

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 24CV018884-910

T. CRAIG TRAVIS,)
Plaintiffs,)
)
v.)
)
P. KEVIN BERGER, DIANE P.)
PARNELL, DONALD T. POWELL,)
MARK F. RICHARDSON, NORTH)
CAROLINA CONSERVATIVES FUND,)
ATLAS POLITICAL CONSULTING,)
LLC, and GOPAC, INC.,)
Defendants.)

**PLAINTIFF’S SUPPLEMENTAL
OBJECTION TO DESIGNATION AS
EXCEPTIONAL CASE**

**[N.C. Gen. R. Prac.
Super. & Dist. Cts. 2.1]**

NOW COMES Plaintiff, by and through his undersigned counsel of record, and based on events that have occurred since the filing of Plaintiff’s objection on July 12, 2024, hereby supplements his objection to the joint motion of certain defendants to designate this case as exceptional pursuant to Rule 2.1 of the North Carolina General Rules of Practice for the Superior and District Courts. In support of his objection, Plaintiff shows the Court as follows:

1. On the morning of July 12, 2024, Ellis Boyle of Ward & Smith, P.A. (“Mr. Boyle”) notified Plaintiff’s counsel that he would be representing Defendants North Carolina Conservatives Fund and Atlas Political Consulting, LLP and that Craig Schauer (“Mr. Schauer”) of Dowling PLLC would be representing Defendants Berger, Parnell, Powell, and Richardson (the defendants represented by Mr. Boyle and Mr. Schauer are hereinafter referred to collectively as the “North Carolina Defendants”). Mr. Boyle also informed Plaintiff’s counsel that he and Mr. Schauer would be filing a joint motion to designate this case as exceptional under Rule 2.1 of the North Carolina General Rules of Practice for the Superior and District Courts.

2. Shortly after receiving the email, Plaintiff's counsel responded to Mr. Boyle and Mr. Schauer at 1:54 p.m. on July 12, 2024, informing them of Plaintiff's objection to the exceptional case designation and appointment of a special judge under Rule 2.1. Plaintiff's counsel further stated that Plaintiff intended to file a written objection and to request a hearing on the North Carolina Defendants' motion. A copy of this email exchange is attached as **EXHIBIT A** and incorporated by reference herein.
3. Shortly thereafter, Mr. Boyle sent a copy of the North Carolina Defendants' Joint Motion to Designate Action as Exceptional Case Pursuant to North Carolina General Rule of Practice 2.1 ("Rule 2.1 Motion") to Plaintiff's counsel by email at 2:56 p.m. on July 12, 2024. Plaintiff's counsel replied to Mr. Boyle's email, copying Mr. Schauer, at 3:12 p.m. on July 12, 2024 and attached a copy of Plaintiff's Objection to Designation as Exceptional Case ("Plaintiff's Objection"). A copy of this email exchange is attached hereto as **EXHIBIT B** and incorporated by reference.
4. In the Rule 2.1 Motion, the North Carolina Defendants requested the appointment of The Honorable Clayton Somers ("Judge Somers") to preside over all proceedings in this case.
5. Upon information and belief, at some point between July 12, 2024 and July 18, 2024, Mr. Schauer spoke privately to Judge Somers about this case and whether Judge Somers would be willing to be appointed pursuant to Rule 2.1 to preside in this matter.
6. Mr. Schauer did not inform Plaintiff's counsel that he intended to speak to Judge Somers about this case or otherwise give Plaintiff's counsel the opportunity to be present during his communication with Judge Somers, nor did Mr. Schauer notify Plaintiff's counsel afterwards that he had spoken to Judge Somers about the case.

7. Instead, Mr. Schauer sent an email to the Tenth Judicial District Trial Court Administrator (“TCA”) at 8:33 a.m. on July 18, 2024, **without copying Plaintiff’s counsel**, notifying the TCA that he had spoken to Judge Somers. In his email to the TCA, on which he copied Mr. Boyle, Mr. Schauer stated as follows:

Mr. Boyle and I filed a Rule 2.1 Motion on Friday. Our motion asks for the appointment of Judge Clayton Sommers [*sic*], because of his experience with a related case. We filed the motion before we were able to contact Judge Sommers. Since filing the motion, I have been able to contact Judge Sommers, and he confirmed that he is willing able [*sic*] to serve as a judge for the case, if designated. Attached is our motion.

