. Stat. §§ 120-130 and 120-131 and nothing more. It does not expressly or implicitly waive privileges created and recognized by the common law.

Even though N.C. Gen. Stat. § 120-133 omits any mention of the attorney-client privilege or work product doctrine, and therefore does not include an express waiver of the privilege or doctrine, the court below, like the Wake County District Attorney in *Miller*, concluded that a waiver should be implied based upon other terms included in Article 17. For example, the court below based its ruling, in part, upon the Article's definition of "document" and the clause found in N.C. Gen Stat. § 120-133 that the waiver applies "Notwithstanding any other provision of law." *See* N.C. Gen. Stat. §§ 120-129(1); 120-133. The court construed these terms as all-encompassing because the General Assembly did not expressly exclude attorney-client or work product documents from the definition. Plaintiffs' argument stands on its head the rule of construction that requires a strict interpretation of statutes that abrogate the common law and the principle established by *Miller* that the legislature's decision to omit any reference to a particular category means that the omitted category is not covered by the statute.

E. The Interpretation of N.C. Gen. Stat. § 120-133 Adopted by the Superior Court and Urged by the Plaintiffs is Contrary to the Way the Statute has been Administered by the General Assembly, Outside Counsel for the General Assembly, and the Attorney General for Almost Thirty Years.

The way in which a statute has been construed by those entrusted with its administration is entitled to "great weight." *Frye Regional Medical Center, Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E. 2d 159, 163 (1999); *State ex rel. Comm'r of Ins. v. North Carolina Auto Rate Administrative Office,* 294 N.C. 60, 67, 241 S.E.2d 324, 329 (1978); *Faizon v. Grain Dealers Mut. Ins. Co.*, 254 N.C. 47, 57, 118 S.E.2d 303, 310 (1961). This same rule of construction applies to statutes that are administered by a legislative body. *MacPherson v. City of Asheville*, 283 N.C. 199, 307, 196 S.E.2d 200, 206 (1973).

In *MacPherson*, the City of Asheville interpreted one of its ordinances regarding the issuance of building permits. The city council, by majority vote, concluded that the applicant had complied with the ordinance and thereby approved a building permit. On appeal, this Court affirmed the city council's decision. This Court held that an interpretation given to a statute by those who administer it is "entitled to great consideration" and "strongly persuasive" and "even prima facie correct." *Id.* at 307, 196 S.E.2d at 206. (citations omitted). Further, the court underscored that "the construction given a statute by the

legislature, while not binding on the courts, is entitled to 'great weight.'" *Id*. (citations omitted) (emphasis added).

Article 17 governs conduct of the General Assembly and its employees. Under the common law rules, none of the information made public by Article 17 would be public information absent the enactment of Article 17. The General Assembly, and its lawyers and staff are responsible for administering Article 17. Thus, any interpretation given to Article 17 by the General Assembly or its lawyers and staff is "entitled to great consideration," "strongly persuasive," "prima facie current," and "entitled to great weight." *MacPherson, supra*.

Defendants made this argument to the court below. The only authority known to the legislative defendants at the time of the hearing was a 1991 contract between the North Carolina House of Representatives and its outside counsel, Leslie Winner, who was a member of the Ferguson Stein law firm in 1991. (R Vol. IV, pp. 529-30). Pursuant to the terms of this contract, Ferguson Stein was engaged to provide legal advice "concerning the General Assembly's upcoming redistricting of election districts for the North Carolina House of Representatives and for North Carolina's seats in the United States Congress." The contract also states in relevant part:

> All communications between any attorney in the firm and any member of the North Carolina House of Representatives pursuant to this agreement shall be considered to be privileged attorney client

> communications which shall not be disclosed without the permission of the member or members who are parties to the communication. Because communications between the firm and members of the House are privileged attorney-client communications, N.C.G.S. § 120-133 shall not apply to communications, including written communications, between any attorneys in the firm and any member of the North Carolina House of Representatives.

(R Vol. IV, p. 529).

It is inconceivable that the General Assembly would enter into a contract interpreting N.C. Gen. Stat. § 120-133 as not being applicable to attorney-client communications, if it did not believe this to be a correct interpretation of the statute. The current legislative leaders relied upon the General Assembly's prior interpretation of N.C. Gen. Stat. § 120-133 when they executed their contract with outside counsel.

