No. 24-1109 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

BEVERLY BARD; RICHARD LEVY; SUSAN KING COPE; ALLEN WELLONS; LINDA MINOR; THOMAS W. ROSS, SR.; MARIE GORDON; SARAH KATHERINE SCHULTZ; JOSEPH J. COCCIA; TIMOTHY S. EMERY; and JAMES G. ROWE;

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS; ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of elections; JEFF CARMON III, in his official capacity as Secretary of the North Carolina State Board of Elections; STACY "FOUR" EGGERS, in his official capacity as a Member of the North Carolina State Board of Elections; SIOBHAN O'DUFFY MILLEN, in her official capacity as a Member of the North Carolina State Board of Elections; KEVIN N. LEWIS, in his official capacity as a Member of the North Carolina State Board of Elections; PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; and DESTIN HALL[1], in his official capacity as Speaker of the North Carolina House of Representatives,

Defendants.

From Wake County
No. 24CV003534-910

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LEGISLATIVE DEFENDANTS CROSS-APPELLANTS' BRIEF

****

[1] Pursuant to N.C. R. Civ. P. 25(f)(1), Destin Hall is substituted for former Speaker Moore, who was named in his official capacity as Speaker of the North Carolina House.

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ISSUE PRESENTED

I. DID THE SUPERIOR COURT ERR WHEN IT ACTED SUA SPONTE TO FORECLOSE LEGISLATIVE DEFENDANTS CROSS-APPELLANTS' ABILITY TO FILE A MOTION FOR ATTORNEYS' FEES AS THE PREVAILING PARTY PURSUANT TO N.C. GEN. STAT. § 6-21.5?

STATEMENT OF THE CASE

Plaintiffs-Appellants ("Plaintiffs") filed this action on 31 January 2024, alleging that certain districts in the 2023 state House, state Senate, and Congressional Plans were partisan gerrymanders that violated Plaintiffs' rights to "fair elections" under the North Carolina Constitution. (R pp 3-55). Plaintiffs named as defendants the North Carolina State Board of Elections and its members (collectively, the "NCSBE Defendants"). Plaintiffs also named as defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Destin Hall,[2] in his official capacity as Speaker of the North Carolina House (collectively, "Legislative Defendants" or "Cross-Appellants").

On 6 February 2024, the Honorable Judge Paul C. Ridgeway requested a three-judge panel of Wake County Superior Court to preside over the matter pursuant to N.C. Gen. Stat. § 1-267.1. (R p 142). On 19 February 2024, the Honorable Chief Justice Paul Newby of the North Carolina Supreme Court assigned the case to a panel with the Honorables Jeffery B. Foster, Angela B. Puckett, and C. Ashley Gore, Superior Court Judges presiding (hereinafter, "the superior court"). (R pp 142-43).

Legislative Defendants timely moved to dismiss Plaintiffs' Complaint on 6 March 2024 pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted (hereinafter, the "Motion"). (R pp 56-58). NCSBE Defendants timely filed their Answer to Plaintiffs' Complaint on 12 March 2024. (R pp 59-83). Pursuant

[2] Plaintiffs originally named former Speaker Timothy K. Moore. However, pursuant to N.C. R. Civ. P. 25(f)(1), Destin Hall is substituted for his predecessor in office.

to a scheduling order, Plaintiffs and Legislative Defendants timely filed their briefs in opposition to and in support of the Motion on 10 May 2024. (R pp 84-139). Legislative Defendants argued that Plaintiffs' claim presented a non-justiciable political question as previously foreclosed in *Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023) ("*Harper* III"). (R p 144).

On 13 June 2024, a hearing was held before the superior court on Legislative Defendants' Motion to Dismiss. At the hearing, the NCSBE Defendants took no position on the Motion. (R p 143).

On 28 June 2024, the superior court entered an order granting Legislative Defendants' Motion to Dismiss, holding that Plaintiffs' claim presented a non-justiciable political question as previously foreclosed in *Harper* III. (R pp 141-46). The order did not address the NCSBE Defendants, but did order that all parties pay their own attorneys' fees. (*Id.*).

On 19 July 2024, Plaintiffs filed a notice of appeal from the 28 June 2024 order. (R pp 147-50).

