
AWARDING ATTORNEYS' FEES IN NORTH CAROLINA

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I. Introduction

This paper addresses certain issues related to the award of attorneys' fees in cases regularly appearing in Superior Court, including the findings of fact necessary to support an award of fees. This paper does not address the award of attorneys' fees in family law matters.

II. List of Statutes that Authorize the Award of Attorneys' Fees

- a. Generally, recovery of attorneys' fees is based on a statute.
- b. The following North Carolina statutes authorize the award of attorneys' fees:
 - 1) Unfair or Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-16;
 - 2) Wage and Hour Act, N.C. Gen. Stat. § 95-25.22;
 - 3) Derivative shareholder actions, N.C. Gen. Stat. § 55-7-46;
 - 4) Derivative actions against an LLC, N.C. Gen. Stat. § 57D-8-05;
 - 5) Partnership derivative actions, N.C. Gen. Stat. § 59-1004(a);
 - 6) Breach of LLC operating agreements that include fee provisions, N.C. Gen. Stat. § 57D-2-32;
 - 7) Debt collection actions when fees are provided for in the contract, N.C. Gen. Stat. § 6-21.2;
 - 8) Nonjusticiable cases, N.C. Gen. Stat. § 6-21.5;
 - 9) Frivolous and malicious claims for, or defenses against, punitive damages, N.C. Gen. Stat. § 1D-45;
 - 10) Violations of Rule 11, Rule 26(g), or Rule 37(b)(2) of the N.C. Rules of Civil Procedure;
 - 11) Trade Secrets Protection Act, N.C. Gen. Stat. § 66-154(d);
 - 12) Reciprocal attorneys' fees provisions in business contracts, N.C. Gen. Stat. § 6-21.6;
 - 13) Lien enforcement and payment bond enforcement actions, N.C. Gen. Stat. § 44A-35;
 - 14) Actions involving certain securities fraud, N.C. Gen. Stat. § 78A-56;
 - 15) Certain matters regarding a business entity's indemnification of directors, officers, employees, and agents, N.C. Gen. Stat. § 55-8-52;
 - 16) Certain personal injury and property damage claims, N.C. Gen. Stat. § 6-21.1;
 - 17) Certain domestic or family issues, N.C. Gen. Stat. § 50-16.4, N.C. Gen. Stat. § 50-13.6, N.C. Gen. Stat. § 6-21;
 - 18) Certain cases involving principals or teachers, N.C. Gen. Stat. § 6-21.4;
 - 19) Cases involving cities or counties that acted outside the scope of their authority, N.C. Gen. Stat. § 6-21.7;
 - 20) Certain prevailing parties on appeal from an appropriate agency's decision, N.C. Gen. Stat. § 6-19.1;

- 21) Certain actions to enforce provisions of the articles of incorporation, the declaration, bylaws, or duly adopted rules and regulations brought under the N.C. Planned Community Act, N.C. Gen. Stat. § 47F-3-120; *see also* N.C. Gen. Stat. § 47F-3-116;
 - 22) A living probate proceeding, N.C. Gen. Stat. § 28A-2B-6;
 - 23) Judicial proceedings involving the administration of a trust, N.C. Gen. Stat. § 36C-10-1004;
 - 24) A consumer credit sale, N.C. Gen. Stat. § 25A-21; and
 - 25) Certain actions brought by individuals for violation of Article 33C, which requires official meetings of a public body to be held in public, N.C. Gen. Stat. §143-318.16B.
- c. Additionally, N.C. Gen. Stat. § 6-21 defines “costs” to include attorneys’ fees in twelve matters in which the costs “shall be taxed against either party, or apportioned among the parties, in the discretion of the Court.” N.C. Gen. Stat. § 6-21 (2015).

III. Rules of General Application

- a. The long-standing general rule in North Carolina has been that a party may not recover attorneys’ fees, either as damages or costs, unless authorized by statute. *See Stillwell Enter., Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980); *see also Graham Cty. Bd. of Elections v. Graham Cty. Bd. of Comm’rs.*, 212 N.C. App. 313, 325, 712 S.E.2d 372, 380 (2011); *Robinson v. Robinson*, 210 N.C. App. 319, 336, 707 S.E.2d 785, 797 (2011).
- b. Therefore, with the exception of negotiated class-action settlements, discussed below in Section VII, to award attorneys’ fees, the trial court undergoes a two-step process to determine: (1) whether there is a statutory basis for a fee award; and (2) if so, whether the fee award requested is reasonable. *See Furmick v. Miner*, 154 N.C. App. 460, 462, 573 S.E.2d 172, 174 (2002).
- c. When awarding attorneys’ fees, the trial court should specify the statutory basis for the award and make the specific findings required by that statute.
- d. On appeal, the trial court’s determination that awarding attorneys’ fees was permissible pursuant to a specified statute is a question of law reviewed *de novo*. *S. Seeding Serv., Inc. v. W.C. English, Inc.*, 224 N.C. App. 90, 99, 735 S.E.2d 829, 835 (2012); *see also Penninga v. Travis*, No. COA16-751, 2017 N.C. App. LEXIS 117, at *9 (N.C. App. 2017).

- e. The Court of Appeals reviews the amount of the fee award under an abuse of discretion standard. See *Faucette v. 6303 Carmel Rd., LLC*, 242 N.C. App. 267, 278, 775 S.E.2d 316, 325 (2015); *Phillips v. Orange Cty. Health Dep't*, 237 N.C. App. 249, 261, 765 S.E.2d 811, 820 (2014); *Williams v. New Hope Found., Inc.*, 192 N.C. App. 528, 530, 665 S.E.2d 586, 587 (2008); *Furmick*, 154 N.C. App. at 462, 573 S.E.2d at 174.
- i. But a failure to make necessary findings may constitute an abuse of discretion. See *McKinnon v. CV Indus.*, 228 N.C. App. 190, 200, 745 S.E.2d 343, 350 (2013) (vacating an award of attorneys' fees pursuant to section 75-16.1 where the trial court made findings that "may be sufficient to support an ultimate finding that plaintiff knew or should have known that his Chapter 75 claim against defendant was frivolous and malicious," but "the trial court's order lack[ed] such an ultimate finding"); see also *WFC Lynnwood I, LLC v. Lee of Raleigh, Inc.*, COA17-562, __ N.C. App. __, 2018 N.C. App. LEXIS 564, at *17-19 (N.C. App. June 5, 2018) (vacating the trial court's fee award and remanding for more specific findings where the trial court found that the attorneys' rates "were comparable and reasonable for the work done, the subject matter of the case, and experience of the attorneys" but there was no evidence in the affidavit or offered at the hearing "with respect to comparable rates in this field of practice").
- f. On appeal, an award of attorneys' fees is first reviewed to determine "whether any competent evidence supports the trial court's findings of fact and whether these findings support the court's conclusions of law." *Faucette*, 242 N.C. App. at 278, 775 S.E.2d at 325 (2015).

IV. Findings Needed to Establish the Reasonableness of the Fees

- a. In addition to the specific additional findings a particular statute may require, the trial court must make findings to determine the reasonableness of an attorney fee award. In assessing reasonableness, the court should consider:

- the time and labor expended;
- the skill required;
- the customary fee for like work;
- the experience or ability of the attorney;
- the novelty and difficulty of the questions of law;
- the adequacy of the representation;
- the difficulty of the problems faced by the attorney, especially any unusual difficulties;
- the type of case; and
- the result obtained.

United Labs., Inc. v. Kuykendall, 335 N.C. 183, 195, 437 S.E.2d 374, 381-82 (1993); see also N.C. R. Prof. Conduct 1.5.

- b. The trial court “may also in its discretion consider and make findings on ‘the services expended by paralegals and secretaries acting as paralegals if, in [the trial court’s opinion], it is reasonable to do so.’” *United Labs., Inc.*, 335 N.C. at 195, 437 S.E.2d at 382 (alteration in original) (quoting *Lea Co. v. N.C. Bd. of Transp.*, 323 N.C. 691, 695, 374 S.E.2d 868, 871 (1989)).
- c. The trial court must make specific findings and cannot merely state that the attorney’s services have a “reasonable value in excess of” a specified dollar amount. *See Falls v. Falls*, 52 N.C. App. 203, 221, 278 S.E.2d 546, 558 (1981).
- d. When assessing the reasonableness of an attorneys’ fee award in a contingency case, the court should consider the additional factors listed in Rule 1.5 of the Revised Rules of Professional Conduct, including:
 - “the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer,” N.C. R. Prof. Conduct 1.5(a)(2);
 - “the time limitations imposed by the client or by the circumstances,” N.C. R. Prof. Conduct 1.5(a)(5);
 - “the nature and length of the professional relationship with the client,” N.C. R. Prof. Conduct 1.5(a)(6);
 - “the experience, reputation, and ability of the lawyer or lawyers performing the services,” N.C. R. Prof. Conduct 1.5(a)(7).

