

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-71

Filed 05 July 2023

Mitchell County, No. 22 CVS 75

P.K. FOXX, Petitioner, Plaintiff,

v.

DONALD STREET, ET AL., Respondents, Defendants.

Appeal by plaintiff from order entered 12 August 2022 by Judge Gregory R. Hayes in Mitchell County Superior Court. Heard in the Court of Appeals 24 May 2023.

Plaintiff-appellant P.K. Foxx, pro se.

Womble Bond Dickinson (U.S.) LLP, by Sean F. Perrin, for defendants-appellees.

ZACHARY, Judge.

This appeal is one of three presently before this Court arising from the same underlying matter. *See Walsh v. Street*, ___ N.C. App. ___, ___ S.E.2d ___, No. COA23-72 (July 5, 2023) (unpublished); *Foxx v. Street*, ___ N.C. App. ___, ___ S.E.2d ___, No. COA23-73 (July 5, 2023) (unpublished). In each case, relatives of the late Gregory Allen Foxx (collectively, “Plaintiffs”) filed petitions for the removal of Mitchell County

Sheriff Donald Street (“Sheriff Street”)¹ from office pursuant to N.C. Gen. Stat. § 128-16(1)–(3) (2021), and subsequently filed amended complaints raising additional claims against Sheriff Street as well as Lieutenant Rickey Wiseman, Detective Cecil Hobson, Jr.,² and Detective Stacey Hughes of the Mitchell County Sheriff’s Office (collectively, “Defendants”).³

In the case at bar, Plaintiff P.K. Foxx, the stepmother of Gregory Allen Foxx, appeals from the trial court’s order granting Defendants’ amended motion to dismiss and denying Plaintiffs’ motion for entry of default. After careful review, we affirm.

I. Background

Gregory Allen Foxx died on 20 August 2020. His death was ultimately determined to be a suicide, although Plaintiffs disagree with this finding. Instead, Plaintiffs allege the existence of a conspiracy involving Defendants and others—including the individual that they suspect committed the potential homicide—to “defraud[] Gregory Allen Foxx, . . . Plaintiff[s], and the Foxx family of a proper, unbiased, and thorough death scene investigation,” among other contentions.

On 2 May 2022, Plaintiff served Sheriff Street with a letter of intent to file a claim against his surety bond. Plaintiff contended, *inter alia*, that Sheriff Street was

¹ The caption of the order from which appeal was taken only names Sheriff Street as a defendant, and omits the other defendants.

² Plaintiff occasionally spelled Detective Hobson’s last name as “Hopson” in the Amended Complaint.

³ Additionally, Plaintiff named Western Surety Company/CNA Surety and its employee Paul Bruflat as defendants in the Amended Complaint pursuant to N.C. Gen. Stat. § 58-76-5, and also named as defendants “JOHN DOES; MARY DOES; others un-named, and others as yet unknown.”

subject to removal from office pursuant to N.C. Gen. Stat. § 128-16(1)–(3) on the grounds of “willful or habitual neglect to perform the duties of his office[,]” “willful misconduct or maladministration in office[,]” and “corruption.” On 16 May 2022, Plaintiff filed a petition for the removal of Sheriff Street from office (“the Petition”) pursuant to N.C. Gen. Stat. § 128-16(1)–(3).

On 3 June 2022, Sheriff Street filed a motion to dismiss, asserting that the trial court “lack[ed] jurisdiction to review the Petition” pursuant to N.C. Gen. Stat. § 128-17. On 10 June 2022, Plaintiff filed a response and brief in opposition to Sheriff Street’s motion to dismiss. Additionally, before the motion to dismiss came on for hearing, Plaintiff filed an amended complaint (the “Amended Complaint”) on 15 June 2022.

In the Amended Complaint, Plaintiff advanced a raft of constitutional and statutory claims against Defendants. Among the claims and relief sought, Plaintiff again requested that the trial court remove Sheriff Street from office, but notably did not invoke N.C. Gen. Stat. § 128-16’s grounds for removal to support this request. Instead, Plaintiff requested that the trial court “remove . . . Defendants from office and prevent them from holding future law enforcement positions pertaining to the public trust, for alleged violations of their Constitutional oath(s)” pursuant to N.C. Gen. Stat. §§ 11-7 and -11, as provided by Art. VI, § 7 and Art. VII, § 2 of the Constitution of North Carolina.

On 1 July 2022, Defendants filed a motion to dismiss the Amended Complaint.

