CASE NO. 23-2160

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FIRST PROTECTIVE INSURANCE COMPANY

Plaintiff-Appellee

v.

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

Defendants-Appellants

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, EASTERN DIVISION
HONORABLE LOUISE W. FLANAGAN, DISTRICT JUDGE

OPENING BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This appeal arises out of the district court's denial of the immunity claims of the appellant, Lewis O'Leary, and his company, ProBuilders of the Carolinas, Inc. [collectively "O'Leary" hereafter] from the claims of First Protective Insurance Company ["FP"], and the resulting denial of O'Leary's motion to dismiss FP's claims. This Court has jurisdiction to review the district court's denial of immunity pursuant to 28 U.S.C. §1291, and the collateral order doctrine. *Nero v. Mosby*, 890 F.3d 106, 117 (4th Cir. 2020), citing, *Nixon v. Fitzgerald*, 457 U.S. 731, 742, 102 S.Ct. 2690, 73 L.Ed. 2d 349 (1982).

STATEMENT OF ISSUES

1. Did the district court's order improperly ignore FP's admission in its complaint that the role of "O'Leary, as the umpire, [was to] settle the dispute" [JA017].
2. Did the district court improperly hold that the North Carolina Revised Uniform Arbitration Act [the "Act"] applies only to "arbitrators", and "arbitration agreements", where §1-569.14(b) of the Act provides that the Act "supplements any immunity under other law."
3. The North Carolina Court of Appeals, the highest court in North Carolina to have reviewed the immunity issues now before this Court, has stated expressly, and unequivocally, that the functionality test, applying judicial immunity to private citizens performing the function of resolving disputes between parties, or of

authoritatively adjudicating private rights, have immunity when doing so, and comprises the substantive common law of North Carolina. How can that decision be "inapposite" to the immunity issues now before this Court.

4. Do decisions of the U.S. Supreme Court, and of North Carolina U.S. District Courts, provide further support for the holding of the North Carolina Court of Appeals regarding O'Leary's immunity.
5. Does the functionality test comprise the common law of North Carolina.
6. Should the provisions of FP's unilaterally drafted dispute resolution appraisal process be construed strictly against FP regarding FP's arbitrary definition of "umpire" applied by the district court.
7. Does the district court's denial of O'Leary's immunity result in a substantial risk of vexatious litigation against those, such as O'Leary, serving as "umpires", and thereby undermine the independence and conduct of a process closely related to the judicial process.
8. Did FP act vexatiously or vindictively when its appraisal process provided to FP the right to reject the award, vacate the award, or to seek a declaratory judgment, rather than to sue O'Leary.
9. Is FP prohibited from obtaining discovery from O'Leary pursuant to §1-569.14(d) of the Act.

10. Is O'Leary entitled to reimbursement of the fees and costs incurred by him in this case pursuant to §1-569.14(e) of the Act.

STATEMENT OF THE CASE

This case arises out of an insurance coverage dispute between the plaintiff insurer, FP, and its insured, Rike, regarding the amount of loss incurred by Rike under the policy. Within its policy FP established an appraisal "umpire" process to resolve such disputes. JA075. The appraisal process set forth in FP's policy states the following:

> "F. Appraisal
>
> 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. If they cannot agree upon an umpire within 15 days, you or we may request that a choice be made by a judge of a court of record in the state where the "residence premises" is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss. Each party will:
>
> 1. Pay its own appraiser; and
> 2. Bear the other expenses of the appraisal and umpire equally.
>
> In no event will an appraisal be used for the purpose of interpreting any policy provision, determining causation or determining whether any item or loss is covered under this policy. If there is an appraisal, we still retain the right to deny the claim." [Underlining added].

That process was invoked to resolve the insurance dispute. Each side selected an appraiser. O'Leary was mutually selected by the appraiser for FP, and for the insured, under FP's policy, to be the umpire to resolve the dispute. As alleged by FP in its complaint, O'Leary was then advised "that the appraisers could not agree on a valuation for the Claim, and requested that O'Leary, as the umpire, settle the dispute." JA017.

As umpire, having considered the determinations of the respective appraisers, O'Leary performed FP's designated function of resolving the dispute between FP and its insured, adjudicating those private rights, and determined an appropriate award on 15 March 2022. Under the policy's appraisal process FP was not obligated to accept the umpire's award, but could deny the claim, or move to vacate the award pursuant to the standards of the Federal Arbitration Act, 9 U.S.C. §10. FP also had the procedural option of seeking a declaratory judgment. Rather than exercising any of those options, FP sued O'Leary.

In its complaint [JA009], FP's allegations are limited to its claims of a failure by O'Leary to disclose prior relationships. JA130.[1] Therein, FP claims that O'Leary failed to disclose that he had prior dealings with the insured, with insured's contractor, and appraiser, and that because O'Leary was alleged to predominantly

[1] Order of the district court at p. 6, summarizing the claims of FP against O'Leary alleged in FP's complaint.

work on behalf of policyholders against insurers, that he was somehow biased in a general sense (in favor of policyholders).

FP's policy provides that North Carolina law governs. JA076. §1-569.14(a) of the Act provides that arbitrators are statutorily immune from civil liability "… to the same extent as a judge of a court of this State acting in a judicial capacity". Subpart (b) of §1-569.14 states that the immunity provided under the Act "supplements any immunity under other law." §1-569.12 of the Act requires certain disclosures to be made by arbitrators which would be considered by a reasonable person to impact upon their impartiality. §1-569.14(c) states that a failure to make such disclosures "… shall not cause any loss of immunity under this section." Underlining added.

O'Leary moved pursuant to Rule 12(c) requesting that judgment be entered dismissing the claims of FP against O'Leary because those claims did not identify a claim upon which relief could be granted as a result of O'Leary's immunity. The district court denied O'Leary's motion, finding that the provisions of the Act did not apply to O'Leary acting as the "umpire" in the appraisal process**,** and that O'Leary's service as an "umpire" did not arise out of an "arbitration agreement". JA133-JA135. As a result of those findings the district court held that O'Leary was not entitled to immunity from the claims of FP.