See Ehrenhaus v. Baker, 216 N.C. App. 59, 96–97, 717 S.E.2d 9, 33–34 (2011).

 - i. **Note Well:** Particular issues arise when there is no written fee agreement or the provisions of the written agreement do not comply with Rule 1.5.
- e. The lodestar method is commonly used to determine a reasonable attorneys’ fee award. When using the lodestar method, courts multiply “the number of hours reasonably expended on the litigation . . . by a reasonable hourly rate.” *Out of the Box Developers, LLC v. Doan Law LLP*, 2014 NCBC LEXIS 39 at *24 (N.C. Super. Ct. Aug. 29, 2014) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The Court should exclude any hours that were not reasonably expended on the litigation, including “hours that are excessive, redundant, or otherwise unnecessary.” *Id.* (quoting *Hensley*, 461 U.S. at 434).
- f. While the trial court may award fees towards the upper range of the lodestar amount, in North Carolina, a trial court cannot award a “merit bonus” or bonus fees, which are additional amounts awarded based on the nature and complexity of the case or the representation provided. *Coastal Prod. Credit Assoc.*, 70 N.C. App. at 229, 319 S.E.2d at 656. In *Coastal Production Credit Association v. Goodson Farms, Inc.*, the Court of Appeals determined that the trial court’s award of a “merit bonus” due to the “nature, complexity, responsibility[,] and timeliness with which plaintiff’s attorney represented his client” was improper because the trial court exceeded its discretion in making such an

award. *Id.* The Court of Appeals noted the trial court considered reasonableness factors in connection to the calculation of an hourly rate, and that the court could have set a higher rate based on the complexity of the case, but that a merit bonus was not proper. *Id.*

V. Awarding Attorneys' Fees Pursuant to Specific Statutes and the Additional Fact Findings the Statutes Require

a. The North Carolina Unfair or Deceptive Trade Practices Act.

- i. The trial court, in its discretion, may award attorneys' fees to the party who prevailed on an unfair or deceptive trade practices claim "upon a finding . . . [that] [t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit." N.C. Gen. Stat. § 75-16.1(1) (2015) (emphasis added).

❖ Willfulness

- An act is willful "if it is 'done voluntarily and intentionally with the view to doing injury to another.'" *Faucette*, 242 N.C. App. at 279, 775 S.E.2d at 326 (quoting *Standing v. Midgett*, 850 F. Supp. 396, 404 (E.D.N.C. 1993)) (finding a defendant's conduct willful where he testified that he intentionally withheld funds despite knowing such funds belonged to the plaintiff); compare *Clark Material Handling Co. v. Toyota Material Handling U.S.A., Inc.*, No. 3:12-CV-00510-MOC-DSC, 2015 U.S. Dist. LEXIS 72510, at *16 (W.D.N.C. June 3, 2015) (finding that defendant's conduct was willful because it knew of plaintiff's contract with a third party and coerced plaintiff into ending the contract by threatening to terminate plaintiff's dealership) with *Standing*, 850 F. Supp. at 404 (finding a non-lawyer defendant's failure to disclose a lien was not willful, because the defendant testified he did not know the meaning of the warranty language and "believed the lien was not valid and enforceable").

❖ Unwarranted Refusal to Settle

- An unwarranted refusal must amount to something more than the rejection of a settlement offer. See *Irwin Indus. Tool Co. v. Worthington Cylinders Wisconsin, LLC*, 747 F. Supp. 2d 568, 590 (W.D.N.C. 2010) (finding the defendant's refusal to settle unwarranted when its "best settlement offer did not approach even half of [the litigation's] undisputed amounts" regarding damages).

- This finding requires a determination on a case by case basis. But the trial court must make specific findings explaining why it found that there was an unwarranted refusal to settle. *See, e.g., Faucette*, 242 N.C. App. at 278–79, 775 S.E.2d at 325–26 (affirming the trial court’s finding of an unwarranted refusal to settle where the court found that all efforts to resolve the claim imposed conditions on the plaintiff and that the defendant did not make an unconditioned offer to settle until years after the litigation began); *Lapierre v. Samco Dev. Corp.*, 103 N.C. App. 551, 561, 406 S.E.2d 646, 651 (1991) (affirming the trial court’s award of fees based on its finding that there was an unwarranted refusal to settle by the defendant where the trial court found that the offers defendant made were unreasonable and inadequate, “considering the judgment entered for the plaintiffs”).
 - In *Clark Material Handling Co. v. Toyota Material Handling USA*, the court found defendant’s refusal to settle unwarranted, and explained that while the parties “discuss[ed] the possibility of settlement once trial began, by the time [d]efendant offered any money to settle, the parties had expended significant time and resources preparing for trial.” 2015 U.S. Dist. LEXIS 72510, at *18. The court also noted defendant’s best offer came after the jury verdict and was less than the jury award. *Id.*
- ii. The trial court may also, in its discretion, award attorneys’ fees against the claimant when the party defending against a 75-1.1 claim prevails and the court finds that “[t]he party instituting the action knew, or should have known the action was *frivolous and malicious*.” N.C. Gen. Stat. § 75-16.1(2) (emphasis added); *see also Birmingham v. H&H Home Consultants & Designs, Inc.*, 189 N.C. App. 435, 443, 658 S.E.2d 513, 519 (2008) (explaining that section 75-16.1(2) applies to a motion for attorneys’ fees brought by the prevailing defendant); *Fed. Point Yacht Club Ass’n v. Moore*, COA15-92, 2015 N.C. App. LEXIS 1028, *19–20 (N.C. App. Dec. 15, 2015) (“A prevailing defendant does not need to be wholly successful against a UDTP claim at trial, as we have held a defendant is a prevailing party after success on partial summary judgment.”).

❖ *Frivolous and Malicious.*

- “A claim is frivolous if a proponent can present no rational argument based upon the evidence or law in support of [it].” *Fed. Point Yacht Club Ass’n*, 2015 N.C. App. LEXIS 1028, at *22 (quoting *Blyth v. McCrary*, 184 N.C. App. 654, 663 n. 5, 646 S.E.2d 813, 819 n. 5 (2007)).

- A “claim is malicious if it is wrongful and done intentionally without just cause or excuse or as a result of ill will.” *Id.*
 - iii. The decision to award attorneys’ fees and determine the amount is “within the sole discretion of the trial judge.” *Faucette*, 242 N.C. App. at 278, 775 S.E.2d at 325. Accordingly, even if “the trial court finds that the elements of N.C. Gen. Stat. § 75-16.1 have been met, the trial court retains the discretion to refuse to award attorney’s fees.” *Sheng Yu Ke v. Heng-Qian Zhou*, ___ N.C. App. ___, 808 S.E.2d 458, 462–63 (2017) (citing *Willen v. Hewson*, 174 N.C. App. 714, 722, 622 S.E.2d 187, 192 (2005)).
 - iv. When a trial court, in its discretion, denies a motion for attorneys’ fees, the court does not need to make the statutory findings required pursuant to section 75-16.1. *See E. Brooks Wilkins Fam. Med., P.A. v. WakeMed*, 244 N.C. App. 567, 581, 784 S.E.2d 178, 187 (2016).
 - v. While the Court has the discretion to award attorneys’ fees to the prevailing party, it is not required to do so, *see* N.C. Gen. Stat. § 75-16.1; but the Court is required to treble the damages awarded by the jury, *see* N.C. Gen. Stat. § 75-16.
 - ❖ Moreover, treble damages do not automatically allow the trial court to find the prevailing party is entitled to attorneys’ fees. While “[a] person damaged by another’s unfair or deceptive acts or practices is entitled to treble damages,” *Shepard v. Bonita Vista Props., L.P.*, 191 N.C. App. 614, 624, 664 S.E.2d 388, 395 (2008), *aff’d*, 363 N.C. 252, 675 S.E.2d 332 (2009) (citing N.C. Gen. Stat. § 75-16), an award of attorneys’ fees must be supported by findings that a party “willfully engaged” in a violation of the statute, “and there was an unwarranted refusal by such party to fully resolve the matter.” N.C. Gen. Stat. § 75-16.1(1).
- b. The North Carolina Wage and Hour Act.
- i. The court has discretion to award reasonable attorneys’ fees to a prevailing plaintiff who brings an action under the Wage and Hour Act. N.C. Gen. Stat. § 95-25.22. The court also has discretion to award reasonable attorneys’ fees to a defendant “if the court determines the action was *frivolous*.” *Id.* (emphasis added).
 - ii. *Frivolous*
 - ❖ A reasoned attempt to distinguish precedent may not rise to the level of frivolous. *See Panos v. Timco Engine Ctr., Inc.*, 2012 N.C. App. LEXIS 236, at *11 (N.C. App. Feb. 7, 2012). In *Panos*, the plaintiff, who was not a resident of North Carolina, continued to pursue a claim under the Wage and

Hour Act (“WHA”), even after the Court of Appeals held that the WHA was inapplicable to nonresidents who neither worked nor lived in the state. *Id.* Although the trial court rejected plaintiff’s argument that the facts of his case made the Court of Appeals holding inapplicable, the trial court ultimately found that plaintiff’s claim was not frivolous because it was there were distinguishing facts that supported plaintiff’s argument. *Id.*

- ❖ The Court of Appeals affirmed a trial court’s decision not to award attorneys’ fees based on the trial court’s finding that plaintiff’s claim was not frivolous where the plaintiff did not ultimately prevail on his claim, but plaintiff’s claim was submitted to the jury and defendant did not prevail on its motion for summary judgment or a directed verdict. *Rice v. Danas, Inc.*, 132 N.C. App. 736, 742, 514 S.E.2d 97, 101 (1999).

