UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CASE NO.: 23-2160

FIRST PROTECTIVE INSURANCE COMPANY,

Plaintiff — Appellee,

v.

LEWIS EDWARD O'LEARY; PROBUILDERS OF THE CAROLINAS, INC.,

Defendants— Appellants.

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# ANSWER BRIEF OF FIRST PROTECTIVE INSURANCE COMPANY

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On Appeal from the United States District
Court for the Eastern District of North Carolina


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# DISCLOSURE STATEMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**DISCLOSURE STATEMENT**

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-2160 Caption: First Protective Insurance Company v. Lewis Edward O'Leary, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

First Protective Insurance Company
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:

PWC Financial, Inc.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Mihaela Cabulea Date: 11/17/2023

Counsel for: Appellee

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## STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The United States District Court for the Eastern District of North Carolina had subject-matter jurisdiction over this case under 28 U.S.C. § 1332, as there is complete diversity of citizenship among the parties and the amount in controversy exceeds $75,000, exclusive of interest, fees, and costs. (JA10-11.)

Appellant, Lewis Edward O'Leary ("O'Leary") is a citizen and resident of Wake County, North Carolina. (JA10.) Appellant, ProBuilders of the Carolinas, Inc. ("ProBuilders") is a citizen of North Carolina, where it is incorporated, and has its principal place of business in Cary, Wake County. (JA10.)[1] Appellee, First Protective Insurance Company ("First Protective") is a citizen of Florida, where it is incorporated, and has its principal place of business in Lake Mary, Florida. (JA10.) The other Defendants, who are not part of these appellate proceedings, are also diverse. Linda Stokes Rike ("Rike") is a citizen and resident of Carteret County, North Carolina. (JA10.) Defendant William Scott Heidelberg is a citizen and resident of Madison County, Tennessee. (JA11.) Defendant Heidelberg and Mullens, Inc. is a citizen of Tennessee, where it is incorporated, and has its principal place of business in Jackson, Madison County, Tennessee. (JA11.) Defendant Ronald Paul

[1] O'Leary is the principal, owner, officer, director, and registered agent for ProBuilders. (JA10.) In this brief, Appellants O'Leary and ProBuilders are collectively references as "the O'Leary Appellants."

Hicks is a citizen and resident of Carteret County, North Carolina. (JA11.) Defendant, StormPro Public Adjusters, L.L.C. is a citizen of North Carolina, where StormPro is incorporated, and has its principal place of business in Morehead City, Carteret County, North Carolina. (JA11.)

This Court, however, does not have appellate jurisdiction over the district court's interlocutory order, as the order appealed (JA125) does not constitute a final, appealable order within the scope of 28 U.S.C. § 1291 nor is it appealable under the collateral order doctrine. First Protective relies on the arguments raised in its Motion to Dismiss the Appeal for Lack of Jurisdiction filed simultaneously with this Answer Brief.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether this Court has jurisdiction to review the district court's interlocutory order denying the O'Leary Appellants' claims of arbitral immunity, their motions for protective order and for attorney's fees under the North Carolina Revised Uniform Arbitration Act ("the North Carolina Arbitration Act").

II. Whether the O'Leary Appellants have waived the argument that they are entitled to immunity based on the "functionality test" by not raising it in the district court; alternatively, whether the argument is without merit because the "functionality test" in *Dalenko v. Collier*, 664 S.E.2d 425, 430-31 (N.C. Ct. App. 2008) is inapplicable to an umpire in an insurance appraisal.

III. Whether the district court's ruling may be affirmed on the alternative ground that the O'Leary Appellants have waived their arbitral immunity argument by not raising it in their answer and affirmative defenses, thus prejudicing First Protective.

IV. Whether the O'Leary Appellants forfeited their argument that they are immune from discovery by making a perfunctory argument on appeal; alternatively, whether their argument fails on the merits as they cannot establish entitlement to arbitral immunity.

V. Whether the O'Leary Appellants forfeited their argument that they are entitled to attorney's fees and costs, by making a perfunctory argument on appeal;

alternatively, whether their argument fails on the merits as they cannot establish entitlement to arbitral immunity.

## STATEMENT OF THE CASE AND FACTS

**Nature of the case.** This is an appeal from an interlocutory order denying the O'Leary Appellants' motions for judgment on the pleadings, for protective order, and for attorney's fees and costs, based on the finding that arbitral immunity under the North Carolina Arbitration Act did not apply to O'Leary in his role as umpire in an insurance appraisal to protect the O'Leary Appellants from First Protective's declaratory and legal action seeking to vacate and set aside an invalid appraisal award due to the O'Leary Appellants' conflict of interest and from discovery, and to entitle them to attorney's fees and costs.

As argued in First Protective's Motion to Dismiss the Appeal for Lack of Jurisdiction, filed simultaneously with this Answer Brief, this Court lacks jurisdiction over this non-final appeal. Alternatively, the O'Leary Appellants' arguments were abandoned or waived, or they fail on the merits, as discussed herein. Although the O'Leary Appellants raise a plethora of issues on appeal, a close review of the Opening Brief reveals that the main issue is whether the North Carolina Arbitration Act applies to them to insulate them from civil liability and discovery, and to entitle them to attorney's fees and costs. On appeal, they do not challenge the district court's determination that the North Carolina Arbitration Act does not apply to an umpire in an insurance appraisal and therefore they have abandoned that argument. Instead, they rely for the first time on appeal on the

“functionality test” argument to claim entitlement to arbitral immunity. Because that argument was not properly preserved for appellate review or alternatively, it is without merit, the O’Leary Appellants’ claims to arbitral immunity fail and so do their claims that they are immune from discovery and that they are entitled to attorney’s fees and costs.

**Statement of the facts. The insurance policy and the claimed losses.** First Protective issued a residential insurance policy to Rike for her residence located at 309 S. 19th Street in Morehead City, North Carolina (the “property”), which was effective from May 18, 2018, to May 18, 2019, and was renewed for the policy period of May 18, 2019, to May 18, 2020 (the “Policy”). (JA12-13.)