A copy of Mr. Schauer’s email to the TCA on July 18, 2024 is attached hereto as **EXHIBIT C** and incorporated by reference herein.

8. Although Mr. Schauer was aware that Plaintiff objected to the designation of the case as exceptional and that Plaintiff had filed a written objection **six days earlier**, Mr. Schauer did not provide a copy of Plaintiff’s objection to the TCA. It appears that Mr. Schauer intended to lead the TCA to believe that he and Mr. Boyle were the only attorneys involved in the case and that there was no opposition to their joint Rule 2.1 Motion.

9. Mr. Schauer did not forward a copy of his July 18, 2024 email to Plaintiff’s counsel or otherwise inform Plaintiff’s counsel that he had communicated with the TCA about the appointment of Judge Somers as the judge for this case.

10. In fact, Plaintiff’s counsel did not find out that Mr. Schauer had spoken to Judge Somers about this case or that Mr. Schauer had communicated with the TCA about the appointment of Judge Somers in connection with the Rule 2.1 Motion until the TCA provided a copy of Mr. Schauer’s email to Plaintiff’s counsel **more than four months later**.

11. At 4:00 p.m. on November 22, 2024, the TCA sent an email to counsel for all parties in this case informing them that she had erroneously¹ transmitted a Rule 2.1 request to the North Carolina Administrative Office of the Courts (“AOC”) on November 4, 2024 for consideration by the Chief Justice of the Supreme Court of North Carolina. After the Chief Justice’s office inquired whether Plaintiff had filed an objection to the Rule 2.1 Motion, the TCA realized² that Plaintiff’s counsel had not been copied on Mr. Schauer’s July 18, 2024 email and that Plaintiff objected to the Rule 2.1 Motion. A copy of the TCA’s November 22, 2024 email is attached hereto as **EXHIBIT D** and incorporated by reference herein.

12. In addition to the grounds set out in Plaintiff’s Objection, good cause exists to deny the North Carolina Defendants’ Rule 2.1 Motion based on the following:

- a. Judge Somers does not have specialized knowledge of or experience with the factual or legal issues involved in this matter that would make him a more appropriate judge to preside over the case than any other Superior Court Judge who would be scheduled for a regular civil session in the ordinary course of business in the Tenth Judicial District. The previous case over which Judge Somers presided referenced in the Rule 2.1 Motion, *Camp Carefree, Inc. v. Rockingham County et al.*, Rockingham County 23 CVS 2013 (“Land Use Case”), was a civil action involving land use issues brought against Rockingham County by property owners. This case involves different parties, different claims, and

¹ Based on Mr. Schauer’s omission of Plaintiff’s counsel from his July 18, 2024 email, failure to attach a copy of Plaintiff’s Objection to the email, and thus the implication that the Rule 2.1 Motion was unopposed, it is understandable that the TCA mistakenly believed that all parties consented to the designation of the case as exceptional and the appointment of Judge Somers.

² Nothing in this supplemental objection should be construed as an allegation of wrongdoing by the TCA or any other court personnel.

different legal theories from the Land Use Case. Contrary to the North Carolina Defendants' assertion in the Rule 2.1 Motion, Judge Somers was not appointed to preside over the Land Use Case pursuant to Rule 2.1. The North Carolina Defendants' request for a specific judge who ruled in favor of Rockingham County in a legally dissimilar matter creates the appearance of impropriety and judge shopping.