On 22 July 2024, the superior court entered a second order dismissing Plaintiffs' claims as to all remaining defendants (the NCSBE Defendants) for the same reasons as the 28 June 2024 order. (R pp 151-52). Plaintiffs filed a new notice of appeal to include both the 22 July 2024 and 28 June 2024 orders on 13 August 2024. (R pp 153-56).

Legislative Defendants filed a notice of cross-appeal on 20 August 2024. (R pp 157-59).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This Court has jurisdiction over Legislative Defendants' cross-appeal of the superior court's order entered on 22 July 2024, which incorporates the panel's order on 28 June 2024, pursuant to N.C. Gen. Stat. § 7A-27(b)(1) because it is a final judgment dismissing Plaintiffs' claims against all parties.

In the alternative, this Court has jurisdiction over Legislative Defendants' appeal pursuant to N.C. Gen. Stat. § 7A-27(b)(3)(a) or § 7A-27(b)(3)(c) on the ground that the superior court's 22 July 2024 order affects Legislative Defendants' substantial right to move for statutory attorneys' fees when plaintiffs knowingly file nonjusticiable claims.

STATEMENT OF THE FACTS

Following the 2020 decennial census, the General Assembly enacted new redistricting plans for North Carolina's state House, state Senate, and Congressional districts (collectively, the "2021 Plans"). Shortly thereafter, groups of plaintiffs filed suits alleging that the 2021 Plans were unconstitutional partisan gerrymanders under the North Carolina Constitution. *See, e.g. N.C. League of Conservation Voters v. Hall*, No. 21-CVS-015426, 2021 WL 6883732, at *1-2 (N.C. Super. Ct. Dec. 3, 2021). The cases were consolidated and assigned to a three-judge panel of Wake County Superior Court, who denied various motions for preliminary injunction. *See id.* After a bypass petition and expedited review of that order, on 8 December 2021 the North Carolina Supreme Court reversed the panel's denial of the preliminary injunctions and remanded for an expedited trial to take place the first week of January 2022. *See Harper v. Hall,* 379 N.C. 656, 865 S.E.2d 301 (2021) (Mem). After a trial on the merits, the panel entered judgment for Legislative Defendants and held that the plaintiffs' partisan gerrymandering claims were nonjusticiable political questions under the North Carolina Constitution. *See, e.g., Harper* III, 384 N.C. at 301-05, 886 S.E.2d at 401-03. The plaintiffs appealed. *Id.* at 304, 886 S.E.2d at 403.

On 4 February 2022, the North Carolina Supreme Court, which had retained jurisdiction, issued an abbreviated order holding that the 2021 Plans were unconstitutional partisan gerrymanders under the North Carolina Constitution and enjoined elections under the 2021 Plans. The Court issued a "full" opinion ten days later in *Harper v. Hall*, 380 N.C. 317, 868 S.E.2d 499 (2022) ("*Harper* I"). The *Harper*

I Court held partisan gerrymandering claims were justiciable because they could be measured by so-called partisan fairness metrics—the "Mean-Median Difference" and the "Efficiency Gap"—and that plans with a Mean-Median Difference of less than 1% and an Efficiency Gap of at or less than 7% would be "presumptively constitutional." *Harper* III, 384 N.C. at 305, 886 S.E.2d at 403-04. The General Assembly was given seventeen days total, with only seven of those days being after the Court issued its full opinion, to draw and file new remedial plans with the panel. *Id.* at 307-08, 886 S.E.2d at 405.

On remand, the General Assembly quickly enacted new remedial state House, state Senate, and Congressional plans (collectively, the "2022 Plans"). Each plan was at or below the Mean-Median Difference and Efficiency Gap thresholds established by *Harper* I. *Id.* at 310, 886 S.E.2d at 406. In order to assist with evaluating the 2022 Plans, the panel retained Robert F. Orr (lead attorney in this case), Robert H. Edmunds, and Thomas W. Ross (a Plaintiff in this case) to serve as court-appointed Special Masters. The Special Masters, in turn, hired four well-known academics as advisors to assist them in evaluating the 2022 Plans. *Id.* at 308, 886 S.E.2d at 405.