First Protective’s policy contained an appraisal provision, which states in pertinent part:

> If you and we fail to agree on the value or amount of any item or loss, either may demand an appraisal of such item or loss. In this event, each party will choose a competent and disinterested appraiser within 20 days after receiving a written request from the other. The two appraisers will choose a competent and impartial umpire.

(JA60.)

Rike submitted to First Protective three claims for physical damage to her property. (JA12.) In September 2018, Rike submitted a claim alleging damage to her property from wind and wind-driven rain during Hurricane Florence (“Florence claim”). (JA12-13.) First Protective promptly began investigating the claim.

(JA13.) On October 9, 2019, while the Florence claim was still pending, Rike submitted another claim alleging that a toilet supply line leaked and caused damage to her property (the "water leak claim"). (JA13.) First Protective promptly began to investigate and adjust the water leak claim concurrently with the Florence claim. (JA13.) In October 2020, while the two claims were still pending, Rike submitted another claim for damage to her property caused by Hurricane Dorian, on September 6, 2019 (the "Dorian claim"). First Protective promptly began investigating and adjusting the Dorian claim concurrently with the other two claims. (JA13.)

**Rike invokes the policy's appraisal provision for the water leak claim.** Rike and her public adjuster, Ronald Paul Hicks ("Rike's public adjuster"), and his company StormPro Public Adjusters, L.L.C., elected Heidelberg and his company Heidelberg and Mullens, Inc. as the appraiser ("Rike's appraiser") for the water leak claim. (JA10-11, JA13-14.) First Protective named James Starrette as its appraiser ("First Protective's appraiser"). (JA14.) The two appraisers agreed to appoint John Robison ("Robison") as an umpire. (JA14.) Robison, however, rightfully recused himself once he learned that Rike had designated him as an appraiser for her Hurricane Florence claim, which proceeded through a separate appraisal. (JA14.) Rike, her public adjuster, and her appraiser were aware of Robison's conflict of interest and recusal. (JA14.)

Subsequently, Rike and her appraiser proposed the O'Leary Appellants to serve as umpire in the water leak claim appraisal. (JA14-15.) Unbeknownst to First Protective or its appraiser, the O'Leary Appellants were actively consulting with and performing services for Rike. (JA15-16.) Further, at the time O'Leary signed his attestation as a "strictly impartial" umpire, O'Leary had an express conflict of interest and bias due to his ongoing business and financial relationships with Rike, her public adjuster, and her appraiser on other claims. (JA16.) In fact, the O'Leary Appellants were actively engaged as consultants to Rike and/or Rike's public adjuster on an insurance claim for Hurricane Florence damage to a property owned by Rike's wholly owned business, called White House Properties. (JA14, JA16.)

Neither O'Leary, nor Rike, her appraiser or her public adjuster disclosed to First Protective or its appraiser at any time that Rike and her public adjuster hired the O'Leary Appellants for another active, ongoing insurance claim. (JA16-17.) As a result of this failure to disclose the O'Leary Appellants' clear conflict of interest, the parties appointed O'Leary as an umpire. (JA16-17.)

One month after O'Leary's appointment, Rike's appraiser advised that the appraisers could not agree on a valuation of the water leak claim and requested O'Leary to settle the dispute. (JA17.) The appraisers and O'Leary deliberated over an eleven-month period to determine the amount of loss for the water leak claim. (JA17.) At no time did the O'Leary Appellants disclose to First Protective or its

appraiser that they were paid consultants for Rike's business's pending insurance claim, or that they had an active and ongoing business relationship with Rike's public adjuster and her appraiser on other claims. (JA17.)

**O'Leary issues an excessive appraisal award.** Ultimately, O'Leary entered an appraisal award for a gross total of $1,036,000.00, which Rike's appraiser signed the next day. (JA18.) First Protective's appraiser did not agree with the award and declined to sign it. (JA18.) This award was almost four times higher than the original estimate of $236,619.80, submitted by Rike's public adjuster to First Protective prior to the water leak appraisal. (JA18.)

**First Protective's post-appraisal investigation of the appraisal award.** After O'Leary issued his appraisal award, First Protective requested that O'Leary provide supporting documentation to determine the basis for the award. (JA20.) O'Leary responded that the award was premised primarily on Rike's appraiser's supporting documentation of Rike's position, which O'Leary purportedly slightly edited to reach a final set of numbers. (JA20.) But he did not provide Rike's appraiser's supporting documentation to First Protective. (JA20.) Instead, Rike's retained counsel provided that documentation, which contained statements by Rike's appraiser regarding the Building, Law and Ordinance, Contents, and Loss of Use aspects of the claim and about how his proposed figures were calculated. (JA20.)

First Protective issued a letter to Rike, requesting that she appear for an Examination under Oath ("EUO") and provide documentation regarding the property and the water leak claim. (JA20.) During her EUO, Rike testified she had personally paid the O'Leary Appellants for O'Leary's work on the White House claim, which was still pending. (JA21.) She also admitted that she did not incur any Loss of Use expenses for her water leak claim, which was contrary to Rike's public adjuster's representation to First Protective and contrary to the appraisal award. (JA21.)

**Procedural history of the case. First Protective files suit.** First Protective filed a declaratory and legal action seeking to vacate the appraisal award for Rike's water leak claim. (JA9-11.) First Protective named the following Defendants: Rike, her public adjuster and his company, Rike's appraiser and his company, and the O'Leary Appellants. (JA22-23.)

Pertinent to this appeal, First Protective pled the following counts against the O'Leary Appellants:

- one declaratory judgment count seeking a declaration that the O'Leary Appellants had a conflict of interest when they acted as umpire in the water leak appraisal, necessitating the invalidation of the appraisal award (JA22-23);

- one declaratory judgment count seeking a declaration that O'Leary and Rike's appraiser made coverage and causation determinations in the appraisal award, which was contrary to North Carolina law (JA23-24);
- one count of violations of North Carolina's Unfair and Deceptive Trade Practices Act against the O'Leary Appellants, Rike, and her public adjuster (JA26-27); and
- tortious interference with contract by O'Leary, Rike's appraiser and her public adjuster, and their respective companies (JA27-28).

Ultimately, First Protective sought damages and to vacate the $1,036,000.00 appraisal award signed by O'Leary and Rike's appraiser. (JA32.)