- b. Mr. Schauer's communication with Judge Somers without the presence or awareness of Plaintiff's counsel constitutes improper *ex parte* communication in violation of Rule 3.5(a)(3) of the North Carolina Rules of Professional Conduct. Although this matter was not pending before Judge Somers at the time of Mr. Schauer's *ex parte* communication in July 2024, the North Carolina Defendants have aggressively sought his appointment and intend for him to preside over this case. Pursuant to Rule 3.5(d)(2), it was reasonably foreseeable to Mr. Schauer that Judge Somers could be appointed. It is unrealistic to believe that, if Judge Somers were appointed, he would forget his conversation with Mr. Schauer—the substance of which is still unknown to Plaintiff—or that Plaintiff could disregard the deliberate attempt to hide this *ex parte* communication from Plaintiff's counsel and have confidence that Judge Somers would be completely impartial.
- c. Mr. Schauer's July 18, 2024 email to the TCA constitutes improper *ex parte* communication with a court official in violation of Rule 3.5(a)(3) of the North Carolina Rules of Professional Conduct. Mr. Schauer knew that Plaintiff was represented by counsel and opposed the Rule 2.1 Motion, but intentionally omitted Plaintiff from his email to the TCA and communicated with the TCA in

a manner that was reasonably likely to cause the TCA to believe that attorneys for all parties were included on his email and that the Rule 2.1 Motion was unopposed so that the TCA would request a Rule 2.1 designation and appointment of Judge Somers without Plaintiff's knowledge. This is exactly what occurred.

d. Mr. Schauer's conduct as described in subparagraphs (b) and (c) above is prejudicial to the administration of justice in violation of Rule 8.4(d) of the North Carolina Rules of Professional Conduct. Mr. Schauer's improper *ex parte* communication³ and misleading presentation of the Rule 2.1 Motion resulted in the TCA erroneously submitting a Rule 2.1 request to the AOC and the AOC submitting the request to the Chief Justice's office. But for the Chief Justice's office inquiring about whether Plaintiff had filed an objection and the TCA affirmatively acting to correct the mistake, the Rule 2.1 Motion would likely have been granted and Judge Somers would likely have been appointed without Plaintiff having an opportunity to be heard on Plaintiff's Objection.

13. It is appropriate for the Court to deny the North Carolina Defendants' Rule 2.1 Motion.

WHEREFORE, Plaintiff respectfully requests that this Court:

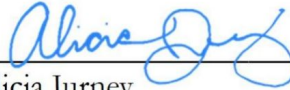
³ Mr. Schauer recently engaged in *ex parte* communication in another matter pending in Wake County Superior Court, which resulted in the presiding judge rescinding the *ex parte* order entered in favor of Mr. Schauer's client. See Rusty Jacobs, *Attorney went around opposing counsel for order blocking certification of a disputed state Supreme Court election*, WUNC (Jan. 9, 2025), <https://www.wunc.org/politics/2025-01-09/jefferson-griffin-attorney-block-certification-state-supreme-court-election>.

1. Allow a hearing before the Senior Resident Superior Court Judge or such other Superior Court Judge as may be designated to preside on the defendants' motion and Plaintiff's objection to the designation of this case as exceptional under Rule 2.1;
2. Deny the North Carolina Defendants' motion to designate the case as exceptional; and
3. Grant Plaintiff such other and further relief as the Court deems just and proper.

This the 13th day of January, 2025.

**PARKER BRYAN BRITT
TANNER & JENKINS, PLLC**

ATTORNEYS FOR PLAINTIFF



Alicia Journey
N.C. State Bar #37133
P.O. Box 1069
Raleigh, North Carolina 27602
Telephone: (919) 833-3115
Facsimile: (919) 833-3116
Email: alicia@parkerbryanlaw.com

/s/ Kimberly W. Bryan

Kimberly W. Bryan
N.C. State Bar # 18948
P.O. Box 1069
Raleigh, North Carolina 27602
Telephone: (919) 833-3115
Facsimile: (919) 833-3116
Email: kimberly@parkerbryanlaw.com

/s/ Stephanie T. Jenkins

Stephanie T. Jenkins
N.C. State Bar # 19104
P.O. Box 1069
Raleigh, North Carolina 27602
Telephone: (919) 833-3115
Facsimile: (919) 833-3116
Email: stephanie@parkerbryanlaw.com