- iii. A finding of bad faith is not required to award attorneys’ fees under the Wage and Hour Act. *Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 435, 531 S.E.2d 476, 482 (2000).

c. The Retaliatory Discharge Act.

- i. If a plaintiff prevails in an action brought pursuant to N.C. Gen. Stat. §95-243, the Court may award “reasonable costs and expenses, including attorneys’ fees.” N.C. Gen. Stat. § 95-243(c) (2015).
- ii. “If the court determines that the plaintiff’s action is frivolous, it may award to the defendant and assess against the plaintiff the reasonable costs and expenses, including attorneys’ fees, of the defendant in defending the action brought pursuant to this section.” N.C. Gen. Stat. § 95-243(c) (2015).
- iii. There are no cases specifically interpreting section 95-243(c).

d. Awarding attorneys’ fees in derivative actions.

- i. *Derivative Shareholder Actions against a Corporation.*
 - ❖ Section 55-7-46 specifies three situations in which the court may award reasonable attorneys’ fees after the termination of a derivative proceeding against a corporation.
 - ❖ First, the Court may award attorneys’ fees to the prevailing plaintiff when the litigation “resulted in a **substantial benefit** to the corporation.” N.C. Gen. Stat. § 55-7-46(1) (emphasis added); *see also* Russell M. Robinson, II, Robinson on North Carolina Corporation Law § 17.10, at 17-38–17-39 (7th ed. 2016) (emphasis added).

- North Carolina courts have not clearly defined what constitutes a substantial benefit. However, courts have concluded that a corporation may obtain a substantial benefit without the plaintiff being the prevailing party, or despite a derivative claim not having proceeded to a final judgment. *See Aubin v. Susi*, 149 N.C. App. 320, 327, 560 S.E.2d 875, 880 (2002) (noting that section 55-7-46 “does not require that plaintiff be a successful litigant in order to recover attorney’s fees based upon her derivative claims”).
- The Court of Appeals concluded that removing a “self-dealing, controlling director from office,” and appointing “a permanent receiver to protect the corporation” was a substantial benefit to the corporation, even though plaintiff did not prevail on the underlying claims. *Lowder v. All Star Mills, Inc.*, 82 N.C. App. 470, 476, 346 S.E.2d 695, 699 (1986); *contra In re Newbridge Bancorp S’holder Litig.*, No. 15 CVS 9251, 2016 NCBC LEXIS 91, at *57 (N.C. Super. Nov. 22, 2016) (finding that supplemental disclosures that “were of only marginal benefit” to class members did not constitute a substantial benefit to the corporation).
- Attorneys’ fees and other expenses can be awarded to a derivative plaintiff even if there is no monetary recovery to the corporation. *See Lowder*, 82 N.C. App. at 477, 346 S.E.2d at 699.
- When there are multiple corporate defendants, the “total costs must be equitably apportioned among the defendant corporations” in the final judgment. *See Lowder*, 82 N.C. App. at 474, 346 S.E.2d at 698. But an award of attorneys’ fees in a preliminary order without specifically allocating the fees is not an error. *See id.*
- The Court of Appeals has recognized the difficulty in apportioning the fees among the corporate defendants, but cautions that a “general statement that the benefits obtained on behalf of each corporate defendant were disproportionate,” is insufficient to support an unequal apportionment between defendants. *See Lowder*, 82 N.C. App. at 478–79, 346 S.E.2d at 700 (noting “that the court failed to support its determination that 80% of the attorneys’ fees and expenses be paid by Mills and 20% by Farms”).
- The trial court should assess “whether the expense incurred by plaintiffs in conferring a benefit on the corporation is excessive or unreasonable,” and if so, it should adjust the award of costs and fees. *See Lowder*, 82 N.C. App. at 477, 346 S.E.2d at 700–01.

- ❖ Second, the Court may award attorneys’ fees to a defendant corporation when the litigation occurred “**without reasonable cause or for an improper purpose.**” N.C. Gen. Stat. § 55-7-46(2) (emphasis added); *see also* Russell M. Robinson, II, Robinson on North Carolina Corporation Law § 17.10, at 17-38–17-39 (7th ed. 2016).
 - Neither the Supreme Court of North Carolina nor the Court of Appeals have defined “without reasonable cause” as it relates to this statute. But the Court of Appeals has interpreted “without reasonable cause” in a similar provision of the North Carolina NonProfit Corporation Act. In that context, the Court of Appeals held that “without reasonable cause . . . means that plaintiffs had no ‘reasonable belief’ in a ‘sound chance’ that the claim[s] could be sustained.”” *McKee v. James*, No. 09 CVS 3031, 2015 NCBC LEXIS 78, at *15–16 (N.C. Super. Ct. Aug. 6, 2015) (quoting *McMillan v. Ryan Jackson Props., LLC*, 232 N.C. app. 35, 41, 753 S.E.2d 373, 378 (2014)).
 - Judge Bledsoe concluded that “[i]n light of the similarity in the language and purpose of N.C. Gen. Stat. §§ 55A-7-40 [a provision in the North Carolina NonProfit Corporation Act] and 55-7-46(2), the Court finds that it is likely that [NC] appellate courts would apply” the same definition to “without reasonable cause” in the North Carolina Business Corporation Act. *McKee*, 2015 NCBC LEXIS 78, at *17; *see, e.g., Sutton v. Sutton*, No. 10 CVS 3961, 2011 NCBC LEXIS 43, at *7 (N.C. Super. Ct. Nov. 22, 2011) (finding that the plaintiff initiated the action “without reasonable cause” where the complaint “on its face, [was] seriously deficient and subject to dismissal on several grounds”).
- ❖ Third, the Court may order a party to pay an opposing party’s attorneys’ fees if the Court finds that such fees were incurred as a result of the filing of a pleading, motion or other paper that was “**not well grounded in fact or was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law,**” and that such filings were done for an **improper purpose**. N.C. Gen. Stat. § 55-7-46(3) (emphasis added); *see also* Russell M. Robinson, II, Robinson on North Carolina Corporation Law § 17.10, at 17-38–17-39 (7th ed. 2016).
 - There are no cases directly addressing N.C. Gen. Stat. § 55-7-46(3); however, *Ekren v. K&E Real Estate Invs., LLC*, 12 CVS 508, 2014 NCBC LEXIS 57, at *6 (N.C. Super. Nov. 10, 2014) discusses a similar provision in North Carolina’s Limited Liability Corporation Act and can provide guidance on this topic. (See below).

