

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

PLAINTIFFS/CROSS-APPELLEES’ BRIEF

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ISSUE PRESENTED

- I. THE SUPERIOR COURT DID NOT ERR IN DECIDING THAT EACH PARTY SHOULD BEAR THEIR OWN ATTORNEY'S FEES.**

STATEMENT OF THE CASE

On 31 January 2024, Plaintiffs-Appellants (hereinafter “Plaintiffs”) filed a Complaint in Wake County Superior Court asserting claims under the North Carolina Constitution of impermissible state government intervention in the creation of discrete North Carolina voting districts. (R pp 3–55). The named Defendants in the Complaint are the North Carolina State Board of Elections (“BOE”) and North Carolina Legislative Leadership (“Legislative Defendants”). Details of the claims and arguments are set forth more fully below.

In response to the asserted North Carolina Constitutional claims and in accordance with N.C.G.S. § 1-267.1, the Honorable Chief Justice Paul Newby designated a three-judge panel for the case: the Honorable Jeffery Foster, the Honorable Angela B. Puckett, and the Honorable C. Ashley Gore (the “Superior Court Panel”). (R p 1). On or about 6 March 2024, the Legislative Defendants filed a Motion to Dismiss pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6). (R pp 56–58). On or about 12 March 2024, the BOE filed its Answer. (R pp 59–83).

After briefing, the Superior Court Panel (the “Panel”) heard arguments in a special session of Wake County Superior Court on or about 13 June 2024. (R p 140). The Panel took the matter under advisement and issued an order on 28 June 2024 dismissing the case as to the Legislative Defendants; and on 22

July 2024, the Panel dismissed the claims as to the remaining BOE Defendants. (R pp 141–46; 151–52). Plaintiffs timely appealed both Orders. (R pp 147,153). On 20 August 2024, the Legislative Defendants filed a Notice of Cross-Appeal on the issue of attorney’s fees as to the 26 June 2024 order. (R p 157).

The parties settled the Printed Record on Appeal on 23 December 2024. The parties filed their opening Appellant and Cross-Appellant briefs 21 February 2025. This Honorable Court granted one extension for the parties to file their Cross-Appellee and Appellee briefs, now due 7 April 2025.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The orders entered 27 June 2024 and 22 July 2024 by Superior Court Judges Foster, Puckett and Gore dismissing Plaintiffs’ claims for relief pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6) as to all Defendants are final judgments, and appeal therefore lies to this Court pursuant to N.C.G.S. § 7A-27(b)(1).

STATEMENT OF THE FACTS

The facts of this case are set forth in Plaintiffs’ opening Appellants’ Brief and are incorporated herein by reference.

ARGUMENT

- I. THE SUPERIOR COURT DID NOT ERR IN DECIDING THAT EACH PARTY SHOULD BEAR THEIR OWN ATTORNEY’S FEES.**

A. The Legislative Defendants' claim that the Superior Court erroneously "foreclosed" their opportunity to file a motion for attorney's fees has no merit in that the Legislative Defendants failed to preserve the issue before the Court.

After service of the Complaint on them, the Legislative Defendants went almost 7 months without ever mentioning to the court, much less filing, a motion requesting attorney's fees. Now, however, they seek to claim the Superior Court panel erred by for not letting them do so even though they never raised the issue of attorney's fees until they filed their Cross Appeal. Such reasoning is palpably without merit and attempts to impermissibly shift blame to the judges hearing the case even though the Legislative Defendants' failed to preserve the issue of attorney's fees by failing to raise it with the panel which would have given the panel the opportunity to consider the issue.

This case was filed on 31 January 2024, and the Complaint was duly served on the Legislative Defendants. Having chosen not to file an Answer but instead file a Motion to Dismiss, the Legislative Defendants had every opportunity prior to the hearing on 13 June 2024, to raise the issue of attorney's fees. Yet, they failed to do so. While at that point, no decision had obviously been rendered in the case, the Legislative Defendants had no impediment to either filing a motion for attorney's fees, contingent on prevailing on their motion to dismiss, or at least putting the court on notice

that if they did prevail on their Motion to Dismiss, that they would then seek attorney's fees. At each stage of the proceedings in this case, the Legislative Defendants failed to raise the issue of attorney's fees.