The Special Masters issued a report finding that the 2022 House and Senate Plans complied with the metrics set out in *Harper* I, but the 2022 Congressional Plan did not. *Id.* at 310, 886 S.E.2d at 406. The Special Masters proposed an alternative congressional plan drawn by one of their advisors, Dr. Bernard Grofman. *Id.* Specifically, the Special Masters apportioned voters based on their political affiliation, to the benefit of Democratic voters, to produce a congressional map that

they perceived to be more "fair." *Id.* at 348-49, 886 S.E.2d at 430; *see also Harper v. Hall*, 383 N.C. 89, 106-07, 881 S.E.2d 156, 169 (2022) ("*Harper* II"). The panel adopted the Special Master's report in full and directed that the 2022 elections proceed under the 2022 state House and Senate Plans, and the Special Masters' congressional plan. *Harper* III*,* 384 N.C. at 310-11, 886 S.E.2d at 406-07. All parties appealed. *See Harper II*, 383 N.C. 89, 881 S.E.2d 156.

In *Harper* II, the Supreme Court affirmed the panel's rejection of the 2022 Congressional Plan and the approval of the 2022 House Plan. However, the Court also found that the 2022 Senate Plan still constituted an illegal partisan gerrymander, despite the fact that it passed the fairness measures set out in *Harper* I. *See Harper* III, 384 N.C. at 311-12, 886 S.E.2d at 407-08.

On 20 January 2023, Legislative Defendants timely filed a petition for rehearing under North Carolina Rule of Appellate Procedure 31. *Id.* at 314, 886 S.E.2d at 409. The Court granted the petition for rehearing and allowed further briefing by the parties. *Id.*

On 28 April 2023, the Court entered its opinion in *Harper* III, which overruled *Harper* I and withdrew *Harper* II. *Id.* at 379, 886 S.E.2d at 449. The *Harper* III Court unequivocally held that partisan gerrymandering claims are nonjusticiable political questions under the North Carolina Constitution. Specifically, the Supreme Court held that partisan gerrymandering claims were nonjusticiable because (1) apportionment is textually committed to the General Assembly; (2) there is no judicially manageable standard to adjudicate such claims; and (3) the North Carolina

Constitution does not contain an express prohibition or limit on partisan gerrymandering. *Id.* at 337-38, 345-46, 377-78, 886 S.E.2d at 423, 428, 448-49. The Court further determined that because of the erroneous interpretation of the North Carolina Constitution adopted by the Court in *Harper* I, the General Assembly could enact a new set of legislative and congressional redistricting plans. *Id.* at 378, 886 S.E.2d at 448.

Following *Harper* III, in October 2023, the General Assembly enacted three new redistricting plans. *See* S.L. 2023-145 ("2023 Congressional Plan"); S.L. 2023-146 ("2023 Senate Plan"); and S.L. 2023-149 ("2023 House Plan") (collectively, the "2023 Plans").

On 31 January 2024, Plaintiffs filed a Complaint in this matter seeking a declaration that Legislative Defendants violated the North Carolina Constitution by enacting certain districts within the 2023 Plans for partisan gain. (R pp 3-55). The Complaint alleged only one claim for declaratory and permanent injunctive relief: "Violation of the Right to Fair Elections" under Article I, Section 36 of the North Carolina Constitution. (R p 26).

But *Harper* III doomed Plaintiffs' Complaint from the start—and they knew it. Not only were Robert F. Orr (lead counsel for Plaintiffs) and Thomas W. Ross, Jr. (a Plaintiff) appointed as "Special Masters" at the trial court level in *Harper*, but Plaintiffs also boldly cited the opinion throughout the Complaint. (R pp 14-15 (Complaint ¶39); R pp 17-18 (Complaint ¶51); R p 20 (Complaint ¶63); R p 24 (Complaint ¶74, ¶82); R p 27 (Complaint ¶94)). It is undisputed that Plaintiffs knew

about the Supreme Court's 28 April 2023 decision in *Harper* III and that it is the law of the land. It is likewise undisputed that the Special Masters used partisanship in drawing the 2022 remedial Congressional plan. *Harper* III, 384 N.C. at 348-49, 886 S.E.2d at 430; *see also Harper* II, 383 N.C. at 137 n.4, 886 S.E.2d at 187 n.4 (Newby, J., dissenting). (stating that the public "could legitimately question the objectivity of this court-appointed, de facto 'redistricting commission'" because of Counsel Orr's "direct" and "public[]" "participat[ion] in advertisements…for a Democratic congressional candidate in a district he created during this remedial process.").