- The statutory language closely resembles factors used in determining Rule 11 sanctions.
- ❖ While the decision to award attorneys’ fees pursuant to section 55-7-46 is discretionary, upon a motion for such fees, the trial court is required to consider and determine whether such award is appropriate pursuant to the statute. *See Aubin v. Susi*, 149 N.C. App. 320, 326, 560 S.E.2d 875, 880 (2002) (explaining its belief “that, upon plaintiff’s motion, the trial court was at least required to consider whether the proceeding resulted in a substantial benefit to the corporation, and whether such benefit warranted any award of fees”).
 - ❖ The trial court may award costs and attorneys’ fees in cases involving either domestic or foreign corporations. *See* N.C. Gen. Stat. 55-7-47 (explaining that “the laws of the jurisdiction of incorporation of the foreign corporation” will govern in a derivative proceeding regarding a foreign corporation, “except for matters governed by G.S. 55-7-43, 55-7-45, and 55-7-46”); *Aubin*, 149 N.C. App. at 327, 560 S.E.2d at 880–81.
 - ❖ The court must make specific findings to show that the fee amount awarded is reasonable. *See Lowder v. All Star Mills*, 82 N.C. App. 470, 477–78, 346 S.E.2d 695, 700 (1986).
- ii. *Derivative Actions Against an LLC.*
- ❖ The North Carolina Limited Liability Corporation Act provides that “[o]n termination of the derivative proceeding,” the Court may order the award of attorneys’ fees in three situations. N.C. Gen. Stat. § 57D-8-05. Similarly to the North Carolina Corporation Act, the LLC Act allows the Court to award attorneys’ fees (1) to the plaintiff when the proceeding has resulted in a substantial benefit to the LLC, N.C. Gen. Stat. § 57D-8-05(1) (emphasis added); (2) to the LLC if “the proceeding was commenced or maintained without cause or for an improper purpose,” N.C. Gen. Stat. § 57D-8-05(2) (emphasis added); or (3) to the opposing party if a pleading or motion “was not well grounded in fact or was not warranted by the existing law or a good-faith argument for the extension, modification, or reversal of existing law” and “it was interposed for an improper purpose.” N.C. Gen. Stat. § 57D-8-05(3) (emphasis added).
 - ❖ Neither the Court of Appeals nor the Supreme Court of North Carolina have interpreted “substantial benefit” as defined in N.C. Gen. Stat. § 57D-8-05(1). *Ekren v. K&E Real Estate Invs., LLC*, 12 CVS 508, 2014 NCBC LEXIS 57, at *6 (N.C. Super. Nov. 10, 2014). But Judge Bledsoe found that Section 57D-8-05 of the North Carolina Limited Liability Company Act “is substantially identical to the corresponding provision of the North Carolina Business Corporation Act,” and “is substantially similar to § 7.46(1) of the Model

Business Corporation Act.” *Ekren*, 2014 NCBC LEXIS 57, at *6–7. Therefore, the interpretations of “substantial benefit” under those acts can be used to determine if an action had a substantial benefit to the LLC. *Id.* at *9 (finding a substantial benefit to the LLC because “the catalyst for the return of the LLC’s assets was the filing and prosecution of Plaintiff’s lawsuit”).

- ❖ Section 57D-8-05(3) “sets out a standard similar to the standard for sanctions under Rule 11 of the North Carolina Rules of Civil Procedure,” but unlike Rule 11, to award fees under section 57D-8-05(3), the court must find both that a party’s action was instituted for an improper purpose and that such actions were “not well grounded in fact or [were] not warranted by existing law.” N.C. Gen. Stat. § 57D–8–05(3); *Ekren*, 2014 NCBC LEXIS 57, at *11–12.
 - Under this analysis, “[a]n improper purpose is ‘any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.’” *Ekren*, 2014 NCBC LEXIS 57, at *14 (quoting *Coventry Woods Neighborhood Ass’n v. City of Charlotte*, 213 N.C. App. 236, 241, 713 S.E.2d 162, 166 (2011)).
 - The court must examine the totality of the circumstances to determine whether a party’s objective behavior may support an inference of an improper purpose. *Ekren*, 2014 NCBC LEXIS 57, at *15 (“[B]ased on the totality of the objective circumstances present here, the Court does not find a strong inference that [the defendant’s] Answer, including the three legally insufficient defenses, was filed for an improper purpose.”)
 - A party’s “subjective belief that a paper has been filed for an improper purpose is immaterial.” *Ekren*, 2014 NCBC LEXIS 57, at *14 (quoting *Kohler Co. v. McIvor*, 177 N.C. App. 396, 404–05, 628 S.E.2d 817, 824 (2006)).

iii. *Partnership Derivative Actions.*

- ❖ The trial court has discretion to award reasonable attorneys’ fees to a plaintiff who is successful, “in whole or in part,” in a derivative action against a partnership. N.C. Gen. Stat. § 59-1004(a) (2005).
- ❖ The trial court also has the discretion to award attorneys’ fees to a defendant after “a finding that the action was brought without reasonable cause.” N.C. Gen. Stat. § 59-1004(b) (2015).
- ❖ There is no significant case interpretation of this provision.

e. Awarding attorneys' fees for contracts related to "evidence of indebtedness."

- i. Section 6-21.2 of the North Carolina General Statutes provides that an obligation to pay attorney's fees associated with collecting a note, conditional sale contract, or other indebtedness is valid and enforceable, subject to the limitations noted in the statute. *See* N.G. Gen. Stat. § 6-21.2 (2015).
- ii. A note, conditional sale contract, or "other evidence of indebtedness" that includes an attorneys' fee provision that is a specific percentage of the outstanding balance is enforceable, but the award cannot exceed fifteen percent of the outstanding balance. N.C. Gen. Stat. § 6-21.2(1). If the note, conditional sales contract, lease, or other evidence of indebtedness contains a reasonable attorneys' fee provision but does not specify the specific percent, the provision will be construed to provide for an award of fees equaling fifteen percent of the outstanding balance. N.C. Gen. Stat. § 6-21.2(2); *see also Stillwell Enter. v. Interstate Equip. Co.*, 300 N.C. 286, 294, 266 S.E. 2d 812, 817 (1980) (concluding that a lease, which "acknowledges a legally enforceable obligation by plaintiff-lessee to remit rental payments to defendant-lessor as they become due, in exchange for the use of the property" is "obviously 'evidence of indebtedness'" as described in section 6-21.2).
- iii. *Specific Percentage*
 - ❖ A "specific percentage" does not have to be a precise numerical percentage. *Coastal Prod. Credit Ass'n v. Goodson Farms, Inc.*, 70 N.C. App. 221, 225, 319 S.E.2d 650, 654 (1984) (explaining that section 6-21.2(1) "does not require specification of an exact or fixed percentage, or override minimum or maximum percentages"). For example, the Court of Appeals held that the phrase "not less than ten percent" was a specific percent. *Id.* A note that specifically provided for "reasonable fees 'but not more than such attorneys' usual hourly charges for the time actually expended" was found to fall within the definition of specific percent. *Barker v. Agee*, 93 N.C. App. 537, 544, 378 S.E.2d 566, 570 (1989), *aff'd in part and rev'd in part on other grounds*, 326 N.C. 470, 389 S.E.2d 803 (1990).
 - ❖ Section 6-21.2(2) is only triggered when there is a "failure to specify any percentage." *Coastal Prod. Credit Ass'n v. Goodson Farms, Inc.*, 70 N.C. App. 221, 225, 319 S.E.2d 650, 653 (1984).
 - ❖ Where the contract meets the statutory definition of specific percent for an attorneys' fees award, but does not offer an exact number, then the trial court has discretion to determine the fee amount up to fifteen percent. *Coastal Prod.*, 70 N.C. App. at 226, 319 S.E.2d at 655 (noting that the trial court's fee

award must include findings and evidence supporting the reasonableness of the award).

iv. *Outstanding Balance*

- ❖ An “outstanding balance” for notes and other writings that show indebtedness means “the principal and interest owing at the time suit is instituted to enforce any security agreement securing payment of the debt and/or to collect said debt.” N.C. Gen. Stat. § 6-21.2(3); *see N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 366, 649 S.E.2d 14, 22 (2007) (affirming the trial court’s award of fees “based on a calculation of fifteen percent of . . . the amount that the jury determined to be the outstanding balance due on the lease of the property”).
- ❖ An “outstanding balance” for a conditional sale contract or other security agreement means “the ‘time price balance’ owing as of the time [the] suit is instituted by the secured party to enforce the said security agreement and/or to collect said debt.” N.C. Gen. Stat. § 6-21.2(4).
- ❖ The outstanding balance may include earlier attempts to collect the same debt if such efforts were reasonably related to the current litigation. *See Trull v. Cent. Carolina Bank & Tr.*, 124 N.C. App. 486, 493, 478 S.E.2d 39, 44 (1996); *Coastal Prod.*, 70 N.C. App. at 228, 319 S.E.2d at 656 (finding bankruptcy proceedings, receiverships, foreclosure actions, and deficiency actions to be reasonably related to the collection of debt under a note). The plaintiff bears the burden to prove a reasonable relation, and the trial court’s decision is reviewed for an abuse of discretion. *N.C. Indus. Capital, LLC*, 185 N.C. App. at 369, 649 S.E.2d at 24.

f. Trade Secrets Protection Act.

- i. The trial court may award reasonable attorneys’ fees to the prevailing party for a misappropriation claim brought in *bad faith* or “if *willful and malicious* misappropriation exists.” N.C. Gen. Stat. § 66-154(d) (2015) (emphasis added).

ii. *Bad Faith*

- ❖ “‘Bad faith cannot be defined with mathematical precision,’ but ‘[c]ertainly it implies a false motive or a false purpose.’” *RLM Commc'ns, Inc. v. Tuschen*, No. 5:14-CV-250-FL, 2015 U.S. Dist. LEXIS 35016, at *10 (E.D.N.C. Mar. 19, 2015) (quoting *Bundy v. Commercial Credit Co.*, 202 N.C. 604, 607, 163 S.E. 676, 677 (1932)).
- ❖ “[A] finding of bad faith does not follow simply because a claimant proceeded with legal malice so long as the claimant had ‘a good faith belief that the

[claim] has legitimate basis.’” *Velocity Sols., Inc. v. BSG Fin., LLC*, 14 CVS 557, 2015 NCBC LEXIS 54, at *21 (N.C. Super. Ct. May 26, 2015) (quoting *Reichhold Chems., Inc. v. Goel*, 146 N.C. App. 137, 158, 555 S.E.2d 281, 294 (2001)).