On 28 June 2024, the court entered a signed Order in the case, ruling on the Legislative Defendants' Motion to Dismiss; taxing costs against the Plaintiffs; and ordering that each side be responsible for their own attorney's fees. The Legislative Defendants remained silent on the issue addressing attorney's fees or their desire to seek an award of attorney's fees. On 22 July 2024, the Superior Court entered its second Order dismissing the case against the State Board of Elections and its members. This second Order, applicable only to the Defendant State Board of Elections and Defendant members, dismissed the claims against the State Board and did not address the taxing of costs in the case or attorney's fees. The Legislative Defendants again completely failed to bring the question of their desire to seek an award of attorney's fees to the Court's attention.

Specifically, the Legislative Defendants did not:

- Request attorney's fees in their Motion to Dismiss;
- Request (or even mention) attorney's fees at the Hearing on the Motion to Dismiss;
- File a Motion seeking attorney's fees prior to the Panel issuing an Order ruling in favor of the Legislative Defendants;

- File a Motion seeking attorney's fees prior to the Panel issuing its second Order; or
- File a Motion seeking attorney's fees from the date of the second Order up to the date of filing their cross-appeal in this case.

Rather, the Legislative Defendants raised the issue of attorney's fees for the very first time in their Cross Appeal, erroneously contending the Superior Court panel erred by "foreclosing" them from seeking attorney's fees. However, the Legislative Defendants "foreclosed" their ability to seek attorney's fees by failing to timely raise the issue of attorney's fees with the Court by requesting attorney's fees in their Motion to Dismiss or making a request for fees at the Hearing on the Motion to Dismiss. Even after the Court entered its Order on the Motion to Dismiss in favor of the Legislative Defendants, they did not seek attorney's fees, nor did they appeal from the merits of the first Order's determination that each party should be responsible for their own attorney's fees. Indeed, the Legislative Defendants made absolutely no mention to the Court of its dissatisfaction with the Order entered, nor did they file any sort of motion requesting relief or an opportunity to address the award of attorney's fees.

B. The Legislative Defendants failed to preserve the issue brought forward on their cross-appeal.

North Carolina Rule of Appellate Procedure Rule 10(a) states in full:

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.

N.C. R. App. P. 10(a).

It is well settled that “issues and theories of a case not raised below will not be considered on appeal.” *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001). The appellate courts “will not consider arguments based upon matters not presented to or adjudicated by the trial court. Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court.” *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (citations and quotation marks omitted), cert. denied, 540 U.S. 988, 157 L. Ed. 2d 382 (2003); *See also, Vanguard Pai Lung, LLC v. Moody Nova Trading USA, Inc.*, No. 15124, 2025 N.C. LEXIS 150 (Mar. 21, 2025) (affirming the business

court's determination that several of the defendants' arguments were not preserved for appellate review.)

Here, the Record is uncontroverted that the Legislative Defendants failed to present an issue to the superior court raising their desire to seek attorney's fees. Even if the Superior Court panel had rejected an attempt to reopen the question of attorney's fees after the initial Order, at least the Legislative Defendants would have taken the necessary steps to give the Superior Court panel an opportunity to reconsider the issue before the issue being first raised on appeal. Instead, the Legislative Defendants completely failed to give the trial court any opportunity to address the issue of their interest in seeking attorney's fees. As such, this Cross-Appeal should be dismissed.

C. The Legislative Defendants' attempt to argue the merits of the Superior Court's order that each party pay their own attorney's fees, is not properly before the Court; was not appealed; and even if it was, it has no merit.

The sole issue presented by the Legislative Defendants' cross-appeal is that the superior court erred by acting *sua sponte* by ordering each party to pay their own attorney's fees. They did not appeal the merits of the court's Order on that point and as previously argued, they failed to preserve that specific issue at the trial level by failing to raise the issue of attorney's fees in any manner whatsoever. The merits of the Superior Court panel decision are

not properly before the Court, but Plaintiffs will briefly address the issue on the merits since the Legislative Defendants have attempted to do so.