The O'Leary Appellants filed their answer and affirmative defenses to the complaint. (JA94.) Notably, the O'Leary Appellants did not raise arbitral immunity as an affirmative defense. (JA107-109.)

**The O'Leary Appellants participate in discovery but fail to provide complete responses to First Protective's discovery requests.** Shortly after filing suit, First Protective timely served interrogatories, requests for production, and requests for admission to the O'Leary Appellants. (ECF 70-3; ECF 70-4.) The O'Leary Appellants responded with numerous evasive and incomplete answers. (ECF 70-5.) Upon receiving the responses, First Protective sent correspondence to

the O'Leary Appellants, notifying them of the deficiencies under Federal Rules of Civil Procedure 26 and 33, and requesting that they supplement their responses in accordance with Federal Rule of Civil Procedure 37. (ECF 70-6.) The O'Leary Appellants once again provided deficient answers and responses. (ECF 70-7; ECF-70-8.)

First Protective sent additional correspondence to the O'Leary Appellants asking them to supplement and provide complete answers and responses, but they refused to comply. (ECF 70, ¶ 8.)

**The O'Leary Appellants seek arbitral immunity.** Instead of providing the requested discovery, the O'Leary Appellants filed three separate motions pertaining to First Protective's discovery requests: a motion for judgment on the pleadings; a motion for protective order precluding *all* discovery from them; and a motion for attorney's fees. (JA112; ECF 59 at 1; ECF 60 at 1.)

The O'Leary Appellants also filed a combined memorandum of law in support of their motions claiming for the first time that O'Leary was "statutorily immune from civil liability with regard to [Firs Protective's] claims" and immune from discovery under the North Carolina Arbitration Act. (ECF 61 at 6-7.) They raised the following arguments:

- § 1-569.14 of North Carolina's Arbitration Act applied to O'Leary by virtue of his role as an umpire in the appraisal process under the

express provisions of First Protective's insurance policy (ECF 61 at 7-8);[2]

- O'Leary's failure to make the mandatory disclosures in accordance with § 1-569.12 did not affect their immunity from civil liability (ECF 61 at 6-8 (quoting N.C. Gen. Stat. § 1-569.14(c)).)
- under § 1-569.14(d) of North Carolina's Arbitration Act, O'Leary "[wa]s not competent to testify and shall not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding to the same extent as a judge of a court… sitting in a judicial capacity" (ECF 61 at 8-9);
- the O'Leary Appellants were entitled to attorney's fees and costs under § 1-569.14(e) of North Carolina's Arbitration Act, should the trial court determine they were statutorily immune from civil liability with regard to First Protective's claims under the act. (ECF 61 at 6-7, 9.)

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[2] On appeal, the O'Leary Appellants have abandoned this argument by not raising it in the Opening Brief and they should be precluded from reviving it in the Reply Brief. *See, e.g.*, *A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356, 369 (4th Cir. 2008) ("[i]t is a well settled rule that contentions not raised in the *argument section* of the *opening brief* are abandoned") (emphasis added)) and *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 249 (4th Cir. 2013) ("An appellant cannot remedy the situation by raising the issue in his reply brief.")

The O'Leary Appellants also cited without argument to *Dalenko v. Collier*, 664 S.E.2d 425, 430-31 (N.C. Ct. App. 2008) for the proposition that federal common law recognizes a "functionality test" that provides private citizens with judicial immunity when they act "as arbitrators" in resolving disputes between parties.[3] (ECF 61 at 5-6.)

**First Protective's response to the O'Leary Appellants' claims of arbitral immunity.** First Protective opposed the O'Leary Appellants' motions and omnibus memorandum of law (ECF 63 at 1; ECF 64 at 1; ECF 65 at 1), arguing that:

- the North Carolina Arbitration Act did not apply to O'Leary's claim of immunity, since O'Leary served as an umpire in an appraisal, not as an arbitrator in an arbitration and neither the insurance contract nor North Carolina law provide that an insurance appraisal process is governed by the North Carolina Arbitration Act (ECF 63 at 3-5);
- since the parties did not have an agreement to arbitrate, the North Carolina Arbitration Act could not apply as a matter of law to the

[3] The O'Leary Appellants develop this argument for the first time on appeal, arguing in their Opening Brief that the "functionality test" applies to bestow immunity on them. This argument should be deemed waived. *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 727 (4th Cir. 2021) (explaining that it is not a court's obligation to research and construct legal arguments for the parties, especially when they are represented by counsel and finding that "perfunctory and undeveloped arguments . . . are waived") (citation omitted).

parties' private insurance appraisal, and the O'Leary Appellants were susceptible to First Protective's legal claims and discovery requests (ECF 63 at 3);

- alternatively, the O'Leary Appellants waived their arguments as to the application of the North Carolina Arbitration Act, because they engaged in discovery and failed to plead statutory immunity from civil liability as an affirmative defense (ECF 63 at 7);
- the O'Leary Appellants' motion for protective order was deficient under Federal Rule of Civil Procedure 26(c) because they provided no facts to establish good cause for a protective order, nor did they certify that they had conferred or attempted to confer in good faith with First Protective prior to filing the motion (ECF 63 at 12-13);
- the O'Leary Appellants were not entitled to fees and costs under the North Carolina Arbitration Act, and their request was premature under Federal Rule of Civil Procedure 54(d), since they were not the prevailing party (ECF 63 at 13-14).

The O'Leary Appellants filed a reply, reasserting their arguments that the North Carolina Arbitration Act provided O'Leary with arbitral immunity due to his role as an umpire in the appraisal process. (ECF 66 at 2-3.)

**First Protective moves to compel discovery.** Due to the O'Leary Appellants' refusal to supplement their incomplete and vague answers and responses to First Protective's initial written discovery requests, First Protective moved to compel discovery. (ECF 70.)

The O'Leary Appellants opposed the motion claiming they were immune from discovery based on O'Leary's role as an umpire in the appraisal process and arguing that the requested discovery was irrelevant to First Protective's claims. (ECF 71 at 3-4.)