The district court's order improperly ignored FP's admission in its complaint that the role of "O'Leary, as the umpire, [was to] settle the dispute" [JA017], and also failed to apply the proper "functionality test", comprising the substantive law of North Carolina, to the admitted role of O'Leary. The district court then failed to apply the express provisions of the Act requiring the incorporation of "other law" (the functionality test) into the immunity provisions of the Act. The result of these errors was the improper denial of O'Leary's motion to dismiss, and this appeal.

SUMMARY OF O'LEARY'S ARGUMENT

The immunity provisions of N.C.G.S §1-569.14 of the Act state expressly that: "(a) An arbitrator… is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity;" and, "(b) The immunity afforded by this section *supplements any immunity under other laws.*" [italics added]. In rejecting O'Leary's immunity claim the district court improperly ignored the "other law" expressly incorporated into the immunity provisions of the Act. That "other law" necessarily includes determinations with regard to North Carolina common law as it relates to the immunity of citizens adjudicating and resolving disputes between private parties. That common law is definitively stated by the highest North Carolina Court examining this precise issue in *Dalenko v. Collier*, 191 N.C. App. 713, 722 (2008). *Dalenko* cites to the same issue reviewed and determined by the U.S.

Supreme Court in *Burns v. Reed*, 500 U.S. 478, 499-500, 111 S.Ct 1934, 114 L.Ed.2d 567-68 (1991).

Under North Carolina common law, in his capacity as an "umpire", pursuant to the terms of FP's own contract, and pursuant to the allegations of FP in its complaint, O'Leary performed the function of resolving the dispute between FP and its insured, and of authoritatively adjudicating those private rights. Under the functionality test recognized as North Carolina's common law, and pursuant to the North Carolina Court of Appeals direct adoption in *Dalenko* of the reasoning of the U.S. Supreme Court in *Burns*, O'Leary is entitled to immunity from the claims as alleged by FP, and to the immunity protections afforded by the Act.

Contrary to the district court's order, pursuant to the functionality test, the presence, or absence, of an "agreement to arbitrate" is irrelevant, as is FP's arbitrary term of "umpire". Rather, it is the function of resolving the dispute performed by O'Leary, as established pursuant to the terms of FP's own insurance contract, and admitted by FP, that establishes O'Leary's entitlement to immunity from the claims of FP pursuant to North Carolina law.

ARGUMENT

1. The district court's denial of O'Leary's immunity, and of O'Leary's motion to dismiss, is reviewable by this Court *de novo*.

This Court reviews the district court's denial of O'Leary's immunity claim, and his motion to dismiss, *de novo*. *Nero v Mosby,* 890 F.3d 106, 117 (4th Cir. 2018).

2. In its analysis, the district court improperly rejected the holding of the North Carolina Court of Appeals in *Dalenko v. Collier,* 191 N.C.App. 713 (2008).

As defined by the district court, the determinative issue in this case is whether only those private citizens designated as "arbitrators", pursuant to an "arbitration agreement", are entitled to the immunity provisions of §1-569.14 of the Act. Pursuant to *United States v. Little*, 52 F.3d 495, 498 (4th Cir. 1995),[2] without a North Carolina Supreme Court case on point, the district court reviewed various North Carolina Court of Appeals cases,[3] noting that, "[I]n particular, the 'court must follow the decision of an intermediate state appellate court unless there is persuasive data that the highest court would decide differently.'"

Only one of those cases reviewed by the district court, *Dalenko*, *supra,* is directly on point with that issue in this case. *Dalenko,* holds that, "[W]hether a private citizen

[2] Cited by the district court at page 13 of its order. JA137.

[3] Beginning at p. 10 of the district court's order, JA134.

is clothed with judicial immunity is based on a functionality test." *Burns v. Reed,* 500 U.S 478, 499- 500, 111 S.Ct. 134, 114 L.Ed. 2d 547, 567- 68 (1991) ".... [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."[4] *Dalenko* at 722-23.

The highest court in North Carolina to have reviewed the specific issue now before this Court has therefore clearly considered, and ruled, that whether a private citizen, such as O'Leary "… is clothed with judicial immunity is based on a functionality test", and that "private citizens acting as arbitrators are afforded judicial immunity when performing the function of resolving disputes between parties, or of authoritatively acting as arbitrators are afforded judicial immunity."[5]

None of the prior North Carolina cases reviewed by the district court addresses the functionality/immunity test established in *Dalenko,* the determinative legal issue

[4] Adopting the concurrent opinion [dissenting in part] of Justice Scalia in *Burns*.

[5] *See also, Shrader v. Nat'l Assoc. of Securities Dealers, Inc. et al.,* 855 F. Supp. 122, 122-123 (E.D.N.C, Raleigh Div., June 9, 1994), cited by the *Dalenko* court at 430-431. *Schrader* was decided before North Carolina's adoption of the Uniform Arbitration Act on December 8, 1994. Applying the principles of judicial immunity to persons acting as arbitrators, the court in *Schrader* held that, "the doctrine of judicial immunity is sufficiently well-developed under North Carolina substantive law to encompass the facts of this case and to afford the arbitrators…arbitrator immunity, which will exempt them from civil liability for their activities as arbitrators within the course and scope of the arbitration proceeding."

in this case. The decision of the North Carolina Court of Appeals in *Dalenko*, rendered well after each of the cases reviewed by the district court, has therefore expressly decided, without equivocation, that the functionality test is the common law of North Carolina. No subsequent Court of Appeals, or North Carolina Supreme Court, decision has rejected the *Dalenko* decision, or addressed this issue in any way. As the district court stated within its order, the "court must follow the decision of an intermediate state appellate court unless there is 'persuasive data' that the highest court would decide differently."[6] There is no such "persuasive data". The district court was required to follow *Dalenko,* and its failure to do so should be reversed.

3. *Dalenko* is not "inapposite" to the facts of this case.