The interpretation given to N.C. Gen. Stat. § 120-133 by officials of the General Assembly and its counsel in 1991 was confirmed by the General Assembly and its counsel in the landmark redistricting case of *Cromartie v. Hunt*, 133 F.Supp.2d 407, *reversed in part sub. nom. Easley v. Cromartie*, 532 U.S. 234 (2000). A review of four depositions taken in *Cromartie* show that the *Cromartie* plaintiffs served comprehensive document requests that included any documents for which any legal privilege had been waived under N.C. Gen. Stat. § 120-133. (*See* Cohen Dep. 274-80, 290). In reviewing the exhibit list for each deposition,

only *Cromartie* Exhibits 16, 28, and 41 could potentially include documents that might constitute legal advice or work product.[10] A review of the exhibits shows that none of them involve legal advice or documents prepared in anticipation of litigation.

A second issue answered in *Cromartie* is whether legislative counsel can be compelled to provide "other information" acquired during the legislative process, including information that would otherwise be protected by an attorney-client privilege absent the alleged waiver of that privilege by Article 17. The *Cromartie* depositions show that the client (members of the General Assembly), legislative counsel, and the Attorney General's office did not construe the requirement that the General Assembly produce other information acquired during redistricting as encompassing protected attorney-client communications.

For example, during the deposition of Senator Roy Cooper, the Attorney General's office instructed Senator Cooper not to answer questions on the grounds that such answers would require him to disclose confidential legal advice. (*See* Cooper Dep. 14-15, 54, 128). The Attorney General's office made a distinction between Senator Cooper's waiver of legislative testimonial privilege versus his

[10] Defendants have attached these exhibits and excerpts from the deposition transcripts of Roy Cooper, Gerry Cohen, Leslie Winner, and Linwood Jones from *Cromartie* cited herein to their Motion that the Court Take Judicial Notice of Public Records and Alternative Motion to Supplement the Record which is being filed contemporaneously with this brief.

decision not to waive his attorney-client privilege. (*See* Cohen Dep. 143-44). Next, during her deposition, Senator Leslie Winner refused to answer a question that would have required her to provide information she acquired as counsel to the House Committee pursuant to the 1991 contract, and before she was elected to the Senate. Senator Winner stated that she could not answer this question because it would result in her disclosure of attorney-client information. (*See* Winner Dep. 38).[11]

Even more on point, during the deposition of full-time, staff legislative counsel, Linwood Jones and Gerry Cohen, the Attorney General regularly instructed both legislative counsel to refuse to answer questions posed by the plaintiffs' attorney because the answer to these questions would result in the disclosure of legal advice given to Senator Cooper or other legislators. (*See* Jones Dep. 24-25, 37; Cohen Dep. 24, 26, 28, 29, 143-44).

If those responsible for administering N.C. Gen. Stat. § 120-133 during the *Cromartie* case interpreted that statute as waiving the attorney-client privilege, communication between staff counsel and members prior to enactment of the redistricting plans would obviously fall within the definition of "other information acquired" which must be disclosed by legislative employees after redistricting plans are enacted.

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[11] Mr. Jones and Mr. Cohen confirmed that Ms. Winner served as counsel for the House Committee in 2001. (Jones Dep. 10-11; Cohen Dep. 45-46.)

For nearly 30 years, the General Assembly, its full-time staff counsel and the Attorney General's Office have construed N.C. Gen. Stat. § 120-133, as not waiving the attorney-client privilege. The trial court's order improperly ignores this long-standing interpretation given to N.C. Gen. Stat. § 120-133 by those who have administered it.[12]

F. The Superior Court's Court Order Violates the Rule of Construction that Prohibits a Former General Assembly from Binding a Current General Assembly.