- The Court of Appeals upheld a trial court’s refusal to award attorneys’ fees pursuant to section 66-154(d) where the trial court found that the plaintiff did not bring its trade secret misappropriation claim in bad faith, even though the Court had earlier found that plaintiff acted with legal malice. *Reichhold Chems., Inc.*, 146 N.C. App. at 158, 555 S.E.2d at 294. The Court of Appeals explained that “the fact that a suit was brought with malicious intent does not exclude the possibility of a good faith belief that the suit has legitimate basis.” *Id.*

iii. *Willful and Malicious*

- ❖ “Willful means intentionally . . . Willful is used in contradistinction to accidental or unavoidably.” *Silicon Knights, Inc. v. Epic Games, Inc.*, 917 F. Supp. 2d 503, 518 (E.D.N.C. 2012) (quoting *In re Pierce*, 163 N.C. 247, 248, 79 S.E. 507, 508 (1913)).
- ❖ “‘Malicious’ means an action taken ‘in a manner which evidences a reckless and wanton disregard of the plaintiff’s rights.’” *Id.* at 519 (quoting *Moore v. City of Creedmoor*, 345 N.C. 356, 371, 481 S.E.2d 14, 24 (1997)).
- ❖ For example, a defendant’s misappropriation was found to be willful and malicious when he misappropriated hundreds of trade secrets over the course of several years by copying the trade secrets verbatim. *Id.*

g. Awarding attorneys’ fees in accordance with reciprocal attorneys’ fees provisions in business contracts.

- i. Reciprocal attorneys’ fees provisions in business contracts, as defined by N.C. Gen. Stat. § 6-21.6(a)(1), are valid and enforceable so long as all the parties sign the contract. The specific signature requirements are specified in section 6-21.6(b).
- ii. A reciprocal attorneys’ fees provision is a provision by which each party agrees “to pay or reimburse the other parties for attorneys’ fees and expenses incurred by reason of any suit, action, proceeding, or arbitration involving the business contract.” N.C. Gen. Stat. § 6-21.6(a)(4).

- iii. N.C. Gen. Stat. § 6-21.6(c) provides a list of factors that the Court can consider when determining reasonable attorneys' fees and expenses, including:
 - The relative economic circumstances of the parties;
 - Settlement offers made prior to the institution of the action;
 - Offers of judgment pursuant to Rule 68 of the North Carolina Rules of Civil Procedure and whether the judgment finally obtained was more favorable than such offers;
 - Whether a party unjustly exercised superior economic bargaining power in the conduct of the action;
 - The timing of settlement offers;
 - The amounts of settlement offers as compared to the verdict;
 - The terms of the business contract.
- iv. **Note Well:** Section 6-21.6 applies only to business contract entered into on or after October 1, 2011. *See Kezeli v. Logan*, 12 CVS 12925, 2015 NCBC LEXIS 31, at *18 n. 40 (N.C. Super. Ct. Mar. 26, 2015); *Silicon Knights, Inc.*, 917 F. Supp. 2d at 516 n. 5.
- v. This statute applies to certain business contracts only, not consumer contracts.
 - ❖ A business contract is “[a] contract entered into primarily for business or commercial purposes. The term does not include a consumer contract, an employment contract, or a contract to which a government or a governmental agency of this State is a party.” N.C. Gen. Stat. § 6-21.6(a)(1). In contrast, a consumer contract is “entered into by one or more individuals primarily for personal, family, or household purposes.” N.C. Gen. Stat. § 6-21.6(a)(2).
- vi. The statute specifies that “[r]easonable attorneys’ fees and expenses shall not be governed by (i) any statutory presumption or provision in the business contract providing for a stated percentage of the amount of such attorneys’ fees or (ii) the amount recovered in other cases in which the business contract contains reciprocal attorneys’ fees provisions.” N.C. Gen. Stat. § 6-21.6(d).
- vii. A non-prevailing party cannot recover fees pursuant to section 6-21.6, when the contract’s fee provision required one party to prevail before the recovery of fees. *Hometown Servs., Inc. v. EquityLock Sols., Inc.*, 1:13-cv-00304-MR-DLH, 2014 U.S. Dist. LEXIS 148613, at *4 (W.D.N.C. Oct. 20, 2014); *see also Liberty Mut. Fire Ins. Co. v. KB Home*, 5:13-CV-831-BR, 2015 U.S. Dist. LEXIS 107232, at *9–10 (E.D.N.C. Aug. 14, 2015) (holding that plaintiffs were not entitled to attorneys’ fees because the contract’s fee provision was expressly limited to disputes submitted to arbitration).

h. Awarding attorneys' fees in lien enforcement and payment bond enforcement actions.

- i. The trial court may, in its discretion, award reasonable attorneys' fees to a prevailing party in a lien or bond enforcement action "upon a finding that there was an *unreasonable refusal by the losing party to fully resolve the matter* which constituted the basis of the suit or the basis of the defense." N.C. Gen. Stat. § 44A-35 (2015) (emphasis added).
- ii. For purposes of this statute, a prevailing party is a plaintiff "who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim" or is a defendant "against whom a claim is asserted which results in a judgment of less than fifty percent (50%) of the amount sought in the claim defended." *Id.*

❖ *Unreasonable Refusal to Resolve the Matter*

- In *SMS Construction Inc. v. Wittels*, the Court of Appeals affirmed the trial court's award of attorneys' fees when the trial court found that there was an unreasonable refusal to resolve the matter because the defendant refused to acknowledge the improvements to his property, the plaintiff had "to undergo additional and unnecessary discovery" due to defendant's obstinacy, and the defendant refused plaintiff's settlement offer of \$22,000 on an outstanding debt of \$19,335. 2018 N.C. App. LEXIS 135, at *12–13 (N.C. Ct. App. Feb. 6, 2018).
- The trial court should evaluate the "actions taken or not taken prior to judgment" by the losing party to determine if there was an unwarranted refusal to resolve the matter. *S. Seeding Serv., Inc. v. W.C. English, Inc.*, 224 N.C. App. 90, 101, 735 S.E.2d 829, 836 (2012) (affirming the trial court's award of attorneys' fees based on its finding that defendants actions pre-trial demonstrated an unreasonable refusal to settle); *Terry's Floor Fashions, Inc. v. Crown Gen. Contractors, Inc.*, 184 N.C. App. 1, 645 S.E.2d 810, 814 (2007) (describing the trial court's finding that defendant unreasonably refused to settle, in part, based on defendant's multiple letters stating he would not settle).
- See also the section above discussing a similar factor which is required to award fees pursuant to the Unfair or Deceptive Trade Practices Act.

i. Awarding attorneys' fees involving certain securities fraud violations.

- The trial court has discretion to award reasonable attorneys' fees for securities fraud violations under Chapter 78A. N.C. Gen. Stat. § 78A-56 (a).
- There are no specific cases addressing this statute.

j. Awarding attorneys' fees for the breach of an LLC operating agreement.

- A trial court has discretion to award attorneys' fees when a party breaches the operating agreement of an LLC, so long as the agreement contains an attorneys' fee award provision. N.C. Gen. Stat. § 57D-2-32. According to the statute, the amount of such an award must be reasonable. *Id.*
- Presumptively, the same reasonableness factors discussed concerning other statutes would control here.

k. Awarding attorneys' fees in nonjusticiable cases.

- i. "In any civil action . . . 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." N.C. Gen. Stat. § 6-21.5 (2015) (emphasis added). However, "[t]he filing of a general denial or the granting of any preliminary motion" is not sufficient, on its own, to support an award of attorneys' fees, "but may be evidence to support" such an award. *Id.*
- ii. To award attorneys' fees pursuant to N.C. Gen. Stat. §6-21.5, the trial court must find either that a party should "reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue" or that the party "persisted in litigating the case after the point where [he] should reasonably have become aware that the pleading [he] filed no longer contained a justiciable issue." *Brooks v. Giesey*, 334 N.C. 303, 309, 432 S.E.2d 339, 342 (1993); *see also McLeenan v. C.K. Josey, Jr.*, ___ N.C. App. ___, 785 S.E.2d 144, 148–49 (2016).
- iii. A court must review all relevant pleadings and documents to determine whether attorneys' fees should be awarded. *Lincoln v. Bueche*, 166 N.C. App. 150, 153, 601 S.E.2d 237, 241 (2004). The trial court may consider evidence after the pleadings have been filed. *Barris v. Town of Long Beach*, 208 N.C. App. 718, 722, 704 S.E.2d 285, 289 (2010).