/s/ G. Brentley Tanner

G. Brentley Tanner
N.C. State Bar #37087
P.O. Box 1069
Raleigh, North Carolina 27602
Telephone: (919) 833-3115
Facsimile: (919) 833-3116
Email: brent@parkerbryanlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2025 the foregoing Plaintiff's Supplemental Objection to Designation as Exceptional Case was served upon Defendants as follows:

W. Ellis Boyle
Ward & Smith, P.A.
Attorney for Defendants
Berger, Powell, and Richardson

Via email: WEBoyle@wardandsmith.com

Craig Schauer
Dowling LLP
Attorney for Defendants
NCCF and APC

Via email: cschauer@dowlingfirm.com

Nate Huff
K&L Gates LLP
Attorney for
Defendant GOPAC

Via email: nate.huff@klgates.com



Alicia Journey
Attorney for Plaintiff

From: Alicia Journey <ajourney@smithdebnamlaw.com>
Sent: Friday, July 12, 2024 1:54 PM
To: W. Ellis Boyle <WEBoyle@wardandsmith.com>
Cc: Kimberly W. Overton <KWOverton@wardandsmith.com>; Craig Schauer <cschauer@dowlingfirm.com>; Michael J. Denning <MDenning@smithdebnamlaw.com>; Kristin Ruth <kruth@smithdebnamlaw.com>; Sherry Bass <sbass@smithdebnamlaw.com>
Subject: RE: craig travis lawsuit: 2.1 judge motion

Ellis:

Thank you for getting in touch. Sorry we missed your call. Kristin, Michael, and I have all been tied up in other matters today.

We've spoken to our client and do not consent to designation of this case as exceptional. Please let us know when you file your motion. We plan to file a formal objection and request a hearing on this issue.

We look forward to working with you.

Alicia

From: W. Ellis Boyle <WEBoyle@wardandsmith.com>
Sent: Friday, July 12, 2024 10:18 AM
To: Alicia Journey <ajourney@smithdebnamlaw.com>
Cc: W. Ellis Boyle <WEBoyle@wardandsmith.com>; Kimberly W. Overton <KWOverton@wardandsmith.com>; Craig Schauer <cschauer@dowlingfirm.com>
Subject: craig travis lawsuit: 2.1 judge motion

This message is from an **External Source**.

Alecia, good morning, I hope this email finds you well. I just left you a voicemail, so I will be repeating a bit of that information. Ward and Smith represents 2 of the entity defendants, Atlas and NC Conservative Fund, in the Craig Travis lawsuit you filed in Wake County. I copied Craig Schauer who represents the 4 entity defendants. We plan on filing a joint motion to appoint a 2.1 judge this afternoon after 3 pm. We would like to have Plaintiff's position on that, if you can get it to us by then. Presumably it will be some version of join, object, or take no position, but if you are able to get us something by 3 pm, we will be happy to include it. As I said on the voicemail, sorry to not have spoken directly to you before sending this email, but I did try to reach out to you and your colleagues. Please feel free to contact me whenever is convenient for you if you would like to discuss the case in more detail.

W. Ellis Boyle
919-277-9187



W. Ellis Boyle
Attorney

Alicia Journey

From: Alicia Journey
Sent: Friday, July 12, 2024 3:20 PM
To: W. Ellis Boyle; Michael J. Denning; Kristin Ruth; Sherry Bass
Cc: Kimberly W. Overton; Craig Schauer; Alexandra E. Ferri
Subject: RE: craig travis lawsuit: 2.1 judge motion and motion to dismiss
Attachments: Filing Submitted for Case: 24CV018884-910; T. Craig Travis VS P. Kevin Berger; Envelope Number: 940680; 2024-07-12 Objection to Exceptional Case Designation SIGNED (01087507x9E735).PDF

Thank you. Attached, please find our objection to exceptional case designation and confirmation of submission for filing.

From: W. Ellis Boyle <WEBoyle@wardandsmith.com>
Sent: Friday, July 12, 2024 2:56 PM
To: Alicia Journey <ajourney@smithdebnamlaw.com>; Michael J. Denning <MDenning@smithdebnamlaw.com>; Kristin Ruth <kruth@smithdebnamlaw.com>; Sherry Bass <sbass@smithdebnamlaw.com>
Cc: Kimberly W. Overton <KWOverton@wardandsmith.com>; Craig Schauer <cschauer@dowlingfirm.com>; Alexandra E. Ferri <AEFerri@wardandsmith.com>; W. Ellis Boyle <WEBoyle@wardandsmith.com>
Subject: craig travis lawsuit: 2.1 judge motion and motion to dismiss

This message is from an **External Source**.