**The district court denies the O'Leary Appellants' claims of arbitral immunity and they appeal the interlocutory order.** The district court denied the O'Leary Appellants' motion for judgment on the pleadings claiming statutory immunity from civil liability under the North Carolina Arbitration Act, on the basis that O'Leary served as an umpire in a contractually-agreed upon appraisal, not as an arbitrator in an arbitration. (JA143.)

In reaching this conclusion, the district court reviewed the language of the North Carolina Arbitration Act and looked at cases from the North Carolina Supreme Court that analyzed the Arbitration Act and concluded that "[n]either of these cases suggest that an appraisal provision not referencing arbitration constitutes an 'agreement to arbitrate' under the arbitration act." (JA133-135 (citing *Nucor Corp. v. Gen. Bearing Corp.*, 333 N.C. 148, 153 (1992) and

*Crutchley v. Crutchley*, 306 N.C. 518, 522 (1982).) While the district court noted that the North Carolina Supreme Court has not applied the Arbitration Act to an insurance appraisal, it found the North Carolina Supreme Court's decision in *N. Carolina Farm Bureau Mut. Ins. Co. v. Sadler*, 711 S.E.2d 114, 117 (N.C. 2011) instructive because it suggested that an appraisal provision as the one at issue in this case must be evaluated in accordance with the law of contract and based on the terms of the subject policy not of the Arbitration Act. (JA136.) Although the *Sadler* court analyzed a disputed appraisal that raised many of the issues in the present case without referring to appraisal as arbitration, it did not directly address claims against an umpire, nor did it address limitations of discovery from an umpire. (JA136.)

The district court then looked at North Carolina Court of Appeals' decisions for guidance on the issue of whether the parties' appraisal constitutes an agreement to arbitrate that falls under the North Carolina Arbitration Act. (JA137-139.) The court found, relying on the North Carolina Court of Appeals' holding in *PHC, Inc. v. N. Carolina Farm Bureau Mut. Ins. Co.*, 501 S.E.2d 701 (N.C. Ct. App. 1998), that "where, as here, an appraisal provision does not mandate the application of the [Uniform Arbitration Act], the Act's provisions are inapplicable." (JA140-141.)

The district court rejected the O'Leary Appellants' reliance on North Carolina Court of Appeals cases that stand for the general proposition that

appraisals are "analogous to an arbitration proceeding," because those cases did not look at whether the provisions of the Arbitration Act applied to appraisals, nor did they address arbitral immunity or claims for damages. (JA140-141 (citing *N. Carolina Farm Bureau Mut. Ins. Co. v. Harrell,* 557 S.E.2d 580 (N.C. Ct. App. 2001) and *Enzor v. N. Carolina Farm Bureau Mut. Ins. Co.,* 473 S.E.2d 638 (N.C. Ct. App. 1996)).)

The district court also rejected the O'Leary Appellants' reliance on *Dalenko*, 664 S.E.2d 425 for the proposition that the "[p]rivate citizens acting as arbitrators are afforded judicial immunity when performing the function of resolving disputes between parties, or of authoritatively adjudicating private rights." (JA142 (citing *Dalenko*, 664 S.E.2d 425).) The court found *Dalanko* inapposite because the parties in that case had consented to binding arbitration, unlike the parties here, and refused to follow it because that would result in an expansion of North Carolina public policy:

> Furthermore, while *Dalenko* suggests conceivably an expansion of North Carolina public policy to afford appraisers "judicial immunity," this court sitting in diversity "should not create or expand a State's public policy," particularly with "an uncertain and ephemeral interpretation of state law." *Time Warner Ent. Advance/Newhouse P'ship v. Carteret-Craven Elec. Membership Corp.*, 506 F.3d 304, 314 (4th Cir. 2007).

(JA142.)

The district court found it unnecessary to address First Protective's waiver argument (JA143 n.15) and concluded that the O'Leary Appellants' immunity "argument is foreclosed by the North Carolina Court of Appeals' decision that the provisions of the Arbitration Act do not apply to an insurance appraisal, and there is no persuasive data that the North Carolina Supreme Court would decide differently." (JA137.) Therefore, the district court denied the O'Leary Appellants' motions for judgment on the pleadings, for protective order, and for attorney's fees (JA143), and granted First Protective's motion to compel discovery. (JA144.)

The O'Leary Appellants filed the present interlocutory appeal seeking appellate review of the district court's denial of their claims of immunity. (JA145.) The district court has stayed its order compelling the O'Leary Appellants to engage in discovery pending the resolution of this appeal. (ECF 94.)

## SUMMARY OF THE ARGUMENT

**Issue I.** The Court does not have jurisdiction to review the district court's interlocutory order denying O'Leary's claim of arbitral immunity, and denying their motions for protective order and attorney's fees and costs, for the reasons discussed in First Protective's Motion to Dismiss Appeal for Lack of Jurisdiction, filed simultaneously with this Answer Brief.

**Issue II.** The O'Leary Appellants abandoned their argument that O'Leary was statutorily immune from civil liability from First Protective's claims because O'Leary was acting as an umpire under the express provisions of First Protective's policy by failing to raise that issue in the Opening Brief. *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n. 6 (4th Cir.1999). In addition, the O'Leary Appellants do not raise any error regarding the district court's analysis of the appraisal provision in the subject policy and the relevant North Carolina law holding that private insurance appraisals are not subject to the provisions of the North Carolina Arbitration Act and that absent an agreement to arbitrate, they are not subject to arbitral immunity. Thus, they waived these issues and cannot revive them in the Reply Brief. *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 249 (4th Cir. 2013).

Instead, the O'Leary Appellants rely on the "functionality test" in *Daleanco* to argue that O'Leary is entitled to arbitral immunity under the Arbitration Act.

This issue, however, was not properly preserved for appellate review because it was not raised below. *In re Under Seal*, 749 F.3d 276, 285–86 (4th Cir. 2014). Alternatively, the O'Leary Appellants' argument is without merit since the *Dalenko* court only analyzed the application of the "functionality test" prior to North Carolina's General Assembly's codification of arbitral immunity within the Revised Uniformed Arbitration Act. *Dalenko*, 664 S.E.2d at 430 n.2. The district court also recognized that it was not bound by *Dalenko* since the case was inapposite and only entailed immunity claims in a parties' agreement to arbitrate, and not a private insurance appraisal proceeding.