In *Kornegay v. City of Goldsboro*, 180 N.C. 441, 105 S.E. 187 (1920), plaintiffs argued that an act authorizing the sale of bonds at less than par value should be declared illegal because it allegedly conflicted with an earlier statute. In rejecting this argument, the Court held that "[i]t is a well recognized principle of statutory construction that when two acts of legislature applicable to the same subject" there must be an attempt to reconcile them. *Id.* at 192. In those rare instances where the two statutes cannot be reconciled, "the latter shall prevail." *Id.* Thus, when a later law is "positively repugnant to the former law, and not merely affirmative, cumulative, or auxiliary, it repeals the older law by implication *pro tanto*, to the extent of such repugnancy within the limits to which the latter applies." *Id.*

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[12] Moreover, the trial court's order violates the principle that long acquiescence in the interpretation of a statute should be respected. *State v. Emery*, 224 N.C. 581, 587, 31 S.E.2d 858, 862 (1944).

The trial court's order ignores this rule of construction. On 4 June 2011, the General Assembly passed S.L. 2011-145 §§ 22.4-22.5, which amended N.C. Gen. Stat. §§ 120-32.6 and 147-17. By way of these amendments, the General Assembly reaffirmed its authority to engage outside counsel without having to obtain permission from the Governor. The General Assembly also clarified that it retained the authority to make decisions regarding its own legal counsel, whether it elected to be primarily represented by its own outside counsel, the Attorney General, or both. This session law, enacted before the enactment of the redistricting plans, clearly indicates the legislative intent of the General Assembly that it alone retains the authority to select its own legislative counsel for confidential legal advice in the area of redistricting and that the General Assembly did not construe N.C. Gen. Stat. § 120-133 as waiving its right to assert attorney-client privilege. To the extent N.C. Gen. Stat. § 120-133 might be construed as an implied waiver of attorney-client privilege or work product doctrine, it has been legislatively overruled by S.L. 2011-145 §§ 24.4-24.5.

G. The Superior Court's Order Violates the Principle that Statutes *In Pari Materia* Must be Harmonized.

It is well settled that statutes *in pari materia* should be considered and harmonized. *State v. Falk*, 179 N.C. 712, 103 S.E. 16, 17 (1920). Under this rule of construction, nothing in the Public Records Act, or the way in which that act has

been interpreted by the courts, supports the expansive waiver implied by the Superior Court in its interpretation of Article 17.

This Court has held that "[b]y enacting the Public Records Act, 'the legislature intended to provide that, as a general rule, the public would have access to public records.'" *Poole*, 330 N.C. at 475, 412 S.E.2d at 13 (citing *News & Observer v. Starling*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984)). Under the Public Records Act, the terms "public record" and "document" have been defined in a manner similar to the definition of documents under Article 17. *Compare* N.C. Gen. Stat. § 132-1 *with* N.C. Gen. Stat. § 120-129(1). Until it was amended in 1975, like Article 17, the Public Records Act made no mention of either the attorney-client privilege or the work product doctrine. If the General Assembly intended an interpretation of the term "document" under Article 17 to encompass attorney-client and work product documents, it is reasonable to assume that a similar intention would be found under the Public Records Act.

Yet, from its inception and through the date of the 1975 amendments, there are no cases holding that the General Assembly intended to implement a waiver of legislative or attorney-client privileges under the Public Records Act. In fact, decisions after the 1975 amendments (expressly restricting the scope of the attorney-client privilege that may be asserted by government entities covered by the Public Records Act), North Carolina courts have ruled that local government

officials may continue to assert a common law legislative privilege. *Northfield Dev. Co.,* 136 N.C. App. at 282, 523 S.E.2d at 749 (2000); *Vereen*, 121 N.C. App. at 782, 462 S.E.2d at 473.

In 1983, the General Assembly decided to expressly modify the scope of the legislative privilege that can be asserted by State legislators but only as it relates to documents concerning redistricting or information requested by members or prepared by staff. In all other respects, legislative privilege was recognized and given additional statutory protection. Moreover, the General Assembly did not enact an express statutory modification of the common law attorney-client privilege or work product doctrine. In contrast, under the Public Records Act, in 1975, the General Assembly intended to modify the scope of the attorney-client privilege that might be asserted by agencies covered by the Act, but was silent on the issue of legislative privilege. Just as common law legislative privilege has not been waived by the Public Records Act, *see Northfield Dev. Co.* and *Vereen, supra*, attorney-client privilege has not been waived by N.C. Gen. Stat. § 120-133.