All, please find attached the notice of filing and courtesy copies of what was filed this afternoon.

W. Ellis Boyle
919-277-9187

 **W. Ellis Boyle**
Attorney

Ward and Smith, P.A.
751 Corporate Center Drive, Suite 300 (27607)
Post Office Box 33009 | Raleigh, NC 27636-3009
P: 919.277.9187 | F: 919.277.9177
www.wardandsmith.com



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From: Craig Schauer <cschauer@dowlingfirm.com>
Sent: Thursday, July 18, 2024 8:33 AM
To: Myers, Kellie Z.
Cc: W. Ellis Boyle
Subject: Rule 2.1 motion
Attachments: Travis - 08 - Joint Motion to Designate Action as Exceptional Case_.pdf

Ms. Myers,

Mr. Boyle and I filed a Rule 2.1 Motion on Friday. Our motion asks for the appointment of Judge Clayton Sommers, because of his experience with a related case. We filed the motion before we were able to contact Judge Sommers. Since filing the motion, I have been able to contact Judge Sommers, and he confirmed that he is willing able to serve as a judge for the case, if designated. Attached is our motion.

Thanks,
Craig

Dowling PLLC

Craig D. Schauer
3801 Lake Boone Trail
Suite 260
Raleigh, North Carolina 27607

[919.529.3351](tel:919.529.3351)
cschauer@dowlingfirm.com

From: Myers, Kellie Z. <kellie.z.myers@nccourts.org>
Sent: Friday, November 22, 2024 4:00 PM
To: Alicia Journey; W. Ellis Boyle; Craig Schauer; Nathan Huff
Subject: [External]Rule 2.1 Request - T. Craig Travis VS P. Kevin Berger (24CV018884-910)
Attachments: Rule 2.1 motion

Good afternoon,

I am writing regarding the request for Rule 2.1 designation in this matter.

On November 4, 2024, I sent a Rule 2.1 request to the NCAOC Assistant Director for consideration by Chief Justice Newby. This request was sent prematurely due to my error, and I have asked the Assistant Director to disregard the request, which she has done. After I sent the Rule 2.1 request, staff of Chief Justice Newby’s Office reached out to ask if I had received an objection from Plaintiff. I reviewed the electronic court file in Odyssey and located Plaintiff’s objection filed under “Other/Miscellaneous.” It was then that I realized that I had neither received nor reviewed Plaintiff’s objection and that I failed to recognize that Plaintiff’s counsel was not copied on the July 18, 2024, email to me with the Joint Motion to Designate attached (that email is attached herein to ensure that Plaintiff’s counsel has a copy).

I apologize for transmitting the Rule 2.1 request to the NCAOC without the complete information included.

If Plaintiff’s position remains the same as set out in the July 12, 2024, Objection, this matter will need to be set for a hearing before the Senior Resident Superior Court Judge, so I ask that Ms. Journey reply-all to this email and let me know how her client wishes to proceed.

Additionally, Defendants state in their Joint Motion to Designate that “Judge Somers was appointed as a Rule 2.1 judge in the similar case of *Camp Carefree, Inc. v. Rockingham County*, Case No. 23-CV-2013 file in Rockingham County Superior Court.” I have reached out to Rockingham County and the NCAOC and neither have been able to confirm that the case was a Rule 2.1 case. Therefore, I kindly ask Defendants’ counsel to confirm the date the Chief Justice appointed Judge Somers as the Rule 2.1 judge in the Rockingham County case so that we may locate the Rule 2.1 designation and assignment order.

Best regards,



Kellie Myers
 Court Administrator
 10th Judicial District | Wake County
 North Carolina Judicial Branch
 O 919-792-4775

Justice for all
www.NCcourts.gov/WakeTCA



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