Defendants again relied upon N.C. Gen. Stat. § 128-17 in part, together with Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure to the extent that the trial court considered the Amended Complaint as an amended complaint rather than an amended removal petition. Plaintiff filed a response and brief in opposition to the motion on 11 July 2022. Plaintiff argued, *inter alia*, that Defendants’ reference to N.C. Gen. Stat. § 128-17 in their motion to dismiss was a “fraudulent misrepresentation” and “irrelevant” as that statute was “not cited in Plaintiff’s cause of action.”

On 22 July 2022, Plaintiff filed a motion for entry of default, asserting, *inter alia*, that Defendants failed to file a responsive pleading. Plaintiff also repeated her arguments concerning Defendants’ reference to section 128-17 in their motion to dismiss the Amended Complaint.

Defendants’ motion to dismiss the Amended Complaint and Plaintiff’s motion for entry of default came on for hearing on 8 August 2022. In an order entered on 12 August 2022, the trial court granted Defendants’ motion to dismiss and denied Plaintiff’s motion for entry of default. The trial court supplied two bases for granting Defendants’ motion to dismiss. First, the court observed that it “lack[ed] jurisdiction over the Amended Complaint insofar as Plaintiff seek[s] to remove Mitchell County Sheriff Donald Street pursuant to [N.C. Gen. Stat.] § 128-17.” And second, the trial court granted the motion pursuant to Rules 12(b)(1), (2), and (6). Plaintiffs timely filed joint notice of appeal from the trial court’s similar orders in each of their

respective cases.

II. Discussion

Plaintiff argues that the trial court erred by granting Defendants' motion to dismiss because the court (1) "bas[ed] its decision on" N.C. Gen. Stat. § 128-17; and (2) acted in violation of Plaintiff's right to due process and "to have a final determination on the merits of the case." We disagree.

A. Standard of Review

"When considering a motion to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure, the question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

B. Removal Petition

We first address Plaintiff's argument that the trial court erred by granting Defendants' amended motion to dismiss "insofar as Plaintiff seek[s] to remove Mitchell County Sheriff Donald Street pursuant to [N.C. Gen. Stat.] § 128-17." Plaintiff strenuously contends that "Plaintiffs did not, at any time in their 'Letter[s] of Intent to Sue,' Petitions/Complaints, or Amended Complaints, seek to remove

[Sheriff Street] pursuant to” N.C. Gen. Stat. § 128.17.⁴ This argument invites an explanation of the relevant statutes.

Article 2 of Chapter 128 of the General Statutes of North Carolina governs the removal of “[a]ny sheriff or police officer” from office. *See* N.C. Gen. Stat. § 128-16 to -20. Section 128-16 sets forth six grounds for removal, while sections 128-17 through -20 prescribe the procedure for the removal from office of a sheriff for a cause specified in section 128-16. *Id.*; *see also State v. Hockaday*, 265 N.C. 688, 689–90, 144 S.E.2d 867, 869 (1965) (describing the history of these statutes). Sections 128-16 through -20 form the entirety of Article 2 of Chapter 128, and have been collectively referred to as “the removal statute[.]” *State ex rel. Leonard v. Huskey*, 65 N.C. App. 550, 552, 309 S.E.2d 726, 727 (1983).

As for the form and content of the removal petition, section 128-17 provides:

The complaint or petition shall be entitled in the name of the State of North Carolina, and may be filed upon the relation of any five qualified electors of the county in which the person charged is an officer, upon the approval of the county attorney of such county, or the district attorney of the district, or by any such officer upon his own motion. It shall be the duty of the county attorney or district attorney to appear and prosecute this proceeding.

N.C. Gen. Stat. § 128-17.

⁴ In her appellate brief, Plaintiff asserts that defense counsel presented “false and misleading statements” to the trial court by providing “a misleading representation of fabricated and immaterial evidence”—referring to the invocation of § 128-17 in Defendants’ motion to dismiss—and argues that this “constitut[es] an alleged fraud perpetrated upon the court” by Defendants’ counsel in violation of several of the North Carolina State Bar’s Rules of Professional Conduct. This argument is without merit.

This Court has explained that the plain text of section 128-17 “specifies that only three classes of persons may file the petition for removal: (1) five qualified electors upon the approval of the county attorney or district attorney; (2) the county attorney; or (3) the district attorney.” *State v. Felts*, 79 N.C. App. 205, 209, 339 S.E.2d 99, 101, *disc. review denied*, 316 N.C. 555, 344 S.E.2d 11 (1986). Further, this Court recognized that section 128-18 “specifies that the accused shall be named as defendant, and the petition shall be signed by some elector, or by such officer.” *Id.* at 208, 339 S.E.2d at 101 (citation and internal quotation marks omitted); *accord* N.C. Gen. Stat. § 128-18.