- iv. N.C. Gen. Stat. § 6-21.5 must be strictly construed and “does not authorize the court to require counsel to pay attorneys’ fees to the prevailing party.” *Bryson v. Sullivan*, 330 N.C. 644, 665–66, 412 S.E.2d 327, 339 (1992).
- v. The North Carolina Court of Appeals has concluded that section 6-21.5 allows the trial court to award fees incurred for proceedings at the trial court level, but it does not provide trial courts with authority to award fees incurred on appeal. *Hill v. Hill*, 173 N.C. App. 309, 321, 622 S.E.2d 503, 511 (2005) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 406 (1990)) (explaining that section 6-21.5 “is most ‘sensibly understood as permitting an award only of [attorney’s fees] directly caused by the filing, logically, those at the trial level’”); *see also McKinnon*, 228 N.C. App. at 198, 745 S.E. 2d at 349 (“[A]wards of attorney’s fees pursuant to § 6-21.5 may only encompass fees incurred at the trial level.”). Instead, Rule 34 of the North Carolina Rules of Appellate Procedure governs the award of attorneys’ fees incurred due to appeals of this type of case. *Hill*, 173 N.C. App. at 321, 622 S.E.2d at 511.
 - ❖ **Note Well:** It is not unusual that an applicant may request fees based on both section 6-21.5 and another statute that would allow the recovery of attorneys’ fees incurred on appeal.
- vi. *Complete Absence of a Justiciable Issue*
 - ❖ “A justiciable issue is one that is ‘real and present as opposed to imagined or fanciful.’” *Lincoln*, 166 N.C. App. at 154, 601 S.E.2d at 242. There is a complete absence of a justiciable issue when it “conclusively appear[s] that such issues are absent even” when assessing the pleadings in the light most favorable to the losing party, as the court does on motions to dismiss. *Id.* (quoting *Sprouse v. North Rivers Ins. Co.*, 81 N.C. App. 311, 326, 344 S.E.2d 555, 565 (1986)); *see, e.g., Credigy Receivables, Inc. v. Whittington*, 202 N.C. App. 646, 658–59, 689 S.E.2d 889, 897 (2010) (affirming the award of attorneys’ fees where the court found that the plaintiff did not have standing to pursue enforcement of the judgment and there were no facts to connect the defendant to the underlying debt); *Alford v. Green*, COA15-1101, 2016 N.C. App. LEXIS 468, at *10 (N.C. Ct. App. May 3, 2016) (affirming the award of attorneys’ fees where the trial court’s findings recounted parts of plaintiff’s deposition in which she admitted to filing a non-justiciable claim).
 - ❖ An award of attorneys’ fees pursuant to section 6-21.5 “may be appropriate despite the layperson’s reliance on legal advice if the layperson persists ‘in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue.’” *Brooks*, 334 N.C. at 310, 432 S.E.2d at 343 (quoting *Sunamerica*, 328 N.C. at 258, 400 S.E.2d at 438). For example, in *Brooks v. Giesey*, the Supreme Court of North Carolina affirmed the trial court’s award of attorneys’ fees

pursuant to section 6-21.5 where there was no legal or factual basis to find the defendants liable for the alleged problems with the land the plaintiffs had bought because the defendants were not a party to the purchase contract. *Id.* at 312–13, 432 S.E.2d at 344–45.

- ❖ In *McLennan v. C.K. Josey, Jr.*, the Court of Appeals upheld a fee award to the plaintiff because the defendants’ counterclaim contained no justiciable issues of fact or law when the defendants knew the deed description, which was the basis for their suit, incorrectly excluded more than 200 acres that belonged to plaintiff. ___ N.C. App. ___, 785 S.E.2d 144, 148–49 (2016).

I. Awarding attorneys’ fees for punitive damages claims.

- i. The court shall award reasonable attorneys’ fees against any claimant who files a punitive damages claim, or a defendant who asserts a defense in a punitive damages claim, where the respective party knew or should have known that the claim or defense was frivolous or malicious. See N.C. Gen. Stat. § 1D-45 (2015) (emphasis added).
- ii. *Frivolous or Malicious.*
 - ❖ “A claim for punitive damages is ‘frivolous’ where its ‘proponent can present no rational argument based upon the evidence or law in support of it.’” *Phillips v. Pitt Cty. Mem’l Hosp., Inc.*, 242 N.C. App. 456, 458, 775 S.E.2d 882, 884 (2015) (quoting *Ryne v. K-Mart Corp.*, 149 N.C. App. 672, 689, 562 S.E.2d 82, 94 (2002)).
 - ❖ “A claim is ‘malicious’ where it is ‘wrongful and done intentionally without just cause or excuse as a result of ill will.’” *Phillips*, 242 N.C. App. at 458, 775 S.E.2d at 884 (quoting *Ryne*, 149 N.C. App. at 689, 562 S.E.2d at 94).
 - ❖ The Court of Appeals upheld a denial of an award of attorneys’ fees pursuant to section 1D-45 where the trial court found “some evidence” in support of the punitive damages claims. *Weston Medsurg Ctr., PLLC v. Blackwood*, 2017 N.C. App. LEXIS 68, at *11–12 (N.C. Ct. App. Feb. 7, 2017) (explaining that the trial court found some evidence of “egregiously wrong conduct” by defendants supporting the trial court’s finding that the punitive damages claim was neither frivolous nor malicious).
- iii. A trial court must make specific findings that explain why the conduct is frivolous or malicious. See *Messer v. Pollack*, COA17-582, 2018 N.C. App. LEXIS 133, at *5 (N.C. Ct. App. Feb. 6, 2018) (vacating the award of attorneys’ fees where the trial court merely stated that defendants’ punitive damages claim was frivolous).

without specifying “which of Defendants’ two punitive damages claims was frivolous . . . or why one or both of those claims was frivolous or malicious”).

- iv. The trial court’s findings need to “address whether [the party] knew or should have known that their punitive damages claim was frivolous or malicious.” See *Messer*, 2018 N.C. App. LEXIS 133, at *5.

m. Awarding attorneys’ fees in discovery disputes.

- i. Note: This paper provides only a brief summary of the exhaustive body of precedent from state and federal courts on this topic.

- ii. *Rule 11*

- ❖ Rule 11 of the North Carolina Rules of Civil Procedure requires an attorney or pro se litigant to sign and “certify ‘that the pleadings are (1) well grounded in fact, (2) warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law, and (3) not interposed for any improper purpose.’” *Hill v. Hill*, 173 N.C. App. 309, 313, 622 S.E.2d 503, 507 (2005) (quoting *Grover v. Norris*, 137 N.C. App. 487, 491, 529 S.E.2d 231, 233 (2000)).
- ❖ If a party violates Rule 11, the Court may, upon a motion or *sua sponte*, impose sanctions, including “an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.” N.C. Gen. Stat. § 1A-1, Rule 11.
- ❖ A party’s failure to comply with any of the three requirements in Rule 11, is a violation of Rule 11 and is sanctionable. See *Hill*, 173 N.C. App. at 313, 622 S.E.2d at 507.
- ❖ The Court of Appeals “reviews the awarding of sanctions based on Rule 11 *de novo*.” *Lincoln v. Bueche*, 166 N.C. App. 150, 156, 601 S.E.2d 237, 243 (2004). The trial court must make specific findings of fact to support its conclusion that a party violated Rule 11. See *Hill*, 173 N.C. App. at 314, 622 S.E.2d at 508 (quoting *Renner v. Hawk*, 125 N.C. App. 483, 491, 481 S.E.2d 370, 375 (1997)) (explaining that the Court of Appeals must determine “whether the trial court’s conclusions of law are supported by its findings of fact” and “whether the findings of fact are supported by a sufficiency of the evidence”).
 - i. The trial court should indicate which prong(s) of Rule 11 a party violated. See *Lincoln*, 166 N.C. App. at 157, 601 S.E.2d at 243.