Legislative Defendants timely moved to dismiss Plaintiffs' Complaint on 6 March 2024 for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted on the specific grounds that "Plaintiffs' Claim for Relief is non-justiciable." (R pp 56-58). Neither the Motion nor Legislative Defendants' Memorandum in Support mentioned attorneys' fees. (R pp 56-57, 127-39).

At the motion to dismiss hearing, Legislative Defendants explained how Plaintiffs' attempts to distinguish their case from *Harper* III amounted to legal gobbledygook. (T p 6:11-15). The plaintiffs in *Harper* defined their partisan gerrymandering claims as "the practice of dividing geographic areas into political units to give a particular political party or group a, quote, special advantage." (T p 6:16-25). Similarly, Plaintiffs in this case alleged that Legislative Defendants drew district lines to maintain a determinative advantage for Republicans. (T p 7:1-2). As Legislative Defendants pointed out, such distinctions are just smoke and mirrors—

Plaintiffs sought the exact same relief that the *Harper* III Court determined foreclosed. (T p 7:3-9).

The superior court took the matter under advisement following the hearing. (T p 66:16-18). On 28 June 2024, the superior court entered an order granting Legislative Defendants' Motion to Dismiss, and dismissing Plaintiffs' claims with prejudice. In its order, the superior court specified exactly how the issues raised by Plaintiffs presented non-justiciable political questions and how the Supreme Court's decision in *Harper* III foreclosed Plaintiffs claims. (R pp 144-46). For example, the superior court explained:

> In its decision, the *Harper* Court reaffirmed the exclusive role of the Legislature as the body tasked with redistricting in North Carolina. "Under the North Carolina Constitution, redistricting is explicitly and exclusively committed to the General Assembly by the text of the Constitution." [*Harper* III] at 326. "[O]ur constitution and the General Statues expressly insulate the redistricting power from intrusion by the executive and judicial branches." *Id.* at 331.
>
> In the instant case, the issues raised by Plaintiffs are clearly of a political nature. There is not a judicially discoverable or manageable standard by which to decide them, and resolution by the Panel would require us to make policy determinations that are better suited for the policymaking branch of government, namely, the General Assembly.
>
> Plaintiffs, in their arguments to the Panel, urge us to find that the holdings in *Harper* do not apply to the facts and issues present in this case, but rather to Article I, §10, Free Elections Clause claims. We do not find these arguments persuasive. This case deals with the same underlying issue that was addressed in *Harper*: the redrawing of districts from which representatives to the Legislature will be elected.

(R p 145). Despite dismissing Plaintiffs' claim as non-justiciable, the superior court also determined, before Legislative Defendants could move or petition otherwise, that

"[e]ach party shall pay their own attorney fees." (R p 146). This limited finding on attorneys' fees is the subject of Legislative Defendants' cross-appeal.

ARGUMENT

I. STANDARD OF REVIEW.

Legislative Defendants have been unable to find any case directly addressing the standard of review for a superior court's *sua sponte* decision to deny a prevailing party the opportunity to move for attorneys' fees under N.C. Gen. Stat. § 6-21.5. In similar circumstances, where a lower court acted *sua sponte*, this Court has looked to "the usual standards of review" for the underlying questions at issue. *Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218, 225, 791 S.E.2d 100, 105 (2016). In the normal course, denial of a motion for prevailing party attorneys' fees under N.C. Gen. Stat. § 6-21.5 is reviewed for an abuse of discretion. *See Willow Bend Homeowners Ass'n v. Robin*son, 192 N.C. App. 405, 417, 665 S.E.2d 570, 577 (2008).[3]

But here, no motion was filed because the superior court foreclosed Legislative Defendants' ability to seek fees and costs. The superior court's order is unclear as to what legal grounds the court relied upon in reaching its conclusion that each party must bear its own fees and costs, because no such motion was properly before it. Though the order does not cite to N.C. Gen. Stat. § 6-21.5, the superior court's legal conclusion that all parties bear their own fees and costs forecloses the relief plainly afforded to Legislative Defendants under the statute. Because "[t]he Court of Appeals