Plaintiff cited N.C. Gen. Stat. § 128-16(1)–(3) among the alleged violations of state law in her initial letter of intent, as well as in the Petition. Moreover, Plaintiff titled the Petition as being filed “PURSUANT TO: NCGS ARTICLE 2, §128-16 (1),(2),(3)[.]”

Nevertheless, it is beyond dispute that the Petition in this case did not meet the procedural requirements of section 128-17. Plaintiff acknowledges that she “[c]learly . . . d[id] not fit this criteria” and intended that the Amended Complaint present a civil action instead of a special proceeding pursuant to the removal statute. Accordingly, in that the trial court only partially based its order granting Defendant’s motion to dismiss on section 128-17, “insofar as Plaintiff seek[s] to remove Mitchell County Sheriff Donald Street pursuant to [N.C. Gen. Stat.] § 128-17[.]” we discern no error in this portion of the trial court’s order, to the extent that the Amended

Complaint acted as an amendment to the Petition and maintained Plaintiff's request for the removal of Sheriff Street pursuant to the removal statute.

Plaintiff also maintains that she sought the removal of Sheriff Street pursuant to N.C. Gen. Stat. § 14-230(a), rather than section 128-17. Section 14-230(a) provides, in pertinent part, that a sheriff who is found "guilty of misbehavior in office . . . shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense." N.C. Gen. Stat. § 14-230(a).

However, section 14-230(a) is a criminal statute, and our Supreme Court has recognized that the Constitution of North Carolina mandates "that the responsibility and authority to prosecute all criminal actions in the superior courts is vested solely in the several District Attorneys of the State." *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 871 (1991); *accord* N.C. Const. art. IV, § 18(1) ("The District Attorney *shall* . . . be responsible for the *prosecution* on behalf of the State of *all* criminal actions in the Superior Courts of his district. . . ." (emphases added)). Plaintiff therefore cannot privately prosecute an action for misbehavior in office, and this statute cannot support her prayer for relief in the Amended Complaint that Sheriff Street be removed from office.

C. Motion to Dismiss

Lastly, Plaintiff argues that the trial court erred by granting Defendants' motion to dismiss because "[i]t is a violation of due process for a State to enforce a judgment against a party to a proceeding without having given him an opportunity

to be heard before final judgment.” Plaintiff contends that the dismissal of her case at this stage of litigation was in violation of her constitutional right to procedural due process and “to have a final determination on the merits of the case.”

Plaintiff’s argument is unavailing. Instead of a violation of constitutional rights, dismissal pursuant to Rule 12(b)(6) is a longstanding procedural remedy that serves to address the sufficiency of complaints in the courts of this state. *See Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (“The motion to dismiss under Rule 12(b)(6) performs substantially the same function as the old common law general demurrer. A motion to dismiss is the usual and proper method of testing the legal sufficiency of the complaint.” (citation omitted)).

“Rule 12(b)(6) generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.” *Newberne v. Dep’t of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (citation and internal quotation marks omitted). Dismissal is proper, however, when “(1) the complaint on its face reveals that no law supports the plaintiff’s claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff’s claim.” *Id.* at 784, 618 S.E.2d at 204 (citation omitted).

Plaintiff does not raise any arguments in her appellate brief concerning the merits of the trial court’s order granting Defendants’ motion to dismiss pursuant to Rule 12. “Issues not presented and discussed in a party’s brief are deemed

abandoned.” N.C.R. App. P. 28(a). Plaintiff’s argument is entirely grounded in her constitutional and procedural concerns about the nature of dismissal. As such, any argument concerning the merits of the trial court’s dismissal pursuant to Rule 12 is “deemed abandoned.” *Id.*

Finally, although Plaintiff raises some merits arguments in her reply brief, “[u]nder Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, where a party fails to assert a claim in its principal brief, it abandons that issue and cannot revive the issue *via* reply brief.” *McLean v. Spaulding*, 273 N.C. App. 434, 441, 849 S.E.2d 73, 79 (2020), *disc. review denied*, 376 N.C. 900, 855 S.E.2d 279 (2021). Thus, we cannot consider arguments raised in Plaintiff’s reply brief that were not presented in her principal brief on appeal.

III. Conclusion

For the foregoing reasons, we affirm the trial court’s order.

AFFIRMED.

Judges TYSON and STADING concur.

Report per Rule 30(e).