The application of the functionality test arose out of the direct examination of arbitrator immunity in *Dalenko,* at 722-723. The *Dalenko* court did not consider, or refer to, the immunity provisions of the Act. Rather than being inapposite, the *Dalenko* court stated unequivocally, including its adoption by direct citation to the principles of common law immunity stated in *Burns,* that the functionality test comprises the proper standard for review of the immunity of those serving as private citizens acting as arbitrators, and that such individuals are afforded judicial

[6] Citing *U.S. v Little, supra,* at 498.

immunity when performing the function of resolving disputes between parties, or of authoritatively acting as arbitrators.

The district court's dismissal of the holding of *Dalenko* was therefore improper, and should be rejected by this Court.

4. The express incorporation of "other law" into the immunity provisions of the Act necessarily includes North Carolina's functionality test.

The immunity provisions of the Act state that: "An arbitrator… is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity; and, *[T]he immunity afforded by this section supplements any immunity under other law."* N.C.G.S §1-569.14(a) and (b). Italics added.

Contrary to the reasoning of the district court, pursuant to the "immunity under other law" provision, application of the immunity provisions of the Act are not limited to an "agreements to arbitrate", or to only private citizens identified as "arbitrators". Rather, pursuant to *Dalenko,* the immunity provided under the Act is provided to those private citizens performing the function of resolving disputes between parties, or of authoritatively adjudicating private rights. This application of the functionality test is also mandated by FP's admission that "…the appraisers could not agree on a valuation for the Claim, and requested that O'Leary, as the umpire, settle the dispute." JA017.

The district court's analysis of FP's arbitrary application of the term "umpire" to O'Leary therefore has no relevance to the determination of whether or not O'Leary is immune from the claims of FP. Rather, it is his responsibility as defined within FP's policy, to resolve the dispute by adjudicating the private rights of FP and its insured, that define his functionality, and his immunity, under governing law. *Dalenko,* at 722-23; *Burns v. Reed*, 500 U.S. at 499-500; *See also*, *Howland v. U.S. Postal Service,* 209 F.Supp. 2d 586, 592 (W.D.N.C. 2002), also cited by *Dalenko* at 722.

5. It is undisputed that O'Leary was a private citizen performing the function of adjudicating the private rights of FP, and its insured, in accordance with the express provisions of FP's own contract, and as conceded by FP.

The touchstone for the applicability [of immunity] is performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights." *Dalenko, supra*; *Burns, supra; Shrader, supra; Howland, supra at* 592. In the case now before the Court, FP granted to O'Leary, as a private citizen, the contractual authority to adjudicate the private rights between FP and its insured. Having granted that authority to O'Leary, FP cannot now seek to deprive O'Leary of the immunity provided to him under the substantive common law of North Carolina. Allowing FP to do so would allow, as has occurred here, vexatious

litigation, consisting in this case of FP seeking to intimidate O'Leary in the conduct of a process closely related to the judicial process, which process FP itself created.

6. **Acceptance of the order of the district court would adopt a policy that is contrary to North Carolina's substantive common law, undermines and deters the acceptance of a private adjudicatory function by private citizens, threatens such individuals with vexatious litigation, and improperly interferes with the credible conduct of such proceedings. Such a policy should be rejected by this Court.**

Clearly, if parties to a dispute could file suit against the person(s) contractually appointed to resolve that dispute the credibility of the dispute resolution process would be undermined, and obtaining persons to resolve such disputes would be greatly hindered. It should not be assumed that FP would, in good faith, create such a process for the resolution of appraisal disputes while retaining the ability to undermine the credibility of the process established. Consistent with this premise, "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. *Howland, supra,* at 593, citing, *Tamri v. Conrad*, 552 F.2d 778, 781 (7th Cir. 1977).

7. If FP claims that its prescribed "umpire" process was not properly conducted, its remedies were to either reject O'Leary's decision, to move to vacate that decision, or to seek a declaratory judgment. FP should not have the additional option of suing O'Leary individually.

It was unnecessary, and clearly vexatious, for FP to commence suit against O'Leary to protect its rights under the policy. The policy allowed FP to reject O'Leary's award. Alternatively, FP had the right to seek to vacate the award pursuant to 9 U.S.C. §10 if it could establish the grounds to do so,[7] or to seek a declaratory judgment,[8] rather than suing O'Leary for monetary damages. FP's election to sue O'Leary was therefore vexatious, and vindictive, and clearly intended to punish O'Leary individually, threaten him with damages, and burden him with the extensive costs of litigation regardless of the outcome. Without the protections of immunity such dispute resolution processes can never be credible, and the arbitrary powers of those such as FP will be available for abuse, as has occurred in this case with regard to FP's claims against O'Leary.

8. Discovery may not be obtained by FP from O'Leary.

§1-569.14(d) of the immunity provisions of the Act provides that O'Leary "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

[7] No such facts have been shown to exist.

[8] 28 U.S.C. §2201; F.R.C.P. Rule 57

to the same extent as a judge of a court… sitting in a judicial capacity." The exceptions set forth in subparts (1) and (2) of the statute did not apply.

The district court's denial of O'Leary's motion seeking a protective order to prevent the taking of discovery of him prohibited by section 1-569.14(d) should have therefore been granted. The district court's refusal to grant that motion should be reversed.

9. O'Leary's fees and costs must be reimbursed to him by FP.

§1-569.14(e) of the Act provides that, upon a finding that O'Leary is immune from the claims of FP, "the court shall award to the arbitrator… reasonable attorney's fees, costs and other reasonable expenses of litigation". Such a finding is appropriate in this case, and an award of fees and costs to O'Leary is therefore mandated by the governing statute. O'Leary's motion before the district court seeking such an award should be granted.

CONCLUSION

For the reasons set forth above the order of the district court should be reversed. The claims of FP against O'Leary should be dismissed, O'Leary's motion requesting a protective order from any discovery in this case should be granted, and O'Leary's motion for fees and costs required to be reimbursed by statute should be

granted, subject to an appropriate submission by counsel with regard to those fees and costs to be determined by the district court.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for O'Leary does not request oral argument. However, if the Court believes that oral argument on this case would be helpful, O'Leary's counsel would welcome that opportunity.

