

No. COA 23-298

FIFTEEN B DISTRICT

COURT OF APPEALS OF NORTH CAROLINA

\*\*\*\*\*

CONNOR P. FRALEY,  
Plaintiff/Appellant

v.

From Orange County

ORANGE COUNTY BOARD  
OF ELECTIONS,  
Defendant/Appellee

\*\*\*\*\*

DEFENDANT-APPELLEE'S BRIEF

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CONNOR P. FRALEY,  
Plaintiff,

v.

From Orange County

ORANGE COUNTY BOARD  
OF ELECTIONS,  
Defendant.

\*\*\*\*\*

DEFENDANT-APPELLEE'S BRIEF

\*\*\*\*\*

ISSUE PRESENTED

Did the Trial Court err in its interpretation of N.C. Gen. Stat. § 163-122(a)(3) as it applies to elections for Orange County Commissioner, District 2?

STATEMENT OF THE CASE

On 19 January 2023, Connor P. Fraley (sometimes referred to as “Fraley,” “Plaintiff,” or “Appellant”) filed this action against the Defendant/Appellee Orange County Board of Elections (or “Orange County”) in Orange County Superior Court. The Plaintiff sought an interpretation as to whether an unaffiliated candidate such as himself is entitled to have their name placed as a candidate on a County-wide race after receiving write-in

support from voters solely within a particular district, not from the totality of County voters as required by statute. (R p. 2)

The complaint sought a declaratory ruling as to what percentage of voters one should garner in order to have their name placed on the ballot for a general election race for a seat on the Orange County Board of Commissioners. (R pp. 4-6) It should be noted that in his Complaint, the Plaintiff did not seek a review of the constitutionality of Orange County election processes, and as such has waived any review based upon constitutional grounds.

Orange County filed a Motion for Summary Judgment on 1 February 2023. (R p. 10) The Plaintiff filed a Motion for Summary Judgment on 7 February 2023. (R p. 12) Again, in his Motion for Summary Judgment, the Plaintiff did not challenge the constitutionality of the elections process as it relates to the election of Orange County Commissioners.

Both Motions for Summary Judgment were heard before the Honorable Allen Baddour during the 13 March 2023 civil session of Orange County Superior Court. By Order signed 21 March 2023, Judge Baddour allowed Orange County's Motion for Summary Judgment and denied the Plaintiff's Motion for Summary Judgment. (R p. 14) The effect of Judge Baddour's Order

was that a candidate for a County-wide race (which would include that of County Commissioner) seeking election via a write-in candidacy must obtain signatures from 4% of the entire voting population of the County, not 4% solely within the District in which a prospective candidate resides.

The Appellant gave timely Notice of Appeal of Judge Baddour's Order. (R p. 16) The Record on Appeal was filed on 4 April 2023, and docketed on 11 April 2023 (R p. 1). The Appellant served his brief upon Orange County on 4 April 2023, making the Appellee's brief due on 8 May 2023. An extension of time was granted and Orange County was given up to and including May 15, 2023, in which to file a responsive brief.

#### STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Appellate review of the 21 March 2023, Order is authorized by of N.C. Gen. Stat. § 7A-27(b)(1), because it is a final order with respect to all of the Plaintiff's claims.

#### STATEMENT OF THE FACTS

The Plaintiff is a citizen and resident of Orange County, North Carolina. In 2022, the Plaintiff sought to be placed on the ballot as a candidate for Orange County Commissioner during the 2022 general election as an unaffiliated candidate.



Under N.C. Gen. Stat. § 153A-58(3), Orange County Commissioners are elected based upon a county-wide vote. Further, as allowed, pursuant to Chapter 13-3 of the Orange County Code of Ordinances, the County is divided into two districts, denoted as “District 1” which has a population of approximately 71,389, and includes the more urban sections of Orange County, and “District 2” which has a population of approximately 44,142, and encompasses a more rural element of Orange County. In addition, the County allows for selection of candidates from an “at large” region in which district boundaries are not considered. The Plaintiff resides in District 2. (R p. 4, Paragraph 4)

In the statutory framework set up under N.C. Gen. Stat. § 153A-58, N.C. Gen. Stat. § 163-122, and further codified under Orange County Code of Ordinances §13-3, under the election for Orange County Commissioners, each District holds a primary. Those who win the respective primaries are collectively all placed on a ballot for the general election of Orange County Commissioners. Those receiving the most votes on a county-wide, not district basis, in the general election serve as Commissioners and serve the County as whole, regardless of the District from which they received the initial primary nomination. As the Plaintiff admits in his complaint, “District 2 seats shall be

nominated by the voters of District 2 and elected by the entire county in the general election.” (R p. 4, Paragraph 4.)

