

NO. COA 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. EMRY,
and JAMES G. ROWE,

Plaintiffs-Appellants/Cross-Appellees,

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,
PHILLIP E. BERGER in his official capacity as
President Pro Tem of the North Carolina
Senate, and DESTIN HALL in his official
capacity as Speaker of the North Carolina
House of Representatives.

Defendants-Appellees/Cross-Appellants.

From Wake County

MOTION TO DISMISS PURSUANT TO RULE 10(a)(1)

TO THE HONORABLE COURT OF APPEALS OF NORTH
CAROLINA:

COMES NOW, the Plaintiffs-Appellants/Cross-Appellees (“Plaintiffs”), and herein respectfully submits this Motion to Dismiss the Legislative Defendants-Appellees/Cross-Appellants’ (“Legislative Defendants”) appeal where the issue presented therein was not initially raised in the trial proceedings. In support of this motion, Plaintiffs submit as follows:

1. Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states in full:

“(a) Preserving Issues During Trial Proceedings. (1) General. In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact

and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.”

2. Legislative Defendants raise for the very first time the issue of attorney’s fees pursuant to N.C.G.S. § 6-21.5 in their cross notice of appeal. The issue of attorney’s fees is the Legislative Defendant’s single issue on appeal. The basis of Legislative-Defendants’ argument is that the three Judge Panel (the “Honorable Panel”) to which this matter was assigned denied their ability to argue for or otherwise preserve this issue. This argument lacks merit.

3. This matter was filed on 31 January 2024, and the Complaint duly served on Legislative Defendants. The Legislative Defendants never filed an Answer to the Complaint, electing to instead timely filing a Motion to Dismiss. (R p 56-57). The Legislative Defendants’ Motion to Dismiss contained no prayer for attorney’s fees from the Honorable Panel. The Legislative-Defendants’ raised no argument for attorneys’ fees in their extensive briefing to the Honorable Panel as it related to their motion to dismiss. (R pp 127-139). Moreover, the Legislative Defendants made no motion, issued no notice or filing requesting attorney’s fees before the Special Session of Wake County

Superior Court held before the Honorable Panel on 13 June 2024 at Campbell Law School.

4. At the 13 June 2024 Special Session of Court, the Legislative Defendants' Motion to Dismiss in this case came on for hearing before the Honorable Panel. All Parties to the case were given ample time to argue the merits of the case. At the conclusion of the arguments, presiding Judge Jeffery Foster stated:

All right. Thank you-all for your arguments today. They were helpful to the Court, illuminating the issues that we need to consider, and I appreciate your time and effort that you put in on behalf of all your clients. *I think this is a classic example of why these issues are important and why we're here.* So thank you all.

(T p 66 (emphasis added)). Judge Foster further inquired of counsel for the Parties if they had any objection to “deciding this case out of county, out of term.” Counsel for Legislative Defendants replied: “No, your Honor.” *Id.*

5. The Honorable Panel took the case under advisement, and an Order (Order I) was subsequently filed by the Honorable Panel on 26 June 2024. (R p 141). Order I was issued 12 days after the conclusion of the hearing. Order I was entered by the Court upon “Legislative Defendants' Motion to Dismiss” and stated: “3. *The costs of this action*

shall be taxed against the Plaintiffs.” and “4. Each party shall pay their own attorney fees.” (R p 146 (emphasis added)).

6. The Legislative Defendants made no subsequent timely filings pursuant to N.C.G.S. § 1A-1, Rules 59 or Rule 60 of the North Carolina Rules of Civil Procedure, in response to the Court’s entry of Order I.

7. On 19 July 2024, Plaintiffs, out of an abundance of caution, filed their Notice of Appeal from Order I within thirty days of its entry. (R pp 147-50).

8. On 22 July 2024, the Honorable Panel, *sua sponte*, issued an Order dismissing the remaining claims as to any remaining parties (the State Board of Elections and its named members) (Order II). (R p 151). Plaintiffs filed an Amended Notice of appeal to encompass Order II on or about 13 August 2024. (R p 153). Only then—some 53 days after entry of Order I which taxed costs against the Plaintiffs and ordered each side to be responsible for their own attorney’s fees—did the Legislative Defendants file their notice of cross-appeal on 20 August 2024 as to Order II.

9. The Legislative Defendants' now raise the issue of attorney's fees for the very first time, claiming pursuant to N.C.G.S. § 6-21.5, in their Cross-Appellants' Brief filed 21 February 2025 (over a year from the filing of Plaintiffs 53-page Complaint) that they were denied the opportunity to seek attorney's fees.

10. The Legislative Defendants moved to dismiss Plaintiffs' claims. The only hearing yet in this case was upon the Legislative Defendants' filing. They argued against Plaintiffs' claims zealously, referencing the same as "gobbledygook." It was incumbent upon the Legislative Defendants to pray to the court for an award attorneys' fees prior to asking the court to dismiss this case. Alternatively, the Legislative Defendants could have contingently preserved the attorney's fees issue if their motion to dismiss proved successful. The Legislative Defendants did neither.

WHEREFORE, Plaintiffs respectfully move this Court pursuant to Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure to dismiss the Legislative Defendants' Cross Appeal where the Legislative Defendants failed to preserve the issue raised in the first instance in their Notice of Cross-Appeal.

Respectfully submitted, this 7 day of April 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 SERVICE

I, Thomas R. Wilson, hereby certify that I have used e-file and served a copy of the forgoing MOTION, and have served a copy on counsel of record via email at the addresses below:

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This the 7th day of April 2025.

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