Respectfully submitted this the 1st day of February, 2024,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 3,466 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because the brief has been prepared in a proportionally-spaced typeface using Microsoft Word 365 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

Lewis O'Leary, and Probuilders of the Carolinas, LLC, hereby certify that their Opening Brief, and Joint Appendix, were electronically filed utilizing the 4th Circuit U.S. Court of Appeals CM/ECF system, notification of which was remitted to the following CM/ECF participants:

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APPELLANT'S REPLY TO APPELLEE'S ANSWER BRIEF

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REPLY FACTS

First Protective ("FP") argues that O'Leary failed to claim before the district court that the common law recognizes a "functionality test" that provides private citizens with judicial immunity when they act "as arbitrators" in resolving disputes between parties. FP's Answer Brief, Doc. 21, p. 22. FP fails to state that, in his initial memorandum O'Leary argued to the district court that the North Carolina Revised Unform Arbitration Act ("Act") applied to and governed FP's appraisal process, and that, "[W]hether a private citizen is clothed with judicial immunity is based on a functionality test. 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 v. Collier, Jr*., 191 N.C. App. 713, 722 (2008)". ECF 61, at pp. 5-6.

Then, in reply to FP's response opposing O'Leary's motion [ECF 66], O'Leary stated the following to the district court under the argument titled, "1. FP's claim that O'Leary's actions as an umpire are not subject to [the Act] fail as a matter of controlling North Carolina law. (a). O'Leary possesses immunity from the claims of FP with regard to his service as an umpire pursuant to §1-569.14. *Dalenko v. Collier,* 191 N.C.App. 713, 722 (2008): Whether a private citizen is clothed with judicial immunity is based on a functionality test. *Burns v Reed*, 500 U.S. 478, 499-500 (1991)." ECF 66, at pp. 1 and 3.

O'Leary therefore clearly presented to the district court, with citations to governing law, the governing functionality test.

FP then misrepresents, and also states only in part, the appraisal provision of its policy with the insured that is relevant to the selection, and the role of, the "umpire". FP Answer Brief, Doc. 21 at 14. FP first misrepresents the final sentence of its stated excerpt, as reading, "[T]he 2 appraisers will choose a competent and impartial umpire." In fact, the sentence reads, "[T]he 2 appraisers will choose an umpire." FP also fails to present the final portion of the appraisal provision stating the role of the "umpire", which states as follows: "[T]he appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to [FP], the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss."

The allegations of FP's complaint also state that "…the appraisers could not agree on a valuation for the claim, and requested that O'Leary, as the umpire, settle the dispute." JA017.

The role of the umpire/O'Leary is further stated within FP's "Declaration of Appraisers." JA90.[1]

UMPIRE SELECTION

> The above signed do hereby select and appoint Louis O'Leary to act as UMPIRE, to *settle differences* that may arise between the two parties named above pertinent to matters involving the above-referenced claim. [italics added]

FP then identifies within its statement of facts O'Leary's alleged failures to disclose as the basis for its claims against O'Leary. FP Answer Brief, Doc. 21 at 16 and 18. This is consistent with the allegations of FP's complaint [JA009], in which FP's allegations claim a failure by O'Leary to disclose prior relationships. JA015, JA017, JA021, JA022. Therein, FP alleges that O'Leary failed to disclose that he had prior dealings with the insured, with insured's contractor, and appraiser, and that because O'Leary was alleged to predominantly work on behalf of policyholders against insurers, that he was somehow biased in a general sense (in favor of policyholders).

However, pursuant to §1-569.14(c) of the Act, O'Leary's alleged failure to make disclosures in accordance with §1-569.12(a) or (b) does not affect his judicial immunity from the claims of FP. Also, pursuant to §1-569.12(d), if FP had a claim

[1] Signed by FP's appraiser, Starrette, and the insured's appraiser, Heidelberg.

that O'Leary may not have disclosed a fact required to be disclosed pursuant to §1-569.12(a) or (b) of the Act, upon timely objection by FP a court may vacate an award. FP has not moved to do so. Nor did FP deny the award, as it was allowed to do under the appraisal provisions of its policy. JA075.

To the extent additional FP arguments are provided in FP's "statement of facts" in its Answer Brief, they are addressed hereafter within this Reply Brief.

REPLY ARGUMENT

1. As determined by this Court in prior cases, the district court's denial of the immunity claims of O'Leary are immediately appealable. This Court has clear jurisdiction over this appeal, and FP's contrary argument should be rejected.

a. The Act provides that O'Leary has the same immunity as "a judge of a court of this State acting in a judicial capacity", and that immunity is intended to supplement any immunity under any other laws.

§1-569.14(a) of the Act states that, "(a) An arbitrator… is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity;" and, "(b) The immunity afforded by this section *supplements any immunity under other laws.*" [italics added].

In construing a statute, a court's primary goal is to ensure that the purpose of the legislative intent is accomplished. The first step in this process is to examine the plain words of the statute as the best indicia of legislative intent is the language of the statute itself. If the language of the statute is unambiguous, the court must apply

the statute as written. *Wynn v. Frederick*, 385 N.C. 576, 581 (12-15-2023). The language of the Act is clear and unambiguous. The immunity under the Act is the same immunity as provided to a judge of a court in North Carolina acting in a judicial capacity, and the immunity provided under the Act supplements any immunity under other laws.

As held recently by the Supreme Court of North Carolina, "judicial immunity is a 'general principle of the highest importance to the proper administration of justice [citation omitted]. A judicial officer, in exercising the authority vested in him (should) be free to act upon his own convictions, without apprehension of personal consequences to himself." *Wynn*, supra, at 587. These are the immunities to which O'Leary is entitled.

The referenced "other law" necessarily includes determinations with regard to North Carolina substantive common law as it relates to the immunity of citizens adjudicating and resolving disputes between private parties. That common law is definitively stated by the highest North Carolina Court examining this precise issue in *Dalenko v. Collier*, *Jr.,* 191 N.C. App. 713, 722 (2008), citing the same functionality test as previously established in *Burns v. Reed*, 500 U.S. 478, 499-500 (1991).