The O'Leary Appellants' policy arguments in support of extending the "functionality test" to umpires in insurance appraisals are also without merit. The North Carolina Supreme Court has explained that the rights and duties of parties in appraisal proceedings are limited to the terms of the policy. *Sadler*, 711 S.E.2d at 117. The O'Leary Defendants do not provide any authority or explanation as to how O'Leary should be afforded protections and powers beyond the scope of the policy's appraisal provision.

**Issue III.** First Protective argued below that the O'Leary Appellants waived their immunity claims by failing to raise them in their affirmative defenses in accordance with Federal Rule of Civil Procedure 8(c) and this failure has prejudiced First Protective. Although the district court did not reach the waiver

argument because it addressed the issue of arbitral immunity on the merits, First Protective raises this argument as an alternative basis for affirmance.

**Issue IV.** The O'Leary Appellants forfeited their argument on appeal that the Arbitration Act's immunity provision precluded First Protective from obtaining discovery from them by providing a barebones recitation of the Arbitration Act's immunity provision without any argument, supporting facts, or case law. *Altemus v. Fed. Realty Inv. Tr.*, 490 Fed. Appx. 532, 538 (4th Cir. 2012). Alternatively, their argument fails on the merits as they are not entitled to arbitral immunity under the North Carolina Arbitration Act.

**Issue V.** The O'Leary Appellants forfeited their arguments that they are entitled to attorney's fees and costs under the North Carolina Arbitration Act by failing to provide any argument on appeal, but simply positing in conclusory fashion that they are entitled to attorney's fees and costs. *Altemus*, 490 Fed. Appx. at 538; Fed. R. App. P. 28(a)(8)(A).

## ARGUMENT

**I. This Court does not have jurisdiction to review the district court's interlocutory order denying the O'Leary Appellants' claims of arbitral immunity and their motions for a protective order and attorney's fees.**

**Standard of Review.** This Court reviews questions of jurisdiction under a de novo standard. *SmartSky Networks, LLC v. DAG Wireless, LTD.*, No. 22-1253, 2024 WL 560717, at *4 (4th Cir. Feb. 13, 2024).

First Protective reasserts the arguments raised in its Motion to Dismiss Appeal for Lack of Jurisdiction, that this Court lacks jurisdiction to review the district court's interlocutory order denying the O'Leary Appellants' claims of arbitral immunity and their motions for a protective order and attorney's fees and relies on that motion, which was filed concurrently with this Answer Brief.

**II. The O'Leary Appellants waived the argument that they are entitled to immunity based on the "functionality test" by not raising it below; alternatively, the argument is without merit because the "functionality test" in *Dalenko* is inapplicable here; and no public policy grounds justify application of the North Carolina Arbitration Act to umpires in insurance appraisal proceedings.** (Responding to Issues 2, 3, 4, 5, 6 in OB)

On appeal, the O'Leary Appellants do not raise any errors regarding the district court's analysis of the appraisal provision in the subject policy and the relevant North Carolina law holding that private insurance appraisals are not subject to the provisions of the North Carolina Arbitration Act and that absent an agreement to arbitrate, they are not subject to the arbitral immunity. Thus, these issues should be deemed conceded or waived. This Court has previously found that

where a claim of error does not appear in the statement of the issue or the argument section of an opening brief, an appellant waives the right to review of that ruling on appeal. *See Isaiah v. WMHS Braddock Hosp. Corp.*, 343 Fed. Appx. 931, 932–33 (4th Cir. 2009) (finding that because appellant failed to "raise any claim of error as to the district court's judgment of immunity under Maryland law," he "failed to challenge the district court's ruling as to immunity under the Maryland statutes," and thus "he has waived the right to review of that ruling on appeal.")

Furthermore, the O'Leary Appellants have abandoned their argument made below (ECF 61 at 6 (citing *Harrell*, 557 S.E.2d at 583 and *Enzor*, 473 S.E.2d at 639); ECF 71 at 3-4), that O'Leary was "statutorily immune from civil liability with regard to the claims of [First Protective]" since O'Leary was "an umpire acting as a neutral under the express provisions of the FP policy" by not raising it in the Opening Brief. *See, e.g.*, *A Helping Hand, LLC*, 515 F.3d at 369 ("[i]t is a well settled rule that contentions not raised in the *argument section* of the *opening brief* are abandoned") (emphasis added)) and *Suarez-Valenzuela*, 714 F.3d at 249 ("An appellant cannot remedy the situation by raising the issue in his reply brief.").

Instead, the O'Leary Appellants shift focus to an argument that was not properly developed below, but only referenced in passing by citing to the *Dalenko* case and they argue that the district court improperly rejected the North Carolina Court of Appeals' decision in *Dalenko*, which applied the "functionality test" to

grant judicial immunity to arbitrators prior to the enactment of the Arbitration Act's immunity provision. (OB 8-10.) This issue was not properly preserved for appellate review or alternatively, it is entirely without merit. They also make some perfunctory arguments premised on public policy (OB at 13-14) that lack merit and must be rejected.

**A. The O'Leary Appellants' "functionality test" argument was waived by not properly raising it below and this Court should not consider it for the first time on appeal because the O'Leary Appellants have not showed fundamental error or any unusual circumstances.**

In the district court, the O'Leary Appellants made a perfunctory reference to the "functionality test," when they cited without argument to *Dalenko*, 664 S.E.2d at 430-31 for the proposition that federal common law recognizes a "functionality test" that provides private citizens with judicial immunity when they act "as arbitrators" in resolving disputes between parties. (ECF 61 at 5-6.) As this Court has previously explained, it is not a court's obligation to research and construct legal arguments for the parties, especially when they are represented by counsel, and thus, "perfunctory and undeveloped arguments . . . are waived." *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 727 (4th Cir. 2021) (citation omitted).