- ii. To determine if a pleading is well-grounded in fact, a court must assess “(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his injury, reasonably believed that his position was well grounded in fact.” *Hill*, 173 N.C. App. at 314, 622 S.E.2d at 507 (quoting *McClerin v. R-M Indus., Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995)).
 - iii. The question is whether the party or his attorney “acted with ‘objective reasonableness under the circumstances’ when they signed the pleading in question.” *Lincoln*, 166 N.C. App. at 156, 601 S.E.2d at 243 (quoting *Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989)).
- ❖ The Court of Appeals reviews the type and amount of sanctions a trial court awards for a Rule 11 violation for abuse of discretion. *See Hill*, 173 N.C. App. at 315, 622 S.E.2d at 508.
 - i. A trial court can award attorneys’ fees and expenses that were “directly caused by the filing” of the action, meaning those fees and expenses incurred at the trial level. *See Hill*, 173 N.C. App. at 321, 622 S.E.2d at 511 (quoting *Cooter & Gell*, 496 U.S. at 406). Rule 11 does not permit the trial court to award attorneys’ fees and costs incurred as a result of subsequent appeals. *See id.*
 - ii. “Attorney’s fees and costs incurred during discovery as a result of plaintiff’s complaint are a proper basis for an award of attorney’s fees and costs under Rule 11.” *See Hill*, 173 N.C. App. at 318, 622 S.E.2d at 510.
 - iii. “[T]he denial of a motion for summary judgment is not an automatic bar to imposition of Rule 11 sanctions.” *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 659, 464 S.E.2d 47, 55 (1995).
 - iv. “Unlike N.C. Gen. Stat. § 6-21.5, when evaluating an award of attorney’s fees under Rule 11 ‘reference should be made to the document itself, and the reasonableness of the belief that it is warranted by existing law should be judged as of the time the document was signed.’” *Lincoln v. Bueche*, 166 N.C. App. 150, 156, 601 S.E.2d 237, 243 (2004) (quoting *Bryson v. Sullivan*, 330 N.C. 644, 656, 412 S.E.2d 327, 333 (1992)). The Court should not consider other documents. *Id.*

iii. *Rule 26(g)*

- ❖ Rule 26(g) of the North Carolina Rules of Civil Procedure provides that “[i]f a certification is made in violation of the rule, the court, upon motion or upon its own initiative shall impose upon the person who made the certification, the party on whose behalf the request, response or objection is made, or both, an appropriate sanction,” which may include reasonable attorney’s fees. N.C. R. Civ. P. 26(g).
- ❖ While there is limited North Carolina case law discussing whether Rule 26(g) sanctions are discretionary or mandatory, several federal cases have explained that sanctions for a violation of Rule 26(g) of the Federal Rules of Civil Procedure are mandatory. *See Azalea Garden Bd. & Care, Inc. v. Vanhoy*, 06 CVS 0948, 2009 NCBC LEXIS 7, at *15 (N.C. Super. Ct. Mar. 26, 2009) (citing numerous federal cases). Rule 26(g) of the North Carolina Rules of Civil Procedure states that a court “shall impose . . . an appropriate sanction,” and does not have a caveat allowing for a court not to impose sanctions, like Rule 37. N.C. R. Civ. P. 26(g) (emphasis added). Thus, it appears that if the Court finds that a party violated Rule 26(g), it is required to issue sanctions. *See Azalea Garden Bd. & Care, Inc.*, 2009 NCBC LEXIS 7, at *15.

iv. *Rule 37(b)(2)*

- ❖ Rule 37(b)(2) provides that “the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.” N.C. Gen. Stat. § 1A-1, Rule 37(b)(2).

VI. Particular Issues Regarding Apportionment of Attorneys’ Fees When a Party Is Only Partially Successful.

- a. “[W]here attorneys’ fees are not recoverable for defending certain claims in an action but are recoverable for other claims in that action, fees incurred in defending both types of claims are recoverable where the time expended on defending the non-recoverable and the recoverable claims overlap and the claims arise ‘from a common nucleus of law or fact.’” *Philips v. Pitt Cty. Mem’l Hosp., Inc.*, 242 N.C. App. 456, 459, 775 S.E.2d 882, 884 (2015) (quoting *Okwara v. Dillard Dep’t Stores, Inc.*, 136 N.C. App. 587, 595, 525 S.E.2d 481, 486–87 (2000)) (emphasis added); *see also Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 467, 553 S.E.2d 431, 443 (2001).
- b. A common nucleus of operative facts exists when each claim is “inextricably interwoven” with the other claims. *Okwara*, 136 N.C. App. at 596, 525 S.E.2d at 487; *see also Philips*, 242 N.C. App. at 459, 775 S.E.2d at 884.

- c. To determine whether claims are inextricably interwoven, the trial court must apply a reasonable relation test. *See Whiteside Estates, Inc.*, 146 N.C. App. at 467, 553 S.E.2d at 443.
- d. Whenever there are multiple claims in an action and there is statutory authority to support awarding attorneys' fees for some claims, but not all claims, the trial court is not required to apportion fees among the claims, but the court should make specific findings to determine whether the claims arise from a common nucleus of operative facts. *See Morris v. Scenera Research, LLC*, 229 N.C. App. 31, 56, 747 S.E.2d 362, 377–78 (2013), (quoting *Whiteside Estates*, 146 N.C. App. at 467, 553 S.E.2d at 443) (“[T]he trial court is not required to apportion attorneys’ fees” when all the “claims [arose] from the same nucleus of operative fact[] and each claim was ‘inextricably interwoven’ with the other claims”), *rev’d in part on other grounds* 368 N.C. 857 (2016).
 - i. If the trial court determines that fees should be allocated because the claims do not arise from a common nucleus of operative facts, it must support this conclusion with specific findings. *See Morris v. Scenera Research, LLC*, No. 09 CVS 19678, 2016 NCBC LEXIS 101, at *19–20 (N.C. Super. Dec. 19, 2016) (explaining that to allocate fees a trial court “must make express findings that the unsuccessful claims did not arise from a common nucleus of operative fact upon which the successful claims were based”) (citing *Morris*, 229 N.C. App. at 56, 747 S.E.2d at 377–78; *see also Morris v. Scenera Research, LLC*, No. 09 CVS 19678, 2017 NCBC LEXIS 48 (N.C. Super. Ct. May 31, 2017) (containing the trial court’s revised findings of fact and award of attorneys’ fees)).
 - ii. On the other hand, if the trial court determines that fees should not be allocated because the claims are “inextricably interwoven” and “arise from a common nucleus of operative fact,” it must make specific findings of fact to support such a conclusion. *Messer v. Pollack*, 2018 N.C. App. LEXIS 133, at *6 (N.C. App. Feb. 6, 2018).
 - ❖ A finding that the claims are inseparable, without further explanation, is inadequate to show such claims are inextricably interwoven from a common nucleus of operative facts. *See Messer*, 2018 N.C. App. LEXIS 133, at *6–7 (vacating the award of attorneys’ fees where the trial court found that “the counterclaims are inseparable from the claim of punitive damages,” but failed to explain how the claims were inextricably interwoven).
 - ❖ But the Court of Appeals affirmed a trial court’s refusal to apportion fees where it would be impractical because the allegations supporting the punitive damages claim were essential to plaintiff’s other claims. *See*

Philips, 242 N.C. App. at 459, 775 S.E.2d at 884–85 (affirming the trial court’s award where the trial court found that plaintiff’s punitive damages claims were essential to his theory of defendants’ liability on all other claims). The Court of Appeals agreed with the trial court that the claims were inextricably interwoven, noting that the allegations in support of the punitive damages claims incorporated by reference allegations in support of his other claims, “adding only that in addition to all his other allegations, the injuries inflicted against him were done with malice, conscious disregard, intent, design, and purpose.” *Id.*

VII. Awarding Attorneys’ Fees in Class Actions and Pursuant To Settlement Agreements

- a. While the general rule is that a court cannot award attorneys’ fees without statutory authorization, North Carolina has recognized the common fund doctrine as an equitable exception to that rule, which is most often applied in class action settlements.
- b. *Common Fund Doctrine*
 - i. In cases where the litigation produces a **common fund**, the trial court may award attorneys’ fees. *See Horner v. Chamber of Commerce of City of Burlington*, 236 N.C. 96, 97–98, 72 S.E.2d 21, 22 (1952); *see also Long v. Abbott Labs.*, No. 97 CVS 8289, 1999 NCBC LEXIS 10, at *14–15 (N.C. Super. Ct. July 30, 1999) (“[T]he determination of attorney fees in common fund cases involves issues of equity and requires the application of equitable principles.”).
 - ii. Despite no statutory authorization, a trial court has discretion to award attorneys’ fees to a party who, at its own expense, either “[1] has maintained a successful suit for the preservation, protection, or increase of a common fund or of common property, or [2] who has created . . . or brought into court a fund which others may share with” such party. *Ehrenhaus*, 216 N.C. App. at 94, 717 S.E.2d at 32 (quoting *Horner v. Chamber of Commerce*, 236 N.C. 96, 97–98, 72 S.E.2d 21, 22 (1952)); *see also In re Wachovia S’holders Litig.*, 168 N.C. App. 135, 138, 607 S.E.2d 48, 50 (2005).
 - iii. North Carolina uses a hybrid of the percentage of fund and lodestar methods for calculating fees in common fund cases.
 - The percentage of fund method awards class counsel fees based on a “percentage of the fund created for the class,” while the lodestar method “awards fees based upon a reasonable hourly rate for the time reasonably expended to create the fund.” *In re Senergy*, No. 96 CVS 5900, 1999 NCBC LEXIS 7, at *17, 21 (N.C. Super. Ct. July 14, 1999).
 - The hybrid method “uses both the percentage of the fund method and the lodestar method in combination with a careful consideration of the fee

factors set forth in the Rules of Professional Conduct of the North Carolina State Bar.” *Long*, 1999 NCBC LEXIS 10, at *15.

c. North Carolina courts do **not** recognize the **common benefit doctrine**.