The express provisions of the Act, North Carolina's substantive common law of functionality, and the principles of judicial immunity, are clearly intended to provide absolute immunity to O'Leary from any civil legal proceedings regarding any claims against O'Leary arising out of FP's appraisal process, including O'Leary's immunity from testimony, or discovery, whether as a party, or as a non-party to such proceedings, pursuant to §1-569.14(d) of the immunity provisions of the Act. The immunity provision of the Act, and North Carolina substantive common law, must therefore be read and applied together when determining the immunity protections provided to O'Leary.

In rejecting O'Leary's immunity claim the district court improperly ignored the "other law" expressly incorporated into the immunity provisions of the Act. Contrary to the district court's order, pursuant to the functionality test the presence, or absence, of an "agreement to arbitrate" is irrelevant, as is FP's arbitrary use of the terms "umpire", and "appraisal". It is the function of resolving the dispute performed by O'Leary, as established and implemented pursuant to the terms of FP's own insurance contract, that establishes O'Leary's entitlement to absolute immunity from the claims of FP pursuant to North Carolina law.

b. This Court has previously held that the denial of claims of absolute immunity are immediately appealable, and are reviewed *de novo*.

As established above, §1-569.14 (a) of the Act states that, "[A]n arbitrator … is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity." §1-569.14(b) of the Act then provides that its immunity provision "supplements any immunity under other laws". That common law is definitively stated by the highest North Carolina Court to have examined this precise issue in *Dalenko v. Collier,* 191 N.C. App. 713, 722 (2008)*:* "[W]hether a private citizen is clothed with judicial immunity is based on a functionality test. … Private citizens acting as arbitrators are afforded judicial immunity when performing the function of resolving disputes between parties, or of authoritatively adjudicating private rights." [2]

FP admits in its complaint, "the appraisers could not agree on a valuation for the claim, and requested that O'Leary, as the umpire, settle the dispute." JA017. As umpire, having considered the determinations of the respective appraisers, O'Leary performed the admitted function of resolving the dispute between FP and its insured, authoritatively adjudicating those private rights, and determined an appropriate award of $1,036,000. JA091.

[2] Citing and adopting directly the holding on the same issue reviewed by *Burns v. Reed*, 500 U.S. 478, 499-500 (1991).

In exercising the authority vested in him pursuant to FP's policy to resolve the dispute between FP and its insured, O'Leary must "be free to act upon his own convictions, without apprehension of personal consequences to himself." *Wynn v Frederick, supra*, at 581. North Carolina's functionality test, and §1-569.14(d) of the immunity provisions of the Act prohibiting discovery from O'Leary, also provides to O'Leary absolute judicial immunity, thereby comprising immunity from suit as well as from liability. *Wynn*, *supra*, at 586-587. Such absolute judicial immunity is an immunity from suit, not only from an ultimate assessment of liability. *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985).

As this court held in *Nero v. Mosby*, 890 F.3d 106, 117 (2018), "[W]e have jurisdiction to review the district court's denial of absolute immunity for this claim pursuant to 28 U.S.C. 1291 and the collateral order doctrine. *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982); *Gray-Hopkins v. Prince George's County*, 309 F.3d 224, 229 (2002). We review denials of absolute immunity *de novo*. *Goldstein v. Moatz*, 364 F.3d 205, 211 (4th Cir. 2004)."

c. Governing law, and the record in this case, establish that O'Leary's appeal also satisfies each element of the collateral order rule.

i. The district court's order conclusively determined the issue of O'Leary's immunity.

The first requirement of the collateral order doctrine requires that a putatively appealable order conclusively has determined a disputed question. *Cobra Natural*

Resources, LLC, v. Federal Mine Safety & Health Review Comm'n, 742 F.3d 82, 88 (2014). The record in this case establishes that the district court has conclusively determined the issue of O'Leary's immunity, and there is no prospect that the district court will alter its ruling. This requirement is therefore satisfied.

ii. O'Leary's appellate claims are clearly separate from the merits of the action.

Only O'Leary claims to have immunity from the claims of FP in the case below. No other defendant below has claimed such immunity. The district court's appealed order relates to immunity issues that are therefore clearly separate from the merits of the action below.

iii. The district court's order regarding O'Leary's immunity relates to not only one, but to several, important issues, each of which alone meets the "important issue" standard.

The Court may take judicial notice that private dispute resolution proceedings address and resolve tens of thousands of private disputes throughout the United States annually. Judicial notice may also be taken with regard to the insurance industry's use of adhesionary form contracts, such as used by FP in this case, and that FP's "appraisal process", using the term "umpire", appears in thousands of FP's contracts with consumers regionally, as well as nationally.

In the Court's 2014 holding in *Cobra Nat'l Resources, LLC v. Federal Mine Safety & Health Review Comm'n*, 742 F.3d 92, 90-92 (2014), this Court reviewed and applied the Supreme Court's collateral order decisions in several preceding

cases, including those listed below.[3] With regard to the "important question" standard, this Court, in *Cobra,* held that "[T]he common thread in those cases in which the collateral order doctrine was applied "was a 'particular value of high order', or a 'substantial public interest'". *Cobra,* at 91-92, citing *Will v. Hallock,* 546 U.S. 345, 352-53 (2006). The proper standard was deemed to require "an assessment of whether a sufficiently important interest would be imperiled by our refusal to provide an immediate review." *Cobra* at 90-91, citing *Mohawk Industries, Inc. v. Carpenter,* 558 U.S. 100, 107 (2009). After its 2014 holding in *Cobra*, this Court held conclusively that, "[W]e have jurisdiction to review the district court's denial of absolute immunity for this claim pursuant to 28 U.S.C. §1291 and the collateral order doctrine. *Nero v. Mosby*, 890 F.3d 106, 117 (4th Cir. 2018).