This Court has held that it "will not accept on appeal theories that were not raised in the district court except under unusual circumstances." *Agra, Gill & Duffus, Inc. v. Benson*, 920 F.2d 1173, 1176 (4th Cir. 1990). Here, there are no

"exceptional circumstances." *Tarashuk v. Givens*, 53 F.4th 154, 167 (4th Cir. 2022) (affirming the trial court's denial of a technician and paramedic's immunity claims and refusing to consider arguments in support of immunity that were raised for the first time on appeal in the absence of any "exceptional circumstances"). The O'Leary Appellants were well aware of the "functionality test" in *Dalenko* when they filed their motions and memorandum of law in the district court, since they cited to that opinion without argument. They were also aware of the Arbitration Act's immunity provisions relied on in their Opening Brief (OB at 6, 11), which provide that "the immunity afforded by this section supplements any immunity under other law." N.C.G.S. § 1-569.14(a) and (b). Yet they failed to raise any arguments for the district court's consideration on the applicability of the "functionality test" pursuant to the provisions of the Arbitration Act as a means for expanding immunity to appraisal umpires.

Additionally, the O'Leary Appellants have failed to show fundamental error, or a denial of fundamental justice that would justify this Court's consideration of this argument for the first time on appeal. *In re Under Seal,* 749 F.3d 276, 285 (4th Cir. 2014) ("When a party in a civil case fails to raise an argument in the lower court and instead raises it for the first time [on appeal], [this Court] may reverse only if the newly raised argument establishes 'fundamental error' or a denial of fundamental justice."). Thus, this Court should decline to consider the O'Leary

Appellants' arguments regarding the alleged application of the "functionality test," where they have not even claimed, let alone demonstrated, in their Opening Brief, that the district court's ruling amounted to fundamental error or the denial of fundamental justice.

### B. The "functionality test" applied in *Dalenko* cannot expand the arbitral immunity afforded under the Arbitration Act to umpires in an insurance appraisal.

On appeal, the O'Leary Appellants argue that the district court improperly rejected the North Carolina Court of Appeals' decision in *Dalenko*, which applied the "functionality test" to grant judicial immunity to arbitrators. (OB 8-10.) They rely on *Dalenko* to argue that the "functionality test" applies where "private citizens acting *as arbitrators* are afforded judicial immunity when performing the function of resolving disputes between parties, or of authoritatively adjudicating private rights." *Dalenko*, 664 S.E.2d at 430 (citation omitted) (emphasis added). They contend the district court was required by § 1-569.14(b) to apply the "functionality test" and extend arbitral immunity beyond "arbitrators" or "agreements to arbitrate" to umpires like O'Leary. (OB at 11 (quoting N.C.G.S. § 1-569.14(b)).) They allege that because the Arbitration Act's immunity provision "supplements any immunity under other law," the district court should have applied the common law "functionality test" as a supplemental "other law" to find that O'Leary was immune from civil liability under the act. (OB at 11-12.)

*Dalenko*, however, does not support this argument, because the *Dalenko* court specifically explained in its decision that the North Carolina Arbitration Act's immunity provision was not applicable to that case, because the statute became effective January 1, 2004 and applied to agreements to arbitrate entered into after that date. *Dalenko*, 664 S.E.2d at 430 n.2. And the arbitration agreement in *Dalenko* was entered into prior to the codification of judicial immunity for arbitrators. *Id.*

In fact, the North Carolina's Legislature supplanted the "functionality test" by codifying arbitral immunity into the Revised Uniform Arbitration Act. *See Nelson v. State Employees' Credit Union*, 775 S.E.2d 334, 338 (N.C. Ct. App. 2015) (quoting *Virmani v. Presbyterian Health Servs. Corp.*, 515 S.E.2d 675, 691 (N.C. 1999)) ("Ordinarily, when the General Assembly 'legislates with respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the law of the State.' ").

Contrary to the O'Leary Appellants' contention, the district court was not bound by the decision in *Dalenko*. As the district court correctly noted, *Dalenko* is inapposite because the parties in that case "consented to submit their disputes to binding arbitration, and their agreement provided that: 'The arbitration award shall be binding as an official court ordered judgment and shall be final as to all claims between [the parties].' " (JA142 (quoting *Dalenko*, 664 S.E.2d at 426).) Here, the

district court correctly found that the underlying insurance appraisal was not an arbitration within the meaning of the Arbitration Act and the terms of the policy's appraisal provision. (JA138-139.) The O'Leary Appellants have not challenged that determination on appeal and have waived any arguments to that effect as argued above.

*Dalenko* does not support the O'Leary Defendants' argument that the "functionality test" should extend immunity to umpires in an insurance appraisal. Nowhere did the North Carolina Court of Appeals in *Dalenko* discuss the possibility of extending judicial immunity beyond arbitrators. *See id.* at 430 ("We further hold that plaintiff's claims were barred under the doctrine of *judicial immunity which is applicable to arbitrators*.") (emphasis added). *Dalenko* applied the "functionality test" to an "arbitrator" that was "within the course and scope of [an] arbitration proceeding" and derived that test from Justice Scalia's concurring opinion in *Burns v. Reed*, 500 U.S. 478, 499–500 (1991). *Dalenko,* 664 S.E.2d at 430, 431. According to Justice Scalia, the "functionality test" applied to private citizens acting as "jurors" or "arbitrators." *Burns*, 500 U.S. at 500 (Scalia, J., concurring in part; dissenting in part).

The O'Leary Appellants have not identified any cases to support their argument that the "functionality test" applies to umpires in insurance appraisals and thus expands the reach of the North Carolina Arbitration Act to umpires. In

fact, the O'Leary Defendants even admit that since the *Dalenko* decision, no other appellate court in North Carolina has addressed the issue of whether "the functionality test is the common law of North Carolina." (IB at 10.) And for good reason, because common law was supplanted by the codification into law of arbitral immunity.

Furthermore, the Comment to the Arbitration Act's immunity provision further supports the fact that the "functionality test" is not intended to expand the arbitral immunity conferred by the Arbitration Act to umpires in a private insurance appraisal. The Comment acknowledges that "[a]rbitral immunity has its origins in common law judicial immunity . . . The key to this identity is the 'functional comparability' of the role of arbitrators and judges." Uniform Law Comment to N.C.G.S. § 1-569.14. The comment further explains that arbitral immunity applies equally to arbitrators and arbitration organizations and that the statutory grant of immunity is "intended to supplement, and not diminish, the immunity granted *arbitrators and neutral arbitration organizations* under any judicial, statutory or other law." *Id.* (emphasis added). Thus, contrary to the O'Leary Appellants' arguments, § 1-569.14 of the Arbitration Act is not intended to expand the category of entities to which arbitral immunity is extended under the act—namely, arbitrators and arbitration organizations—but simply to ensure that those entities' immunity is not diminished by the act.

