No. 24-1109 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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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

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LEGISLATIVE DEFENDANTS CROSS-APPELLANTS' REPLY BRIEF

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LEGISLATIVE DEFENDANTS CROSS-APPELLANTS' REPLY BRIEF

****

Legislative Defendants Cross-Appellants 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 (collectively, "Legislative Defendants"), file this reply in support of their cross-appeal and in response to the arguments raised in Plaintiffs Cross-Appellees' ("Plaintiffs") Brief.

INTRODUCTION

Plaintiffs' Brief fails to meaningfully address the arguments in Legislative Defendants Cross-Appellants' Brief. In fact, Plaintiffs fail to grapple at all with Legislative Defendants' arguments regarding the *sua sponte* nature of the Superior Court's denial of attorneys' fees without an opportunity to make a motion as the prevailing party. Instead, Plaintiffs largely raise the same baseless arguments as their 7 April 2025 Motion to Dismiss Legislative Defendants' Cross-Appeal, while also adding new and contradictory arguments regarding Legislative Defendants' entitlement to fees. As discussed in Legislative Defendants' Response to Plaintiffs' Motion to Dismiss, Plaintiffs' arguments on preservation fail, and Legislative Defendants were entitled to make a motion for fees as the prevailing party pursuant to N.C. Gen. Stat. § 6-21.5.

[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 of Representatives.

ARGUMENT

I. The Issue of Attorneys' Fees is Properly Before this Court.

Under North Carolina Rule of Appellate Procedure 10(a), an issue may be "deemed preserved or taken without any such action" if preservation is provided by rule or law. This applies where a statutory right cannot be exercised until a final order has been entered. *See e.g., In re L.G.A.*, 277 N.C. App. 46, 54, 857 S.E.2d 761, 768 (2021) (holding that an issue was preserved where a party had no legal basis to object at trial because the relevant findings of fact were not yet final). North Carolina General Statute section 6-21.5 permits the prevailing party in a civil action to seek reasonable attorney's fees if the court finds a complete absence of a justiciable issue of law or fact raised by the losing party. Crucially, the statute allows such a motion only after the court has determined who the prevailing party is, requiring the court to make findings of fact and conclusions of law to support any award. N.C. Gen. Stat. § 6-21.5. Thus, in the context of a motion to dismiss, a motion for attorney's fees under N.C. Gen. Stat. § 6-21.5 should be considered after the case is dismissed, as the necessary information to support such a motion is only available at that time. *Bissette v. Harrod*, 226 N.C. App. 1, 6, 738 S.E.2d 792, 797 n.3 (2013).

As discussed more fully in Legislative Defendants' Response in Opposition to Plaintiffs' Motion to Dismiss, Legislative Defendants cannot predict the future. At the time of Legislative Defendants' motion to dismiss (R pp 56-57), and accompanying briefing (R pp 127-39) and hearing, Legislative Defendants did not know they were the prevailing party. Legislative Defendants only became aware of their status as the

prevailing party when the Superior Court issued an order granting Legislative Defendants' motion and dismissing Plaintiffs' Complaint (R pp 141-46). However, in that same order, the Superior Court *sua sponte* directed that each party should bear their own fees and costs. (R p 146). Contrary to the timeline Plaintiffs present, Legislative Defendants did not sit on their rights. In fact, at no time could Legislative Defendants move for costs as the prevailing party because the order granting Legislative Defendants prevailing party status and the order foreclosing their opportunity to move for fees were one and the same.[2]

Plaintiffs fail to cite any case law supporting the illogical proposition that, to preserve its rights under N.C. Gen. Stat. § 6-21.5, a party must move for fees before knowing it has prevailed. To the contrary, in each case cited by Plaintiffs, the unpreserved issue (none of which were regarding fees) was apparent and could have been raised at trial. *See State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003) (holding that the issue of improper juror selection was not preserved because the defendant failed to object to the juror's excusal during trial); *Westminster Homes, Inc. v. Town of Cary*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) (finding that the issue of whether denying a gate amounted to an unconstitutional taking was not preserved because the party had all relevant information at trial to raise the claim); *Vanguard Pai Lung, LLC v. Moody Nova Trading USA, Inc.*, No. 15124, 2025 N.C. LEXIS 150

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[2] This is especially true given that Legislative Defendants would have been required to present the full hours worked on the matter along with evidence that the time and rates charged were reasonable. *See WFC Lynnwood I LLC v. Lee of Raleigh, Inc.*, 259 N.C. App. 925, 933-35, 817 S.E.2d 437, 444 (2018); *Porters Neck Ltd., LLC v. Porters Neck Country Club, Inc.*, 276 N.C. App. 95, 105, 855 S.E.2d 819, 828 (2021).