Plaintiffs asked the court below to infer a waiver of attorney-client privilege based upon two decisions by a federal district court interpreting Wisconsin law. *See Baldus v. Brennan*, 2011 U.S. Dist. Lexis 1416869 (E.D. Wis. Dec. 20, 2011); *Baldus v. Brennan*, 2012 U.S. Dist. Lexis 501 (E.D. Wis. Jan. 3, 2012). Neither of these opinions deal with North Carolina's common law or statutory modifications

of the common law. Moreover, the facts in *Baldus* are quite different from those before the Court. The communications ordered to be compelled in *Baldus* were those of a *non-lawyer* who was hired to draw maps and given political, strategic and policy advice. Obviously, *Baldus* provides no persuasive authority for the matters in the instant case involving requests for legal advice made by legislators and legal advice given to them by their attorneys. Moreover, defendants have already complied with the principles described in *Baldus*. Written communications between the General Assembly's map drawer (Dr. Thomas Hofeller) and members of the General Assembly have been produced. Defendants have also consented to make Dr. Hofeller available for a deposition. Defendants would be in conflict with the *Baldus* holdings only if defendants had argued that communications between them and Dr. Hofeller were privileged.

H. The Superior Court's Interpretation of Article 17 Threatens the Separation of Powers Doctrine.

The interpretation of Article 17 adopted by the court below and urged by plaintiffs jeopardizes the constitutional doctrine of separation of powers. As noted by Madison in Federalist No. 48, "It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and completely administered by either of the other departments." *United States v. Johnson*, 383 U.S. 169, 178 (1966) (affirming Court of Appeals decision awarding a congressman a new trial because evidence protected by legislative privilege

improperly admitted into evidence). Whenever judicial power is brought to bear on legislators in a civil action "legislative independence is imperiled." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (denying action to enjoin congressional subpoena to compel testimony by witnesses). Therefore, legislative privilege operates to protect "the independence of the legislature" against "prosecution by an unfriendly executive and conviction by a hostile judiciary." *Johnson*, 383 U.S. at 179.

The Court of Appeals wisely avoided conflict between public disclosure statutes and the separation of powers doctrine in its decision in *News and Observer Publishing Company v. Easley*, 182 N.C. App. 14, 641 S.E.2d 698 (2007). The plaintiff in *Easley* argued that under the Public Records Act the Governor was required to produce records related to clemency applications. The Governor resisted disclosure of clemency documents and argued that under N.C. Const. art. III, § 5 he had been granted exclusive constitutional authority over clemency issues. He further contended that any mandated public production of clemency petitions would violate the separation of powers doctrine.

The plaintiff in *Easley* responded by arguing that in *Poole*, *supra*, the Court had held that application of the Public Records Act to the Governor did not implicate the separation of powers. *Id.* at 20, 641 S.E.2d at 702. The Court of Appeals rejected this interpretation of *Poole*. *Id.* It agreed with the Governor that

the Constitution had vested the Governor with the exclusive "political" authority over the issue of clemency. *Id.* at 18, 641 S.E.2d at 702. The court avoided any potential separation of powers by noting that "nothing in the Public Records Act refers to or specifically pertains to either pardons or clemency." *Id.* at 23-24, 641 S.E.2d at 704-05. The court concluded that, because the Public Records Act was silent on production of clemency materials, any such documents within the Governor's possession were not subject to disclosure. *Id.*

The principles stated in *Easley* apply with equal force here. Redistricting is a political question which the Constitution squarely places within the discretion of the General Assembly. *See Stephenson v. Bartlett*, 355 N.C. 354, 384-85, 562 S.E.2d 377, 398 (2002). Like the Governor's interpretation of the Public Records Act in the *Easley* case, the General Assembly has interpreted Article 17 as not being applicable to attorney-client communications or work product materials. Nothing in Article 17 refers to or specifically pertains to attorney-client or work product documents – just like the Public Record Act does not refer to documents related to pardons or clemency. The Court in *Easley* avoided a difficult separation of powers question by using traditional rules of statutory construction which excluded clemency documents from the Public Records Act because said documents were not expressly included under that act. Similarly, because attorney-client or work product documents are not included in Article 17, this

Court may easily avoid any separation of powers issues by rejecting plaintiffs' argument that a waiver of these privileges should be implied, contrary to the normal rules of statutory construction.[13]

I. Any Interpretation of N.C. Gen. Stat. § 120-133 that Results in an Implied Waiver of the General Assembly's Common Law or Statutory Attorney-Client or Work Product Privileges Produces Absurd Consequences.