Thus, notwithstanding the O'Leary Appellants' failure to preserve for appellate review their "functionality test" argument, neither *Dalenko* nor § 1569.14 of the North Carolina Arbitration Act support their argument that arbitral immunity applies to umpires in insurance appraisals. The district court's refusal to apply *Dalenko* was correct and should be upheld by this Court.

### C. Public policy does not justify extending arbitral immunity to umpires in insurance appraisals. (Responding to Issues 6 and 7 in the Opening Brief)

The O'Leary Appellants advance some vague and perfunctory public policy arguments on appeal that should be rejected by this Court. First, they argue relying on *Howland v. U.S. Postal Serv.*, 209 F. Supp. 2d 586, 593 (W.D.N.C. 2002) and *Tamari v. Conrad*, 552 F.2d 778 (7th Cir.1977), that "individuals . . . cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between the litigants, and saddled with the burdens of defending a lawsuit." (OB at 13.) These authorities are not persuasive as they concern contractual agreements to arbitrate.

They also argue that First Protective's options for challenging O'Leary's biased and erroneous appraisal award are limited to rejecting the award, seeking to vacate the award, or filing a declaratory action. (OB at 14.) But the O'Leary Appellants did not cite to any authority to support their contention that First Protective was not permitted to sue them for monetary damages along with its

claims seeking to vacate the appraisal award. Additionally, the O'Leary Appellants fail to provide any legal authority to support their arguments that the failure to extend arbitral immunity to appraisal umpires would undermine the credibility of appraisals going forward.

As the district court correctly found, the North Carolina law recognizes that the rights and duties of parties in an appraisal proceeding are established under the terms of the insurance policy. (JA136 (quoting *Sadler*, 711 S.E. 2d at 117).) O'Leary cannot seek to expand his role and protections under the policy. (*Id*. (quoting *Sadler*, 711 S.E. 2d at 117).) Because O'Leary failed to adhere to the terms of the insurance contract and act as an unbiased and neutral umpire by not disclosing his professional relationship with the insured, her public adjuster, and her appraiser, First Protective is entitled to seek monetary damages. First Protective's ability to bring claims against the O'Leary Appellants upholds the integrity of the appraisal process and ensures compliance with the terms of the policy's appraisal provision. To expand the protection afforded the O'Leary Appellants based on these undeveloped and perfunctory arguments, would be to "exceed the scope of the contractual provisions" governing the appraisal process. (JA136 (quoting *Sadler*, 711 S.E. 2d at 117).)

The district court correctly declined to extend the holding in *Dalenko* to umpires in insurance appraisals by recognizing that it was a court "sitting in

diversity" and thus " 'should not create or expand a State's public policy,' particularly with 'an uncertain and ephemeral interpretation of state law.' " (JA142 (quoting *Time Warner Ent-Advance/ Newhouse P'ship v. Carteret-Craven Elec. Membership Corp*., 506 F.3d 304, 314 (4th Cir. 2007)).) This Court should do the same and should reject the O'Leary Appellants' invitation to expand arbitral immunity based on these public policy arguments as they are without merit.

## III. Alternatively, this Court should affirm the district court's orders denying arbitral immunity, because the O'Leary Appellants waived the issue by failing to plead immunity as an affirmative defense and First Protective was prejudiced.

Although the district court did not rule on the waiver issue (JA143, n.15), First Protective argued below that the O'Leary Appellants are not entitled to arbitral immunity because they waived it by failing to plead it as an "avoidance or affirmative defense," as required by Federal Rule of Civil Procedure 8(c). (ECF 63 at 3, 7, n.6.)

The O'Leary Appellants' waiver of the immunity claims by failing to plead them as an affirmative defense has prejudiced First Protective in its ability to effectively conduct discovery. *See Southstar Funding, LLC v. Rhodes*, No. 5:04-CV-858-BR(3), 2007 WL 9718431, at *2 (E.D.N.C. March 20, 2007) (requiring a party arguing waiver to demonstrate prejudice or unfair surprise). The O'Leary Appellants raised their arbitral immunity claims long after they engaged in litigation and participated in discovery. In fact, by the time they raised their claim

of arbitral immunity, they had already provided responses to First Protective's initial discovery requests. (ECF 70 at 1-2.) The O'Leary Appellants' failure to timely raise their arbitral immunity claims has delayed proceedings below. Given the fact that the parties had engaged in months of litigation and discovery prior to the O'Leary Appellants' assertion of entitlement to arbitral immunity, First Protective's ability to effectively conduct discovery and litigate the case had been hindered.

Under Rule 12(c), a judgment on the pleadings is only appropriate "when the well-pleaded factual allegations in the complaint and *the uncontroverted allegations in the answer*, along with any documents attached to the pleadings, show that the case can be decided as a matter of law." *Kenney Properties, Inc. v. Philadelphia Indem. Ins. Co.*, 665 F. Supp. 3d 752, 760 (E.D.N.C. 2022), *aff'd*, No. 22-1842, 2023 WL 8230508 (4th Cir. Nov. 28, 2023) (emphasis added). Here, there is no allegation or evidence set forth in First Protective's Complaint or the O'Leary Appellants' Answer and Affirmative Defenses that would indicate O'Leary adhered to, or believed he was bound by, the provisions of the North Carolina Arbitration Act.

Therefore, this Court may affirm the district court's ruling on this alternative ground. *See Lawson v. Union Cnty. Clerk of Court*, 828 F.3d 239, 247 (4th Cir. 2016), *as amended* (July 8, 2016) ("Our review is not limited to the grounds the

district court relied upon, and we may affirm 'on any basis fairly supported by the record.' " (quoting *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 222 (4th Cir. 2002))).

## IV. The district court correctly ruled that First Protective could obtain discovery from the O'Leary Appellants. (Responding to Issue 8 in Opening Brief)

### A. Standard of review

This Court reviews de novo a district court's denial of immunity from discovery. *Nero v. Mosby,* 890 F.3d 106 (4th Cir. 2018).