In addition to the clear appealability of the absolute immunity issue, several other issues related to O'Leary's immunity clearly meet the "important issue" standard, including: the application of the functionality test as prescribed by the U.S. Supreme Court, by this Court, and by the North Carolina Court of Appeals;[4] statutory construction regarding private dispute resolution immunity pursuant to the

[3] *Will v. Hallock*, 546 U.S. 345 (2006) (significant and irreparable effects); *Johnson v. Jones,* 515 U.S. 304 (1995) ("significant"); *Richardson- Merrell, Inc. v. Koller,* 472 U.S. 424 (1985) (order may also be unreviewable if it "affects rights that would be irretrievably lost in the absence of an immediate appeal);" *etc*.

[4] Adopting, and incorporating, the *Burns* decision of the U.S. Supreme Court into the *Dalenko* decision.

required functionality test; the ability of insurers, and other commercial entities, to undermine the immunity protections available to private persons adjudicating private claims by the use of arbitrary nomenclature such as "appraisal", "umpire", "referee", *etc.;* statutory interpretation, including the legislative intent to eliminate vexatious and vindictive, litigation against those private citizens resolving disputes between parties; attempted avoidance of the immunity provided by the functionality test, and which undermines the credibility of prescribed "umpire", "referee", or similar private dispute resolution procedures; the resulting refusal of private persons willing to determine important private rights if they can be threatened with litigation, vexatious or otherwise.

These issues are independently, and certainly collectively, issues of "particular values of high order", and/or of "substantial public interest". Acceptance of the order of the district court denying O'Leary's immunity under the facts of this case would adopt a policy that is contrary to North Carolina's substantive common law, undermines and deters the acceptance of a private adjudicatory function by private citizens, threatens such individuals with vexatious litigation, and improperly interferes with the credible conduct of such proceedings. Each of these interests comprise sufficiently important interests that would be imperiled by this Court's refusal to provide an immediate review to the order of the district court.

iv. The intended protections of O'Leary from suit would necessarily be lost if the order of the district court could not be immediately appealed to this Court.

The Court's denial of O'Leary's appeal, and thereby of the immunity to which he is entitled, would deprive him immediately of his immunity from FP's civil action, from providing testimony, and from discovery proceedings. Those protections are granted to O'Leary pursuant to section N.C.G.S §1-569.14 of the Act stating that: "(a) An arbitrator… is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity;" and, "(b) The immunity afforded by this section *supplements any immunity under other laws.*" [italics added]. As established earlier, the same protections are provided to O'Leary pursuant to the functionality test, judicial immunity, and the common law principles of absolute immunity, and immunity from suit.

The need to resolve absolute immunity disputes at the earliest possible stage of litigation outweighs concerns about encumbering appellate courts with interlocutory appeals. *Nero, supra*, at 123. Under the facts of this case, affirming the district court's order would deprive O'Leary of the immunity rights he is entitled to, including immunity from suit, and the district court's order would therefore be "effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. 345, at 349.

The jurisdiction of this Court to hear O'Leary's appeal cannot be reasonably disputed, and FP's jurisdiction arguments should be rejected.

2. FP's arguments related to North Carolina's public policy, the purpose and intent of the Act, with regard to judicial immunity, and to the application of North Carolina's functionality test to the facts of this case, should be rejected by the Court.

a. Contrary to FP's arguments, it is the strong public policy of North Carolina that those exercising judicial authority be free to act upon their own convictions without apprehension of personal consequences.

As the North Carolina Supreme Court recently held in *Wynn v Frederick*, *supra,* at 587, "[I]t has long been recognized that judicial immunity is "a general principle of the highest importance to the proper administration of justice." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646 (1871). "[A] judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.* Recognizing this principle, this Court has broadly held that a "judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties." *Town of Fuquay Springs v. Rowland*, 239 N.C. 299, 301, 79 S.E.2d 774, 776 (1954); *see also, Hedgepeth v. Swanson*, 223 N.C. 442, 444, 27 S.E.2d 122, 123 (1943) ("[O]fficers acting in a judicial capacity or quasi-judicial capacity are exempt from civil liability and cannot be called upon to respond in damages to private individuals for the honest exercise of [their] judgment…".

b. To protect and promote that policy North Carolina's functionality test is intended to protect the ability of those private citizens performing the function of resolving disputes between parties, or adjudicating private rights, from intimidation, or the threat of vexatious litigation.

"[W]hether a private citizen is clothed with judicial immunity is based on a functionality test." *Burns v. Reed,* 500 U.S 478, 499- 500, 111 S.Ct. 134, 114 L.Ed. 2d 547, 567- 68 (1991) ".... [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."[5] *Dalenko, supra,* at 722-23. Whether a private citizen, such as O'Leary, "… is clothed with judicial immunity is based on a functionality test", and that, "private citizens acting as arbitrators are afforded judicial immunity when performing the function of resolving disputes between parties, or of authoritatively acting as arbitrators are afforded judicial immunity."[6]

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[5] Adopting the concurrent opinion [dissenting in part] of Justice Scalia in *Burns*.

[6] *See also, Shrader v. Nat'l Assoc. of Securities Dealers, Inc. et al.,* 855 F. Supp. 122, 122-123 (E.D.N.C, Raleigh Div., June 9, 1994), cited by the *Dalenko* court at 430-431. *Shrader* was decided before North Carolina's adoption of the Uniform Arbitration Act on December 8, 1994. Applying the principles of judicial immunity to persons acting as arbitrators, the court in *Shrader* held that, "the doctrine of judicial immunity is sufficiently well-developed under North Carolina substantive law to encompass the facts of this case and to afford the arbitrators…arbitrator immunity, which will exempt them from civil liability for their activities as arbitrators within the course and scope of the arbitration proceeding."

Consistent with this premise, "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. *Howland v. U.S. Postal Service,* 209 F.Supp.586*,* 593(W.D.N.C. 2002), citing, *Tamri v. Conrad*, 552 F.2d 778, 781 (7th Cir. 1977).

c. The Act expressly incorporates *Dalenko's* functionality test and does not improperly expand the immunity provided under the Act.

