

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, in  
his official capacity as Speaker of the North  
Carolina House of Representatives,

Defendants.

From Wake County  
No. 24CV003534-910

\*\*\*\*\*

**LEGISLATIVE DEFENDANTS CROSS-APPELLANTS’ RESPONSE IN  
OPPOSITION TO MOTION TO DISMISS APPEAL**

\*\*\*\*\*

**INDEX**

TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	2
ARGUMENT .....	2
CONCLUSION.....	5

## **TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Atkins v. Peek</i> , 193 N.C. App. 606, 668 S.E.2d 63 (2008).....	4
<i>Bissette v. Harrod</i> , 226 N.C. App. 1, 738 S.E.2d 792 (2013).....	4
<i>Blanchard v. Blanchard</i> , 279 N.C. App. 269, 865 S.E.2d 686 (2021).....	4
<i>Bryson v. Sullivan</i> , 330 N.C. 644, 412 S.E.2d 327 (1992) .....	4
<i>In re Cranor</i> , 247 N.C. App. 565, 786 S.E.2d 379 (2016).....	4
<i>Morgan v. Nash Cnty.</i> , 224 N.C. App. 60, 735 S.E.2d 615 (2012).....	5
<i>Porters Neck Ltd., LLC v. Porters Neck Country Club, Inc.</i> , 276 N.C. App. 95, 855 S.E.2d 819 (2021).....	3
<i>WFC Lynnwood I LLC v. Lee of Raleigh, Inc.</i> , 259 N.C. App. 925, 817 S.E.2d 437 (2018).....	3
<b>Rules</b>	
N. C. R. App. P. 28(j).....	7
N.C. R. App. P. 33(b).....	6
N.C. R. Civ. P. 25(f)(1) .....	2
Rule 10(a) .....	5
Rule 10(a)(1).....	2
<b>Statutes</b>	
N.C. Gen. Stat. §6-21.5 .....	2, 3, 4, 5

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, in  
his official capacity as Speaker of the North  
Carolina House of Representatives,

Defendants.

From Wake County  
No. 24CV003534-910

\*\*\*\*\*

**LEGISLATIVE DEFENDANTS CROSS-APPELLANTS’ RESPONSE IN  
OPPOSITION TO MOTION TO DISMISS APPEAL**

\*\*\*\*\*

## **INTRODUCTION**

Legislative Defendants Cross-Appellants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Destin Hall,<sup>1</sup> in his official capacity as Speaker of the North Carolina House (collectively, “Legislative Defendants”), file this response in opposition to Plaintiffs Cross-Appellees’ (“Plaintiffs”) Motion to Dismiss Pursuant to Rule 10(a)(1) (the “Motion”). Plaintiffs’ Motion lacks any factual or legal support and should be denied.

## **ARGUMENT**

Plaintiffs’ Motion boils down to an argument that Legislative Defendants should have *assumed* that they would be the prevailing party and prematurely moved for fees. But contrary to Plaintiffs’ beliefs, Legislative Defendants’ confidence that Plaintiffs’ claims are legal “gobbledygook” (Mot. ¶10), does not equate to clairvoyance of the outcome. Attorney’s fees in nonjusticiable cases are governed by N.C. Gen. Stat. §6-21.5, which states 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....” (*emphasis added*).

At the time Legislative Defendants filed their motion to dismiss (R pp 56-57) and brief in support (R pp 127-39) they were not the prevailing party and not entitled to move for fees pursuant to N.C. Gen. Stat §6-21.5. Moreover, because the Superior Court took the matter under advisement, (Mot. ¶4), Legislative Defendants did not

---

<sup>1</sup> 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 of Representatives.

know at the time of the hearing that they were the prevailing party. It simply belies logic that a party, who may only move for fees on the basis that they are the prevailing party, is required to move for fees before actually prevailing. Such a rule would create havoc in the lower courts with parties making premature fee motions in every responsive pleading.

N.C. Gen. Stat. §6-21.5 also requires the court to make findings of fact and conclusions of law to support its award of attorneys' fees. This requirement has been construed to mean that lower courts are required to make findings regarding the time and labor expended, skill required, the customary fee for similar work, and the experience or ability of the attorneys involved. *See WFC Lynnwood I LLC v. Lee of Raleigh, Inc.*, 259 N.C. App. 925, 933, 817 S.E.2d 437, 444 (2018). Courts require that some of this information, like considerations of the customary fee, be supported by evidence of comparable rates in the field of practice, which is most often accomplished by producing affidavits from other practitioners. *Id.* at 935, 817 S.E.2d at 444; *see also Porters Neck Ltd., LLC v. Porters Neck Country Club, Inc.*, 276 N.C. App. 95, 105, 855 S.E.2d 819, 828 (2021). Therefore, Legislative Defendants would need to know how much time was expended in the case (including on the hearing) and obtain supporting affidavits from practitioners opining that the time and rates were reasonable *before* even moving for fees. Again, Legislative Defendants could not possibly know this information before the conclusion of the hearing.

Moreover, it is well settled under North Carolina law that bringing a fee motion after a motion to dismiss is granted is the appropriate path forward. *See e.g.*,

*In re Cranor*, 247 N.C. App. 565, 567-68, 786 S.E.2d 379, 381-82 (2016) (trial court properly heard motion for attorneys' fees brought by the prevailing party following dismissal); *Bissette v. Harrod*, 226 N.C. App. 1, 6, 738 S.E.2d 792, 797, n.3 (2013) (acknowledging that a motion for attorney's fees under N.C. Gen. Stat. §6-21.5 may be properly considered after dismissal of the case, as such fees are collateral to the underlying substantive claims); *Bryson v. Sullivan*, 330 N.C. 644, 664, 412 S.E.2d 327, 338 (1992) (affirming the correct practice of assessing a motion for fees pursuant to N.C. Gen. Stat. §6-21.5 after a dismissal).