If the issue on the merits of the Court's Order requiring each party to be responsible for their own attorney's fees were to be addressed, the argument of the Legislative Defendants must fail. "Decisions by the trial court on questions of attorney's fees, is reviewed under an abuse of discretion standard. As with any statutorily authorized award of attorney's fees, we review the trial court's award of attorney's fees under Rule 11 using an abuse of discretion standard. *Martin Architectural Prods., Inc. v. Meridian Constr. Co.*, 155 N.C. App. 176, 182, 574 S.E.2d 189, 193 (2002). The abuse of discretion standard 'is intended to give great leeway to the trial court and a clear abuse of discretion must be shown.' *Central Carolina Nissan, Inc. v. Sturgis*, 98 N.C. App. 253, 264, 390 S.E.2d 730, 737 (1990)." *Hill v. Hill*, 1173 N.C. App. 309, 318 (2005). In this matter, there is absolutely nothing to merit the overturning of the Order as an abuse of discretion.

This case is a matter of first impression based on a theory under the Declaration of Rights, Art. I, of the North Carolina Constitution. Specifically, Plaintiffs contend they have an unenumerated right under Art. I, Sec. 36 that can be manifested through that Article or manifested through other rights that are enumerated in the Constitution, including Art. I, Sec. 19, The Law of the Land clause or through Art. I, Sec. 10, the Free Election clause. The pleadings

set forth a governmental process of creating specific individual election districts by manipulating political data in such a way as to influence or preordain the outcome of elections in those districts. Plaintiffs contend this manipulation of election districts violates their constitutional rights.

While the *Harper III* decision by the North Carolina Supreme Court holds that “partisan gerrymandering” is a non-justiciable political question, that holding does not apply to this case. *Harper v. Hall* (“*Harper III*”), 383 N.C. 292, 886 S.E.2d 393 (2023). The constitutional theories in the *Harper III* case and this case, are fundamentally different. The factual allegations are different, and the remedy sought is different. As Chief Justice Newby wrote in *Harper III*, comparing the claims in that case to the claims in *Rucho*:

Common Cause (one of the plaintiffs), for example, asserts that partisan gerrymandering violates our equal protection clause by “diminish[ing] the electoral power” of members of the Democratic Party...and by burdening Democratic voters’ rights to freedom of speech and freedom to “associate effectively’ with the Democratic Party, and violates the free election clause by preventing elections from reflecting the ‘will of the people.

Harper v. Hall, 384 N.C. 292, 314 n.6, 886 S.E.2d 393, 409 (2023). Chief Justice Newby continued by stating in the majority opinion in *Harper III* referencing the parallel claims in *Rucho*, “The Court explained that partisan gerrymandering claims are effectively requests for courts to allocate political power to achieve proportional representation, something the Federal Constitution does not require.” *Id.* at 317, 886 S.E.2d at 410.

Further, *Harper III* states, “Accordingly, partisan gerrymandering claims do not seek to redress a violation of any particular constitutional provisions; rather such claims ‘ask the courts to *make their own political judgment* about how much representation particular political parties *deserve* – based on the votes of their supporters – and to rearrange the challenged districts to achieve that end.’ *Id.* (first emphasis added). Essentially, partisan gerrymandering claims ask courts ‘to apportion political power as a matter of fairness.’ *Id.* This judgment call is a policy choice. It is not the kind of clear, manageable, and politically neutral standard required for justiciable issues.” *Id.* 317, 886 S.E.2d at 411.

Thus, the Supreme Court in *Harper III* determined that a very specific issue presented in the case was a non-justiciable political question. That issue is fundamentally different from the issue presented to the Court in this case. In *Harper III*, the non-justiciable political issue was whether plaintiffs had a constitutional claim to proportional representation in that Democrats “deserve” a proportional number of elective seats in the districts created by the challenged maps.

In this case, Plaintiffs do not seek a proportional map – for ANY political party – nor do the Plaintiffs ask the Court to “rearrange the challenged districts to that end”. Instead, Plaintiffs seek to have the rights of ALL voters, no matter their political registration, protected from government interference

in the election process by manipulating the voter pool to favor one side in those districts. Plaintiffs do NOT challenge all of the maps in question for the congressional, State House and State Senate. Instead, Plaintiffs challenge a handful of specific districts (3 congressional, 1 State House, and 1 State Senate) and seek no particular political result. In so doing, Plaintiffs seek to protect the rights of all citizens regardless of political affiliation to be free from the government “rigging” an election by manipulating the voter pool for those specific districts set out in the lawsuit.