[3] A lower court may be reversed for abuse of discretion only upon a showing that its actions are "manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

reviews issues of law, such as statutory interpretation, de novo[,]" *Blitz v. Agean, Inc.*, 197 N.C. App. 296, 677 S.E.2d 1, 3 (2009), de novo review of this conclusion is more appropriate. *See also L.I.C. Assocs. I, Ltd. P'ship v. Brown,* 294 N.C. App. 577, 584, 904 S.E.2d 822, 826 (2024) ("[C]onclusions of law reached by the trial court are reviewable de novo." (quotation omitted)). In any event, under either standard, the superior court's order requiring the parties to bear their own attorneys' fees and costs is reversable error.

II. THE SUPERIOR COURT ERRED IN SUA SPONTE FORECLOSING LEGISLATIVE DEFENDANTS' ABILITY TO FILE A MOTION FOR PREVAILING PARTY ATTORNEYS' FEES UNDER N.C. GEN. STAT. § 6-21.5.

The superior court erred by *sua sponte* foreclosing Legislative Defendants' ability to move for an award of reasonable attorneys' fees under N.C. Gen. Stat. § 6-21.5 for Plaintiffs' frivolous, nonjusticiable claim because such a motion was not before it. Had Legislative Defendants been given the opportunity to file and argue a motion under N.C. Gen. Stat. § 6-21.5 as prevailing parties, Legislative Defendants likely would have been awarded reasonable attorneys' fees because Plaintiffs' claims were squarely foreclosed by *Harper* III.

A. The superior court acted outside of its authority in *sua sponte* declining to award prevailing party attorneys' fees.

North Carolina courts have authority to "adjudicate a controversy only when a party presents the controversy to it[.]" *In re Transportation of Juvs.*, 102 N.C. App. 806, 808, 403 S.E.2d 557, 558 (1991). Thus a party's proper pleading or motion is generally required to bring an issue before the trial court for it to act upon. *See id.*

While a superior court has some inherent power to act without a motion, this authority is limited to "only those things which are reasonably necessary for the administration of justice within the scope of their jurisdiction . . . those powers which are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction." *Id.* at 808, 403 S.E.2d at 559. *See also Zetino-Cruz*, 249 N.C. App. at 230, 791 S.E.2d at 108 (holding that changing venue *sua sponte* is beyond the superior court's inherent power to take actions necessary for administering justice); *Williams v. Gibson*, 232 N.C. 133, 135, 59 S.E.2d 602, 603-04 (1950).

N.C. Gen. Stat. § 6-21.5 provides that "the court, ***upon motion of the prevailing party***, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." *Id.* (emphasis added). The plain text of this statute, which must be strictly construed, requires a prevailing party to file a motion seeking attorneys' fees in the first instance. *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 257, 400 S.E.2d 435, 437 (1991). Only after the filing of a motion for prevailing party attorneys' fees for non-justiciable issues can the court entertain granting or denying such an award. N.C. Gen. Stat. § 6-21.5 cannot reasonably be interpreted otherwise.

It is undisputed that Legislative Defendants were the prevailing party, as the superior court granted Legislative Defendants' Motion to Dismiss in its entirety. It is likewise undisputed that the superior court held that Plaintiffs' claims were non-

justiciable and indistinguishable from the claims brought in *Harper*. *See supra* at p. 11. However, Legislative Defendants had not yet moved for prevailing party attorneys' fees, nor did they mention fees in their Motion to Dismiss. As such, the superior court did not have the authority to adjudicate the issue of whether each party should pay their own attorneys' fees because a motion for fees was not properly before it. *In re Transportation of Juvs.*, 102 N.C. App. at 808, 403 S.E.2d at 558.

Furthermore, even if the superior court had the inherent power to act without a motion, *sua sponte* ordering that "[e]ach party shall pay their own attorney fees" was not reasonably necessary for the superior court's administration of justice. (R p 146). At the hearing on Legislative Defendants' Motion to Dismiss, the superior court never indicated that it was going to consider attorneys' fees and Legislative Defendants were not given an opportunity to present their case for prevailing party fees under N.C. Gen. Stat. § 6-21.5. As shown *infra*, this case presents a textbook example of a case brought with a complete absence of justiciable issues, and these issues were uniquely and personally known to Plaintiffs. This is the exact scenario that N.C. Gen. Stat. § 6-21.5 was enacted to prevent. In order for the superior court to properly consider the fee arguments, the decision below on attorneys' fees should be reversed so that Legislative Defendants may file a motion.