To the extent that Plaintiffs argue that Legislative Defendants should have made some sort of motion for a new trial or reconsideration (Mot. ¶6), this too falls flat. It is undisputed, based on the record and Plaintiffs' own motion, that the Superior Court's original order did not address all parties and was not a final order. (Mot. ¶5, 7, 8; *compare* R pp 141-46, *with* pp 151-52,); *see also Atkins v. Peek*, 193 N.C. App. 606, 609, 668 S.E.2d 63, 65 (2008) ("an order entered by the trial court [that] does not dispose of the entire controversy between all parties [] is interlocutory").

That Plaintiffs chose to file an interlocutory appeal from the first order, which would have been dismissible, was their own choice. *Id.* However, it is undisputed that, when Plaintiffs filed a notice of appeal as to the actual final order issued on 22 July 2024, it divested the Superior Court of jurisdiction to act further, and any such ruling on fees would have been an impermissible advisory opinion. *See Blanchard v. Blanchard*, 279 N.C. App. 269, 273-74, 865 S.E.2d 686, 698 (2021); *see also Morgan v. Nash Cnty.*, 224 N.C. App. 60, 77, 735 S.E.2d 615, 626 (2012) (citations omitted)

(observing an “inherent contradiction in the trial court’s entry of an order awarding attorneys’ fees to the ‘prevailing party’ in an advisory opinion, the purpose of which is merely to indicate ‘how [the trial court] would be inclined to rule on the motion were the appeal not pending.’”).

Legislative Defendants cross-appealed from Plaintiffs’ proper second notice of appeal within the appropriate window. As such, all the traditional Rule 10(a) metrics for jurisdiction are met. This is especially true when Legislative Defendants have appealed the Superior Court’s decision to deny fees *sua sponte*. Legislative Defendants simply could not have foreseen the Court’s inclusion of fees and costs in their final order, especially given the plain text of N.C. Gen. Stat §6-21.5 and precedent directing when such a fee motion should be brought. As cited in Legislative Defendants’ opening Cross-Appellants’ Brief (*see* Legislative Defendants’ Cross-Appellants’ Brief at 12-15), an appeal is an appropriate avenue to deal with issues raised by a lower court *sua sponte*.

### **CONCLUSION**

Plaintiffs’ motion requires an impossible standard that a party must be able to foresee the future in order to preserve an issue for appeal where a court acts of its own accord. No rule or case requires the outcome Plaintiffs’ Motion seeks. For the foregoing reasons, Plaintiffs’ Motion to Dismiss should be denied.

Respectfully submitted, this the 17th day of April 2025.

**NELSON MULLINS RILEY &  
SCARBOROUGH LLP**

/s/ Electronically Submitted  
Phillip J. Strach (NC Bar No. 29456)



301 Hillsborough Street, Suite 1400  
Raleigh, NC 27603  
Telephone: (919) 329-3800  
Facsimile: (919) 329-3799  
phil.strach@nelsonmullins.com

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.

Alyssa M. Riggins (NC Bar No. 52366)  
alyssa.riggins@nelsonmullins.com  
Cassie A. Holt (NC Bar No. 56505)  
cassie.holt@nelsonmullins.com  
301 Hillsborough Street, Suite 1400  
Raleigh, NC 27603  
Telephone: (919) 329-3800

**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 1,076 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 17th day of April 2025.

**NELSON MULLINS RILEY &  
SCARBOROUGH LLP**

/s/ Electronically Submitted  
Phillip J. Strach (NC Bar No. 29456)  
*Counsel for Legislative Defendants*  
*Cross-Appellants*

**CERTIFICATE OF SERVICE**

It is hereby certified that on this the 17th day of April 2025, the foregoing was served on the individuals below via email and electronic submission:

Robert F. Orr  
3434 Edwards Mill Road, Suite 112-372  
Raleigh, NC 27612  
orr@orrlaw.com

Thomas R. Wilson  
Greene Wilson Crow & Smith, P.A.  
401 Middle Street  
New Bern, NC 28563  
twilson@nctriallawyer.com

Andrew M. Simpson  
107 Lavender Street  
Carrboro, NC 27514  
andrew.simpson.ch@gmail.com

Ann H. Smith  
Jackson Lewis P.C.  
3737 Glenwood Ave., Suite 450  
Raleigh, NC 27612  
Ann.Smith@jacksonlewis.com

*Counsel for Plaintiffs-Appellants*

Terence Steed  
North Carolina Department of Justice  
P.O. Box 629  
Raleigh, NC 27602  
tsteed@ncdoj.gov

*Counsel for the State Board Defendant-Appellees*

Jeff Warren  
Ellis & Winters LLP  
4131 Parklake Ave., Suite 400  
Raleigh, NC 27612  
Jeff.warren@elliswinters.com

*Counsel for Amici*

**NELSON MULLINS RILEY &  
SCARBOROUGH LLP**

/s/ Electronically Submitted  
Phillip J. Strach (NC Bar No. 29456)  
phil.strach@nelsonmullins.com