The immunity provisions of N.C.G.S §1-569.14 of the Act state expressly that: "(a) An arbitrator… is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity;" and, "(b) The immunity afforded by this section *supplements any immunity under other laws.*" [italics added]. The referenced "other law" necessarily includes determinations with regard to North Carolina common law as it relates to the immunity of citizens adjudicating and resolving disputes between private parties. That common law is definitively stated by the highest North Carolina Court examining this precise issue in *Dalenko: "[W]hether a private citizen is clothed with judicial immunity is based on a functionality test. ... 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,* at 722, citing and adopting

directly precisely the holding on the same issue reviewed by *Burns v. Reed*, 500 U.S. 478, 499-500.

d. The facts of this case require the application of North Carolina's functionality test.

FP's "Declaration of Appraisers/Umpire Selection/Umpire Acceptance" form [JA090]: confirms O'Leary's appointment as umpire; is signed by FP's appraiser [Starrette], and by the insured's appraiser [Heidelberg]; mutually selects O'Leary as umpire; and states O'Leary's acceptance of appointment as umpire, *"to settle differences that may arise between the two parties named above pertinent to matters involving the above referenced claim."* [italics added]. Further confirming the role of O'Leary, FP admits in its complaint, "that the appraisers could not agree on a valuation for the Claim, and requested that O'Leary, as the umpire, settle the dispute." JA017.

As umpire, having considered the determinations of the respective appraisers, O'Leary performed the appointed, and admitted, function of resolving the dispute between FP and its insured, authoritatively adjudicating those private rights, and determined an appropriate award of $1,036,000. FP was "unhappy" about that award, and therefore decided to forgo its right to reject the award, opting to sue O'Leary, and the others involved in FP's appraisal process, for the clear purpose of intimidating them, and others in the future who might choose to participate in FP's

process, thereby destroying the credibility of the process that FP customarily establishes in its adhesionary contracts.

3. There is no basis for any exception or exemption being provided for FP's "appraisal-umpire" process from North Carolina's strong public policy of immunity, the governing functionality test, or from the immunity provisions of the Act, pursuant to the holding of *PHC, Inc. v. N. Carolina Farm Bureau Mut. Ins. Co.*, 129 N.C. App. 801, (1998) fails.

FP's claim that its "appraisal/umpire" process is immune from the application of the governing functionality test, and the immunity provisions of the Act, is premised on the 1998 holding in *PHC, supra*. A review of the facts of *PHC* establishes that no part of the *PHC* decision relates in any way to the role, or function of the umpire, any aspect of immunity related to the responsibilities of the umpire, or the specific provisions of an insurer's "appraisal" process. Rather, *PHC* relates only to the ability of an attorney to obtain fees/costs related to representation of the insured in that case. Importantly, *PHC* also preceded by 10 years the N.C. Court of Appeals decision establishing North Carolina's functionality test in *Dalenko*, adopting the functionality test to be applied to the determination of the immunity of citizens adjudicating and resolving disputes between private parties, as prescribed by the U.S. Supreme Court in *Burns v. Reed, supra*, at 499-500 (1991).

4. O'Leary's functionality test claim was properly raised before the district court and FP's claim of "waiver" fails.

As established earlier in O'Leary's reply to FP's proposed facts, O'Leary identified his claim of judicial immunity based upon the functionality test, identifying both the holding in *Dalenko*, and in *Burns*, in his initial memorandum to the district court in support of his motions for judgment on the pleadings, and requesting a protective order, and in his reply to FP's response to O'Leary's motion.

Additionally, and with regard to the cases cited by FP:

- *Steves & Sons, Inc v. JELD-WEN, Inc*., 988 F.3d 727 (4th Cir., 2012) related to failure to develop argument before the Court of Appeals, not before the district court, and therefore provides no support to FP's argument;
- In *Agra, Gill & Duffus, Inc. v. Benson,* 920 F.2d 1173, 1176 (4th Cir. 2021), a party conceded at trial below a breach of contract, and then, upon appeal, asserted the contradictory argument that the contract in question was never breached, which had never been asserted to the district court at trial. The Court would not accept a new theory that was directly contradicted by the position taken before the district court. *Agra* provides no support to FP's argument*;*
- *Tarashuk v. Givens*, 53 F.4th 154, 167 (4th Cir. 2022), related to the review of the appellants' claim of qualified immunity predicated upon whether or not the decedent plaintiff was a pretrial detainee. The appellants' claimed upon

appeal that the plaintiff was not a pretrial detainee. However, at no point during the proceedings before the district court did the appellants "argue, or even suggest", that the plaintiffs should not be treated as a pretrial detainee. Rather, the appellants had conceded that plaintiff was a pretrial detainee in their motion for summary judgment before the district court. The Court refused to consider the issue raised for the first time on appeal. *Tarashuk* provides no support to FP's argument.

5. FP's claim of "waiver" should also be rejected under the "plain error" standard.

In re Under Seal, 749 F.3d 276, 285-286 (4th Cir. 2014), holds that, "[T]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." Therein, the Court also reviewed the "plain error" standard applied to civil cases, *i.e.*: 1. there is an error; 2. the error is plain; 3. the error affects substantial rights; 4. the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Id*.

Therefore, based upon the "plain error" standard, and this Court's *de novo* review, the district court's denial of O'Leary's immunity comprised error, the error is plain, the error affects O'Leary's substantial right of immunity, and North Carolina's strong public policy, and the error seriously affects the fairness, integrity

or public reputation of judicial proceedings if the district court's denial of O'Leary's immunity is affirmed.

In the unlikely event the Court holds that O'Leary failed to raise his immunity claims before the district court, the Court should reject FPs claim of waiver pursuant to the "plain error" standard.

6. O'Leary did not waive his immunity claims by failing to plead immunity as an affirmative defense.

a. The immunity provisions of the Act establish by statute the strong public policy of North Carolina, that those exercising judicial authority be free to act upon their own convictions without apprehension of personal consequences, and such a statutorily granted protection may not be waived.

"It has long been recognized that judicial immunity is 'a general principle of the highest importance to the proper administration of justice. [citation omitted]. [A] judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself.'" *Wynn v Frederick*, *supra*, at 587. The immunity provisions of the Act, inclusive of the functionality test, therefore comprise the public policy of North Carolina of "the highest importance".