It is always presumed that the "legislature acted with reason and common sense," and that statutes may not be construed to produce "absurd or bizarre consequences." Office of the Attorney General, 2002 N.C. A.G. Lexis 8 (2002) (citing *Commissioner of Insurance v. Rite Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978)). In enacting lawful redistricting plans, the North Carolina General Assembly must interpret and apply redistricting criteria established by a legion of cases decided by the United States Supreme Court and the North Carolina Supreme Court. *See e.g. Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007)

[13] N.C. Gen. Stat. § 120-133 states that documents covered by its waiver become "public records" when the redistricting plans are enacted. It is implausible that the term "public record" as it appears in N.C. Gen. Stat. § 120-133 would be intended by the General Assembly to have a different meaning than the way that term is defined under the Public Records Act and in N.C. Gen. Stat. § 120-130 and 120-131. Thus, even if the General Assembly had implicitly waived its right to assert the common law attorney-client privilege or work product doctrine, which it did not, by describing the documents that must be produced under N.C. Gen. Stat. § 120-133 as "public records," at a minimum the General Assembly reserved to itself the right to assert the statutory attorney-client privilege and work product doctrine available to State agencies and local governments. *See* N.C. Gen. Stat. §§ 132-1; 132-9.

aff'd sub. nom Bartlett v. Strickland, 556 U.S. 1 (2009); *League of United Latin American Voters v. Perry*, 548 U.S. 399 (2006); *Veith v. Jubelirer*, 541 U.S. 267 (2004); *Cox v. Larios*, 542 U.S. 947 (2004); *Cromartie v. Hunt*, 133 F.Supp.2d 407 (E.D.N.C.), *reversed*, *Easley v. Cromartie*, 532 U.S. 234 (2000); *Shaw v. Hunt*, 517 U.S. 800 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Johnson v. DeGrandy*, 512 U.S. 997 (1994); *Shaw v. Reno*, 509 U.S. 630 (1993); *Growe v. Emison*, 507 U.S. 25 (1993); *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Beer v. United States*, 425 U.S. 125 (1976); *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) ("*Stephenson II*"); *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) ("*Stephenson I*").

Given the complexities of redistricting legislation, the requirement that redistricting plans in North Carolina achieve preclearance under Section 5 of the VRA, and the likelihood of lawsuits that could potentially subject the State to hundreds of thousands of dollars in liability for legal fees pursuant to 42 U.S.C. § 1988 or other applicable statutes, it is absurd to interpret Article 17 as operating to implicitly waive the General Assembly's common law attorney-client relationship in the absence of an express waiver. It is even more absurd to conclude that the General Assembly would implicitly strip itself and the People of North Carolina of these common law protections by making such communications "public records,"

without at least reserving to itself the statutory attorney-client privilege and work product doctrine available to every other public entity covered by the Public Records Act. *See supra* n.13.

J. Under Both the Common Law and Public Records Act the Work Product Doctrine Applies to Documents Created During Litigation and in Anticipation of Litigation.

Under the common law, the work product doctrine applies not only to documents created by an attorney or under his direction during litigation, but also to documents prepared in anticipation of litigation. *Hickman*, 329 U.S. at 509-11, n.9. The same rule applies to the statutory work product doctrine established under the Public Records Act. *Wallace Farms v. City of Charlotte*, 203 N.C. App. 144, 147, 689 S.E.2d 922, 924 (2010).