(Mar. 21, 2025) (holding that to have standing to move for JNOV after the verdict, a party must have moved for a directed verdict at trial on the specific issue forming the basis of the JNOV). In contrast to the cases cited by Plaintiffs, Legislative Defendants could not have raised an issue of fees below because prevailing party status, which Legislative Defendants did not have until the time the order was issued, is a predicate to moving for fees pursuant to N.C. Gen. Stat. § 6-21.5.

Plaintiffs' criticisms of Legislative Defendants for not moving for reconsideration or raising the issue after the Superior Court's orders (Pl. Cross-App. Br. pp 6-8) are misplaced. It is undisputed that, when Plaintiffs filed a notice of appeal as to the actual final order issued on 22 July 2024, (R pp 153-56), it divested the Superior Court of jurisdiction to act further.[3] *Blanchard v. Blanchard*, 279 N.C. App. 269, 273-74, 865 S.E.2d 686, 689-90 (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.'"). Not only was there no jurisdiction for Legislative Defendants to make a motion, but once the underlying issue was on appeal, moving for reconsideration on an issue of fees would be illogical because the award of attorney's fees is predicated

[3] Plaintiffs filed a notice of appeal from the 27 June 2024 order. (R pp 147-50). However, that was an improper and uncertified interlocutory appeal. The 27 June 2024 order was not a final judgment as to all parties. (*Compare* R pp 141-46, *with* pp 151-52).

on a party remaining the "prevailing" party. *See Balawejder v. Balawejder*, 216 N.C. App. 301, 320, 721 S.E.2d 679, 690-91 (2011) (trial court erred in awarding attorney's fees after notice of appeal, as fees were based in part on the defendant's prevailing party status and thus were affected by the judgment appealed from).

II. Plaintiffs' Arguments Defy Logic and N.C. Gen. Stat. § 6-21.5.

Plaintiffs misconstrue Legislative Defendants' arguments in their opening brief as prematurely arguing the merits of the case. Not so. Legislative Defendants' Cross-Appellants Brief was focused only on the issue of whether the court erred in failing to allow Legislative Defendants as the *prevailing party* to make a motion for fees pursuant to N.C. Gen. Stat. § 6-21.5, which governs attorneys' fees in nonjusticiable cases. Therefore, some explanation of the Superior Court's ruling on the nonjusticiable nature of Plaintiffs' claims is both legally and logically required in order to thoroughly raise the fee issue. Legislative Defendants Cross-Appellants' Brief only raised the merits to the extent necessary to fully explain their narrow appellate issue. Nevertheless, the notion that the "merits of the Superior Court panel decision are not properly before the Court" (Pl. Cross-App. Br. pp 8-9) is entirely false given that Plaintiffs appealed that very decision.

Furthermore, if the standard of review is an abuse of discretion as Plaintiffs claim (Pl. Cross-App. Br. p 9), Legislative Defendants must show that the Superior Court's decision was "manifestly unsupported by reason" or was "so arbitrary that it could not have been the result of a reasoned decision." *White v. White,* 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). One way to show the trial court's decision was "so

arbitrary that it could not have been the result of a reasoned decision" is to show that a different result would have been reached had the trial court not erred. *See, e.g., McDonnell v. Guilford Cnty Tradewind Airlines, Inc.*, 194 N.C. App. 674, 683, 670 S.E.2d 302, 308 (2009). Naturally, that showing requires discussion of the merits of Legislative Defendants' arguments under N.C. Gen. Stat § 6-21.5; namely that Plaintiffs, the non-prevailing party, should "reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue[.]" *Brooks v. Giesey*, 334 N.C. 303, 309, 432 S.E.2d 339, 342 (1993) (quotation omitted). As shown in Legislative Defendants Cross-Appellants' Brief, had the Superior Court not foreclosed Legislative Defendants' ability to move for prevailing party attorneys' fees, Legislative Defendants would have likely succeeded on their § 6-21.5 motion.

Furthermore, Plaintiffs Cross-Appellants' Brief confusingly states that Plaintiffs do ***not*** contend that *Harper III* should be reversed because it "simply is not precedent that controls this case[,]" (Pl. Cross-App. Br. p 14) but also attempt to argue that *Harper III* should be modified or extended in the same breath. Both statements cannot be true.[4] If this case is truly one of "first impression" (Pl. Cross-App. Br. p 9), then it is not a modification or extension of controlling law. *Harper III* either applies or it does not; it cannot not apply to the merits, but apply to a motion for fees. Plaintiffs must pick their lane and stay in it.

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[4] Even if both could be true, the cited language in N.C. Gen. Stat. § 6-21.5 is not fully exculpatory. It 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." (emphasis added). The language is permissive (may), not mandatory (shall).

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 Cross-Appellants may file a motion pursuant to N.C. Gen. Stat. § 6-21.5.

Respectfully submitted, this the 21st 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 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 1,791/3,750 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 April 2025.

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CERTIFICATE OF SERVICE

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

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