Any ultimate decision as to the justiciability of the issue in this case cannot solely be based on the *Harper III* question presented as *Harper III* does not control. Instead, the Court must conduct an independent review of the question presented in this case to determine whether the criteria for determining non-justiciable political questions forecloses the claims presented by the Plaintiffs. Thus, any argument seeking attorney’s fees based upon a non-justiciability determination would need to be predicated on a different question than the one presented in *Harper III*.

Furthermore, as the *Harper III* majority noted, “[b]ecause some level of partisan gerrymandering is constitutional, ‘[t]he ‘central problem’ ‘with such claims is not determining whether a jurisdiction has engaged in any partisan gerrymandering, which is a simple, yes-or-no delineation. (citations omitted) Rather, the problem with partisan gerrymandering claims, is ‘*determining*

when political gerrymandering has gone too far.’ *Id.* (emphasis added), (quoting *Vieth*, 541 U.S. at 296, 124 S. Ct. 1787). That sort of question requires more than a yes-or-no answer. *Instead, it requires ‘a standard for deciding how much partisan dominance is too much.’* (emphasis added) *Id.* At 2498 (quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 420, 126 S. Ct. 2594, 2611 (2006) (opinion of Kennedy, J.))”

Therefore, even if this Court should decide, contrary to the arguments of Plaintiffs in this case, that the claims raised fall under the categorization “partisan gerrymandering” claims, the *Harper III* majority has made it abundantly clear that there is a limit to “how much partisan dominance is too much”. In this case, Plaintiffs have argued that the constitutional violations raised, and the facts alleged in the Complaint, go well beyond any partisan considerations set forth in *Harper III* as permissible. The constitutional challenge here is against governmental action that strikes straight at the heart of democracy itself where the foundation of free and fair elections is undermined by unconstitutional “partisan dominance”.

The Legislative Defendants’ effort to argue the merits, fails because the merits are not before the Court on this Cross Appeal. Even if they were, the premise upon which the claim rests must fail. The Legislative Defendants rely on N.C.G.S. § 6-21.5. However, this statute clearly provides that “a party who advances a claim or defense supported by a good faith argument for an

extension, modification, or reversal of law may not be required under this section to pay attorney's fees." N.C.G.S. § 6-21.5; *See also Willow Bend Homeowners Ass'n v. Robinson*, 192 N.C. App. 405, 417, 665 S.E.2d 570, 577 (2008).

Here, Plaintiffs do not contend that *Harper III* should be reversed. However, Plaintiffs do contend that *Harper III* simply is not precedent that controls this case. In the specific context of Plaintiffs' claim for a constitutional right to fair election, Plaintiffs contend *Harper III* should be modified. Alternatively, Plaintiffs contend in the context of the application of the Free Elections clause that an extension of the law is warranted. A "justiciable issue" is one that is "real and present as opposed to imagined or fanciful." *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 257, 400 S.E.2d 435, 437 (1991). As argued in Plaintiffs' brief on the merits to this court, the claim in this case is anything but "fanciful". The claim lies at the very heart of democracy and an election system that must be void of governmental efforts to "rig" or preordain an election result.

The Superior Court panel carefully and thoughtfully listened to the arguments advance by Plaintiffs, with presiding Judge Foster concluding the arguments by stating:

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 pp 65-66.

CONCLUSION

For the reasons stated above, the Legislative Defendants' Cross-Appeal should be dismissed or denied on the merits.

Respectfully submitted the 7th day of April 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Plaintiffs-Cross-Appellees certify that the foregoing brief, which was prepared using 13-point proportionally spaced font with Century Schoolbook, is less than 8,750 words (excluding covers, captions, indexes, table of authorities, counsel's signature block, certificates of service, this certificate of compliance and any appendixes) as reported by the word-processing software/word count.

This the 7th day of April, 2025.

/s/ Thomas R. Wilson
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document has been served by e-mail on the following:

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