### B. The O'Leary Appellants forfeited their argument that they are entitled to immunity from discovery; alternatively, their argument fails on the merits.

The O'Leary Appellants make a perfunctory argument that the North Carolina Arbitration Act's immunity provision bars First Protective from obtaining discovery from them. (OB at 14-15.) They merely quote the Arbitration Act's immunity provision without any argument or explanation as to why the act applies to them and merely positing in conclusory fashion that "the district court's denial" of their motion for protective order "should have been granted [sic]." (B at 15.) This Court has recognized that such a barebones recitation of a district court's actions with no substantive argument amounts to a forfeiture of the issue on appeal. *See Altemus v. Fed. Realty Inv. Tr.*, 490 Fed. Appx. 532, 538 (4th Cir. 2012) ("[B]eyond a one-sentence reference to the court's denial of her discovery

request, [appellant] provides no substantive argument addressing the district court's denial of her discovery request. Therefore, [appellant] has forfeited appellate review of this issue.") (citing Fed. R. App. P. 28(a)(8)(A)).

Additionally, the O'Leary Appellants' contention fails on the merits. As previously argued, they do not take issue with the district court's finding that the North Carolina Arbitration Act does not apply to umpires in an insurance appraisal. Furthermore, as argued at length in Issue II *supra*, the "functionality test" in *Dalenko* does not apply to expand arbitral immunity under the Arbitration Act to the O'Leary Appellants. Thus, since the Arbitration Act does not apply to them, they are not immune from discovery.

Alternatively, as First Protective argued below, the O'Leary Appellants' motion for protective order was deficient under Federal Rule of Civil Procedure 26(c) because they did not show good cause for a protective order, nor did they certify that they conferred or attempted to confer in good faith with First Protective prior to filing the motion. (ECF 63 at 12.)

## V. The district court correctly found the O'Leary Appellants were not entitled to attorney's fees and costs under the North Carolina Arbitration Act, because that act does not apply to them. (Responding to Issue 9 in the Opening Brief)

### A. Standard of review

This Court reviews de novo a district court's denial of a motion for attorney's fees deriving from a statutory entitlement. *Nero*, 890 F.3d at 125–26; *S.*

*Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 186 (4th Cir. 2013) (holding that this Court reviews a denial of a motion for attorneys' fees derived from a fee-shifting statute based upon "contract interpretation grounds" de novo).

### B. The O'Leary Appellants forfeited their argument that they are entitled to attorney's fees under the Arbitration Act; alternatively, the argument is without merit because the North Carolina Arbitration Act does not apply to them and they are not entitled to immunity.

The O'Leary Appellants make a perfunctory one paragraph statement that they are entitled to attorney's fees and costs under the North Carolina Arbitration Act, without any argument. They do not identify any error in the district court's ruling, nor do they cite facts or case law to support their contention that they are entitled to attorney's fees and costs at this stage and absent a judgment in their favor. Thus, they have forfeited any error. *Altemus*, 490 Fed. Appx. at 538, *supra*.

Notwithstanding the forfeiture, the argument fails on the merits, because as discussed at length in Issue II *supra*, the O'Leary Appellants have failed to show that they are entitled to immunity under the North Carolina Arbitration Act.

Furthermore, the O'Leary Appellants do not identify any error in the trial court's ruling, but simply request that this Court make a finding that they are entitled to reasonable attorney's fees, costs, and other reasonable expenses of litigation under the Arbitration Act. (OB at 15.) This is simply a request for an

advisory opinion, while the merits of the underlying case is still pending in the district court. At this stage of the litigation, appellate review is improper. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("[A] federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them' " (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971))); *Hartford Fire Ins. Co. v. Carteret Cnty., N.C.*, 89 F.3d 828 (4th Cir. 1996).

## CONCLUSION

WHEREFORE, for the reasons set forth herein and in First Protective's Motion to Dismiss the Appeal for Lack of Jurisdiction, filed concurrently with this Answer Brief, this Court should dismiss this appeal from the district court's interlocutory orders for lack of jurisdiction. Alternatively, the Court should affirm the district court's denial of the O'Leary Appellants' motions for judgment on the pleadings, for protective order, and for attorney's fees and costs, and should affirm the district court's order granting First Protective's motion to compel discovery.

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**CERTIFICATE OF COMPLIANCE**

First Protective Insurance Company's Answer Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding all parts of the document exempted by rule 32(f), this document contains 7,974 words. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in proportionally spaced typeface using Microsoft Word in size 14 font.

*s/Mihaela Cabulea*
MIHAELA CABULEA

## CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2024, I electronically filed this document with the Clerk of the Court using CM/ECF. I also certify that this document is being served today on all counsel of record by transmission of Notices of Electronic Filing generated by CM/ECF.

*s/Mihaela Cabulea*
MIHAELA CABULEA

## ADDENDUM

**N.C. Gen. Stat. § 1-569.12. Disclosure by arbitrator.**

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) A financial or personal interest in the outcome of the arbitration proceeding; and

(2) An existing or past relationship with any of the parties to the agreement to arbitrate or to the arbitration proceeding, their counsel or representatives, a witness, or other arbitrators.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) of this section to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under G.S. 1-569.23(a)(2) for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b) of this section, upon timely objection by a party, the court under G.S. 1-569.23(a)(2) may vacate an award.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under G.S. 1-569.23(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under G.S. 1-569.23(a)(2).

**N.C. Gen. Stat. § 1-569.14(a), (b), (c), (d), (e). Immunity of arbitrator; competency to testify; attorneys' fees and costs.**

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by G.S. 1-569.12 shall not cause any loss of immunity under this section.

(d) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify and shall not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding to the same extent as a judge of a court of this State acting in a judicial capacity. This subsection shall not apply:

> (1) To the extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the arbitration organization against a party to the arbitration proceeding; or
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> (2) To a hearing on a motion to vacate an award under G.S. 1-569.23(a)(1) or (a)(2) if the movant makes a prima facie showing that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative, or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d) of this section, and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorneys' fees, costs, and other reasonable expenses of litigation.