Where benefits are expressly conferred by statute, and are "designed to protect public interests, the law is well settled. Ordinarily, effect will not be given to an attempted waiver of a protective public policy by an individual. A waiver is not . . .

allowed to . . . transgress public policy or morals." *Chemical Bank v. Henderson Belk,* 41 N.C.App. 356, 366 (1979). "Waiver by implication is not looked upon with favor by the courts; in fact, every reasonable intendment will be indulged against the waiver of fundamental rights, the courts never presuming acquiescence in their loss." *Id*.

Therefore, where, as here, there is no express waiver of the statute's protection anywhere in the record, no waiver can be deemed to have occurred. Even if an attempted waiver could be said to exist it would be void because the allowance of such a waiver would "defeat the legislative purpose" of the statutory scheme intended to protect the public, "and would attempt, by private action of parties, to confer upon the courts that jurisdiction over the question that was expressly taken away by the enactment of the statute." *Id.*

FP's statutory "waiver" claims therefore necessarily fail.

b. The Court is not precluded from considering an affirmative defense if the district court has nonetheless chosen to address it and the plaintiff suffers no prejudice.

FP's argument initially references *Southstar Funding, LLC v. Rhodes*, 2007 WL 9718431, at *2, (E.D.N.C. 2007), for the proposition that, as the party arguing waiver, FP must demonstrate prejudice or unfair surprise. The *Southstar*

decision sets forth a more extensive standard than that merely summarized by FP. In full, *Southstar* states, at *2, that:

> "[H]owever, even if a party fails to plead an affirmative defense, the opposing party still must show prejudice or unfair surprise before the waiver will be enforced. *RSCH Operations, LLC v. Third Crystal Park Associates LP*, 2004 WL 259-6032, *7 (4th Cir. Nov. 16, 2004); *see also, Ridpath v. Board of Governors Marshall Univ.*, 447 F.3rd 292, 306 (4th Cir. 2006) (Court of Appeals not precluded from considering an affirmative defense that was not properly asserted in the district court, if the court has nonetheless chosen to address it and the plaintiff suffers no prejudice)."

Herein, FP fully participated in the submission to, and consideration of, O'Leary's immunity claims by the district court. There is no evidence of "unfair surprise" having occurred in that regard. The district court chose to address those claims, and issued its order denying O'Leary's claims of immunity. This Court's review of the district court's order is therefore entirely appropriate, and would promote judicial economy as well.

c. **FP has provided no facts supporting its claim that FP has been prejudiced, and that claim necessarily fails.**

FP claims to have been hindered in its ability to effectively conduct discovery, or to otherwise litigate the case, as result of O'Leary's immunity claims. But FP's claims are subjective, and conclusory. FP presents no actual evidence supporting these claims. Rather, a review of the district court docket sheet shows that matters have proceeded apace, with a Third Amended Case Management Order having been

issued by the district court on March 22, 2024 [Doc. 97], setting a deadline for discovery of September 25, 2024, filing of dispositive motions by November 27, 2024, and mediation to be held by August 7, 2024.

Given these facts, and governing law, FP's waiver claim fails, and this Court should properly address, as has the district court, O'Leary's immunity claims.

7. The district court's order staying FP from seeking discovery from O'Leary during the pendency of this appeal, and O'Leary's argument on that issue before both the district court, and this Court, confirm that O'Leary has not "forfeited" his argument of immunity from discovery.

First, the district court's order [ECF 94] staying the discovery sought by FP pursuant to FP's motion seeking an order of contempt against O'Leary before the district court, for claimed failure to comply with FP's discovery requests during the pendency of this appeal [ECF 82], would appear to have disposed of this FP claim.

However, and additionally, O'Leary is immune from the claims of FP pursuant to the functionality test established by *Dalenko, supra*, which adopted the functionality test holding of *Burns v. Reed, supra.* The full scope of the statutory immunity protections of §1-569.14 of the Act therefore apply to O'Leary. Those protections include: O'Leary's judicial immunity pursuant to subpart (a); the supplementation provisions pursuant to subpart (b); the additional immunity provisions pursuant to subpart (c); and the discovery prohibitions established in

subpart (e), which prohibit FP from seeking, or requiring, O'Leary to testify, or to produce records.

Contrary to FP's apparent claim, O'Leary is not required to provide a lengthy argument in support of the express statutory provisions of the Act regarding his protections from the discovery process. The statute speaks for itself, and O'Leary is entitled to those protections intended by the legislature to a private citizen performing the function of resolving disputes between FP and its insured. Pursuant to the stated public policy of North Carolina, O'Leary is entitled to be free from intimidation, or the threat of vexatious litigation as a result of the performance of his role.

8. O'Leary did not "forfeit" his claim for reimbursement of fees and costs.

The converse of FP's "forfeiture" claim is that, if O'Leary is determined by this Court to be entitled to the protections intended by the immunity provisions of the Act, he is entitled to receive the intended protections of §1-569.14(e) of the Act, which requires that he receive reimbursement of all "reasonable attorney's fees, costs, and other reasonable expenses of litigation" he has been required to incur as a result of the litigation commenced against him by FP, which costs have been substantial.

CONCLUSION

For the reasons set forth herein, and in O'Leary's opening brief, O'Leary respectfully requests that the Court reverse the district court's denial of O'Leary's immunity, the district court's denial of O'Leary's motion to dismiss the claims of FP, reverse he district court's denial of O'Leary's motion for protective order, and remand to the district court for the determination of FP's obligation to reimburse the fees, and costs, incurred by O'Leary, in accordance with the requirements of §1-569.14(e) of the Act.

Respectfully submitted this the 6th day of May, 2024

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CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 5,633 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments).
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CERTIFICATE OF SERVICE

Lewis O'Leary, and Probuilders of the Carolinas, LLC, hereby certify that their APPELLANT'S REPLY TO APPELLEE'S ANSWER BRIEF was electronically filed utilizing the 4th Circuit U.S. Court of Appeals CM/ECF system, notification of which was remitted to the following CM/ECF participants:

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