The legislative defendants' outside counsel were engaged on March 21, 2011, to provide "legal advice regarding the 2011 legislative and congressional redistricting and expected or anticipated litigation." (R Vol. IV, p. 532). One of the decisions made by legislative leaders before outside counsel was engaged was to pursue preclearance of the plans by the filing of a court action in the United States District Court for the District of Columbia while also seeking simultaneous administrative preclearance by the United States Department of Justice. *See* 28 C.F.R. §§ 51.10-51.11. Redistricting plans adopted by the General Assembly, the public hearing process leading up to the enactment of the plans, and the entire

legislative process itself, are all important pieces of evidence that are considered by the federal court and the Department of Justice in order to reach a decision on preclearance. *See* 28 C.F.R. §§ 51.26-51.28. Thus, legislative defendants and outside counsel were preparing for redistricting litigation in the District of Columbia from the first moment outside counsel was engaged. Further, given the contentious history of redistricting litigation in North Carolina, and in light of the standards imposed by the *Stephenson* and *Strickland* decisions, it was reasonable for defendants to begin their preparations for the defense of the 2011 Plans from the first moment the General Assembly went into its legislative session in January of 2011.

The court below suggested that defendants could not assert the work product doctrine until after "the litigation was commenced" or "after the final General Assembly and Congressional plans were pre-cleared." Neither proposal by the superior court would result in the correct application of the work product doctrine as applied to documents prepared in anticipation of litigation.

III. EVEN IF THE TRIAL COURT CORRECTLY HELD THAT A WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE CAN BE IMPLIED UNDER N.C. GEN. STAT. § 120-133, THE TRIAL COURT ERRED BY FAILING TO LIMIT ANY SUCH WAIVER TO COMMUNICATIONS AND DOCUMENTS CREATED PRIOR TO THE ENACTMENT OF THE 2011 PLANS.

The only "waiver" established in Article 17 is found in N.C. Gen. Stat. § 120-133. The waiver is limited to the area of redistricting. Applying the normal rules of statutory construction, N.C. Gen. Stat. § 120-133 operates to waive legislative privilege but only for those documents or information that either exist or are available when the redistricting plan is enacted. Nothing in N.C. Gen. Stat. § 120-133 can be reasonably interpreted as waiving *any* privileges – legislative or attorney-client – for documents "concerning redistricting" that are created by legislators or information or acquired by legislative employees *after* the redistricting plans have become law.

The superior court erred to the extent it ruled that N.C. Gen. Stat. § 120-133 operates as a perpetual waiver of legislative privilege for any redistricting documents exchanged by legislators and legislative employees or any related information acquired by legislative employees after plans are enacted. Plaintiffs have conceded that N.C. Gen. Stat. § 120-133 should not be interpreted as waiving legislative privilege for documents created after the enactment of the 2011 Plans. *See* Plaintiffs' Opposition at 10-11 ("Additionally, the Legislative Defendants

contend the trial court interpreted N.C. Gen. Stat. § 120-133 as stripping legislators of their legislative privilege even after enactment of the plans, but . . . the trial court's order does not have that effect.").[14] Based upon the plain meaning of the statute, rules of construction applicable to statutes that modify the common law, and plaintiffs' concessions, any documents concerning redistricting exchanged by members and legislative employees or information acquired by legislative employees *following* the enactment of the 2011 Plans, remain protected from public disclosure by both the common law of legislative privilege and by operation of N.C. Gen. Stat. §§ 120-130 and 120-131. This is true regardless of whether this same information is also protected by a common law attorney-client privilege or work product doctrine. The superior court's order should be reversed to the extent it requires the production of any documents or information created or acquired after redistricting plans were enacted.[15]

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[14] Moreover, Plaintiffs' Request for Production only encompassed documents that were created prior to the enactment of redistricting plans. (R Vol. III, pp. 364-387)

[15] On November 7, 2011, the General Assembly enacted technical corrections of all three redistricting plans. These corrections were necessary because of software errors in the program used to transform plans enacted in July 2011 into bill text. The legislative defendants agree with plaintiffs that "documents concerning redistricting" exchanged by legislators and legislative employees related to these corrective acts are not protected by legislative confidentiality except to the very limited extent any such documents reflect attorney-client communications or attorney work product.

CONCLUSION

For the forgoing reasons, the superior court's order compelling the discovery of information protected by the common law attorney-client privilege and work product doctrine should be reversed.

Respectfully submitted this 15th day of June, 2012.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Legislative Defendants' Brief has been served this day by depositing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first-class postage-prepaid envelope properly addressed to the following:

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