B. The superior court abused its direction ordering the parties to pay their own attorneys' fees.

N.C. Gen. Stat. § 6-21.5 was enacted "to discourage frivolous legal action" that can occur at any stage of litigation. *Short v. Bryant*, 97 N.C. App. 327, 329, 388 S.E.2d 205, 206 (1990). Upon a motion by a prevailing party, a superior court may exercise

its discretion to award fees under § 6-21.5 after finding either that: (a) the non-prevailing party should "reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue[;]" or (b) the non-prevailing party "persisted in litigating the case after the point where [it] should reasonably have become aware that the pleading [it] filed no longer contained a justiciable issue." *Brooks v. Giesey*, 334 N.C. 303, 309, 432 S.E.2d 339, 342 (1993) (quotation omitted).

While usually a high bar, the former option is met here: Plaintiffs should reasonably have been aware that the Complaint contained no justiciable issue at the time the Complaint was filed. Plaintiff Thomas W. Ross was a paid, court-appointed Special Master in the *Harper* litigation. Plaintiffs' lead counsel was also paid to be a Special Master in *Harper*. And by citing *Harper* III in the Complaint, it is undeniable that Plaintiffs and their counsel knew that *Harper* III held their claim and theories were nonjusticiable political questions.

Nor are the facts in *Harper* distinguishable. Plaintiffs in *Harper III* also brought partisan gerrymandering claims, contending that "the General Assembly violated the state constitution by drawing legislative districts that unfairly benefited one political party at the expense of another. . . ." 384 N.C. at 299, 886 S.E.2d at 400. There is simply no material difference between the "advantage" alleged here and the "unfair benefit" alleged in *Harper*. The superior court found that the substance of the claim alleged here is identical to *Harper* after Plaintiffs failed to allege a good faith argument for a judicially discernable definition of "fair" elections separate from what the North Carolina Supreme Court squarely foreclosed as nonjusticiable political

questions in *Harper* III. (T pp 41:8-47:7; 50:2-51:5; 57:18-59:15). Even giving Plaintiffs' Complaint "the indulgent treatment which they receive on motions . . . to dismiss," no reasonable person with knowledge of *Harper* III would think that Plaintiffs' alleged a justiciable controversy. *Free Spirit Aviation, Inc. v. Rutherford Airport Authority*, 206 N.C. App. 192, 197-98, 696 S.E.2d 559, 563 (2010) (quoting *Sprouse v. North River Ins. Co.,* 81 N.C. App. 311, 326, 344 S.E.2d 555, 565 (1986)).

No one can reasonably dispute that Legislative Defendants are prevailing parties on their Motion to Dismiss. Had Legislative Defendants been given the opportunity to file a motion under N.C. Gen. Stat. § 6-21.5 as prevailing parties, Legislative Defendants likely would have been awarded reasonable attorneys' fees because Plaintiffs' claims were squarely foreclosed by *Harper* III. (R pp 143-46). Because of the exceedingly high likelihood that a motion by Legislative Defendants would have been successful on the merits, the superior court's *sua sponte* ruling that the parties shall be responsible for their own respective fees should be reversed.

CONCLUSION

For these reasons, this Court should reverse the superior court's determination that the parties shall be responsible for their own respective attorneys' fees, and remand to the superior court so that Legislative Defendants-Appellants may file a motion pursuant to N.C. Gen. Stat. § 6-21.5.

Respectfully submitted, this the 21st day of February, 2025.

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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 COMPLIANCE

Pursuant to North Carolina Rule of Appellate Procedure 28(j), the undersigned certifies that the foregoing brief, which was prepared using a 12-point proportionally spaced font with Century Schoolbook, is approximately 4,015 words, (excluding covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, counsel's signature blocks) as reported by the word-processing server's word count.

This the 21st day of February, 2025.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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CERTIFICATE OF SERVICE

It is hereby certified that on this the 21st day of February, 2025, the foregoing was served on the individuals below via email and electronic submission:

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