- i. In cases where a class action produces a **non-monetary** settlement, the trial court may **not** award attorneys’ fees based on the common benefit doctrine. *In re Wachovia S’holders Litig.*, 168 N.C. App. at 141, 607 S.E.2d at 52. But courts can award attorneys’ fees in class actions that produce a non-monetary settlement when there is statutory authority to support such award. For example, N.C. Gen. Stat. § 55-7-46(1) allows the trial court to award attorneys’ fees in shareholder derivative actions, even absent a monetary settlement. *See Lowder*, 82 N.C. App. at 477, 346 S.E.2d at 699.
 - The common benefit doctrine, also known as the corporate benefit doctrine, provides that a party “who confers a common *monetary* benefit upon an ascertainable stockholder class” is entitled to an award of attorneys’ fees for the “efforts in creating the benefit.” *In re Wachovia*, 168 N.C. App. at 139, 607 S.E.2d at 50–51 (emphasis added) (quoting *Cal–Maine Foods, Inc. v. Pyles*, 858 A.2d 927, 929 (Del. 2004)).
 - Delaware has regularly utilized this doctrine when approving class settlements arising from mergers where the only consideration is supplemental disclosures in advance of a shareholder meeting. *See, e.g., Cal–Maine Foods, Inc.*, 858 A.2d at 929.
 - To obtain a fee award under the common benefit doctrine, the party must prove three elements: “(1) the suit was meritorious when filed; (2) the action producing benefit to the corporation was taken by the defendants before a judicial resolution was achieved; and (3) the resulting corporate benefit was causally related to the lawsuit.” *In re Wachovia*, 168 N.C. App. at 139, 607 S.E.2d at 51 (quoting *Cal–Maine Foods, Inc.*, 858 A.2d at 927).
 - In 1987, the North Carolina Court of Appeals rejected the common benefit doctrine as a doctrine of general application. *Madden v. Chase*, 84 N.C. App. 289, 292, 352 S.E.2d 456, 458 (1987). Then, in 2005, the Court of Appeals found that it was bound by *Madden* and reversed the business court’s award of attorneys’ fees based on the common benefit doctrine. *In re Wachovia S’holders Litig.*, 168 N.C. App. at 141, 607 S.E. 2d at 51.

- ii. However, the Court of Appeals has now determined that parties in a class settlement can contract for the payment of attorneys' fees, usually in the form of a fee-shifting provision, and the court can then award such fees without any statutory basis. *Ehrenhaus v. Baker*, 243 N.C. App. 17, 30, 776 S.E.2d 699, 708 (2015) (approving fee-shifting agreements in class action settlements); *In re Pike Corp. S'holder Litig.*, No. 14 CVS 1202, 2015 NCBC LEXIS 95, at *17 (N.C. Super. Ct. Oct. 8, 2015) (explaining that the trial court "does not need explicit statutory authority to award attorneys' fees where the parties have agreed to a fee-shifting provision in a voluntary settlement"); *In re Newbridge Bancorp S'holder Litig.*, No. 15 CVS 9251, 2016 NCBC LEXIS 91, at *37 (same).
- The agreed to fee-shifting provision in a settlement "is—like all other aspects of the settlement—subject to the trial court's approval in a fairness hearing." *Ehrenhaus*, 243 N.C. App. at 30, 776 S.E.2d at 708.
 - "During the fairness hearing, the trial court must carefully assess the award of attorneys' fees to ensure that it is fair and reasonable." *Ehrenhaus*, 243 N.C. App. at 30, 776 S.E.2d at 708. But if the parties did not agree to a specific fee amount, but agreed to fee shifting, then "the Court may award the amount that it determines to be fair and reasonable, potentially subject to an agreed-to floor or cap." *In re Pike Corp. S'holder Litig.*, 2015 NCBC LEXIS 95, at *18.
 - Courts determine the fairness and reasonableness of a fee-shifting agreement in disclosure-based settlements by assessing "the materiality and value of the disclosures obtained against the amount of attorneys' fees requested" and by examining the factors enumerated in Rule 1.5 of the Rules of Professional Conduct. *Newbridge*, 2016 NCBC LEXIS 91, at *37; *see also* N.C. R. Prof. Conduct 1.5.
 - The trial court may exercise a "searching inquiry when deciding upon a fee request that does not depend on the validity of the settlement." *In re Krispy Kreme Doughnuts S'holder Litig.*, No. 16 CVS 3669, 2018 NCBC LEXIS 1, at *21 (N.C. Super Ct. Jan. 2, 2018).
 - It is not yet clear whether, or under what circumstances, a trial court may apply *quantum meruit* to award attorneys' fees in a disclosure-based settlement. *See Newbridge*, 2016 NCBC LEXIS 91, at *59 n.10 (denying a motion for attorneys' fees under a *quantum meruit* theory when the supplemental disclosures were only of "marginal benefit to the [c]lass").
- d. North Carolina, unlike some other jurisdictions, does *not* recognize the "private attorney general" doctrine and the "substantial benefit" doctrine—equitable exceptions to the general rule that every litigant is responsible for her own attorneys' fees. *Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 283, 679 S.E.2d 512, 519 (2009).

VIII. Fees Incurred on Appeal

- a. The North Carolina Court of Appeals has explained that once the trial court finds “that [the prevailing party is] entitled to attorney’s fees in obtaining their judgment, any effort by defendants to protect that judgment should likewise entitle them to attorney’s fees.” *City Finance Co. v. Boykin*, 86 N.C. App. 446, 449, 358 S.E.2d 83, 85 (1987).
- b. Generally, statutes allowing the award of attorneys’ fees “should be construed liberally in order to accomplish the purpose of the Legislature.” *Id.* at 450, 358 S.E.2d at 85 (quoting *Hicks v. Albertson*, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1973)).
- c. However, as discussed above, if the trial court’s only authority for awarding attorneys’ fees is section 6-21.5 or Rule 11 of the North Carolina Rules of Civil Procedure, then the trial court does not have the authority to award attorneys’ fees incurred as a result of the appeal. *Hill*, 173 N.C. App. at 321, 622 S.E.2d at 511; see also *McKinnon v. CV Indus.*, 228 N.C. App. at 199, 745 S.E.2d at 350 (quoting *Shepard v. Bonita Vista Props., L.P.*, 191 N.C. App. 614, 627, 664 S.E.2d 388, 396 (2008)) (noting that “unlike N.C. Gen. Stat. § 6-21.5, application of N.C. Gen. Stat. 75-16.1 is not confined solely to the trial level, and a trial court may award attorney’s fees under § 75-16.1 for ‘services rendered at all stages of litigation[.]’” including appeals”) (alteration in original).

IX. Fees on Fees

- a. Courts often refer to the fees incurred while litigating a dispute regarding an award of attorneys’ fees as “fees on fees.”
- b. “The majority of federal circuit courts have held that, where a party is entitled to a statutory award of fees, ‘the time expended by attorneys in obtaining a reasonable fee is justifiably included in . . . the court’s fee award,’ including both the ‘time spent preparing the fee petition and time devoted to litigating the amount of the award at the fee hearing.’” *Morris v. Scenera Research, LLC*, No. 09 CVS 19678, 2017 NCBC LEXIS 48, at *15 (N.C. Super. May 31, 2017) (quoting *Bagby v. Beal*, 606 F.2d 411, 416 (3d Cir. 1979)).
- c. While neither the Court of Appeals nor Supreme Court of North Carolina have examined this issue, the business court has awarded fees on fees, predicting that the Supreme Court of North Carolina would allow fees on fees to be awarded in a case where the party was entitled to fees in obtaining their judgment and the attorneys’ fee award was upheld. See *Morris*, 2017 NCBC LEXIS 48, at *45–49.

- d. When awarding fees on fees, the court must examine the reasonableness of such fees, but also “should exercise its discretion to assign appropriate responsibility for the extent of the fees on fees incurred.” *Id.* at *17. Such discretion “must be exercised in a manner that protects the receipt of the initial attorneys’ fee award without encouraging unnecessary protracted litigation on that fee award.” *Id.*