The Plaintiff resides within District 2. He is seeking to be placed upon the ballot as an unaffiliated candidate in the general election from District 2, by garnering 4% of the signatures from voters within District 2, although the race itself is for a general election which encompasses the entire County. As explained, more specific statutes applicable require that an unaffiliated candidates must garner 4% of the signatures *from the County as a whole, not from a particular district* in order to be placed on a county-wide ballot.

For the reason set forth below, Judge Baddour did not err in entering summary judgment on behalf of the Defendant.

### ARGUMENT

THE TRIAL COURT DID NOT ERR IN GRANTING IN ITS INTERPRETATION OF N.C. GEN. STAT. § 163-122(a)(3) AS IT APPLIES TO ELECTIONS FOR ORANGE COUNTY COMMISSIONER, DISTRICT 2.

Assignment of Error No.1

R. p. 19

- A. THE TRIAL COURT DID NOT ERR BECAUSE ITS STATUTORY INTERPRETATION, ON ITS OWN TERMS, DID NOT CONTRADICT STATUTORY REQUIREMENTS.
- B. THE TRIAL COURT DID NOT ERR BECAUSE ITS ADOPTED STATUTORY INTERPRETATION DOES NOT LEAD TO UNCONSTITUTIONAL RESULTS.

C. THE TRIAL COURT DID NOT ERR BECAUSE EVEN IF THE STATUTE ARE UNAMBIGUOUS, THE CANONS OF STATUTORY INTERPRETATION DO NOT REQUIRE A DIFFERENT CONCLUSION THATN THE TRIAL COURT REACHED.

This case is before the Court on review of the trial court's order granting the Defendant's Motion for Summary Judgment pursuant to N.C. R. Civ. P. 56, and turns upon statutory construction of certain election statutes and Orange County ordinances. The issue is whether the Plaintiff is entitled to a declaratory judgment directing that unaffiliated candidates for the Office of Orange County Commissioner be entitled to placement of their name on county-wide election races by receiving signatures from 4% of the electorate of a particular district, despite specific statutes to the contrary, for what is ultimately a county-wide race.

More specifically at issue is whether Plaintiff qualified for nomination for placement in the general county-wide election to have his name on the ballot for the office of Orange County Commissioner, from District 2, in accordance with the provisions of N.C. Gen. Stat. § 153A-58, N.C. Gen. Stat. § 163-122, and Orange County Code of Ordinances §13-3(b)(2).

For the reasons explained in this Brief, Defendant respectfully contends that based upon construction of the applicable statutes and ordinances

Plaintiff is not entitled to the Declaratory Judgment sought, and that the trial court was correct in its order entering summary judgment for the Defendant.

### **STANDARD OF REVIEW**

The standard of review on an appeal from summary judgment is *de novo*, and it has long been held that summary judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. Warren v. Gen. Motors Corp., 142 N.C. App. 316, 319, 542 S.E.2d 317, 319 (2001). N.C. R. Civ. P. 56(b), is clear in that summary judgment is appropriate in a declaratory judgment action. It specifically provides that a defending party “against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.” (Emphasis added.) It has long been established that summary judgment is appropriate when there is no genuine issue of material fact and any party is entitled to a judgment as a matter of law. In re Will of Jones, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

Orange County has previously asserted that any review of the Plaintiff's claims based upon constitutional grounds would be improper as constitutional challenges were not raised in the Plaintiff's pleadings nor in any subsequent

motions filed with the trial court. To the extent such are considered the standard of review for alleged violations of constitutional rights is *de novo*.

State v. Graham, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), appeal dismissed and disc. review denied, 363 N.C. 857, 694 S.E.2d 766 (2010); see also Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc., 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (“[D]e novo review is ordinarily appropriate in cases where constitutional rights are implicated.”)

### **LAW AND DISCUSSION**

The North Carolina General Assembly has granted counties leeway in how each chooses to elect its officials. N.C. Gen. Stat. § 153A-58(3), sets out the options Counties may choose for election. Races can be either county-wide, or based upon districts.

In Orange County an election is based upon district primaries. The winners of the district primaries are then put before the county as a whole in a general election, with those receiving the highest vote totals being elected as members of the Orange County Board of Commissioners. The qualified voters of each district shall nominate candidates and elect members who reside in the district, The statutes *do not* make distinctions as to party affiliation, if any, of candidates. Absent also from the statutory provisions of N.C. Gen. Stat. § 153A-58 are any provisions relating to unaffiliated

candidates who seek to be nominated by petition, pursuant to the provisions of N.C. Gen. Stat. § 163-122. These procedures have been further codified under Chapter 13-3 of the Orange County Code of Ordinances.

N.C. Gen. Stat. § 163-122(3) allows for unaffiliated candidates to seek nomination for all offices, including by not limited to county commissioners, to seek nominations by the filing of a petition signed by voters. It provides in pertinent part, that for an unaffiliated candidate seeking nomination by petition, that “[i]f the office is a county office or a single county legislative district. . .” that they must gather petition signatures “equal in number to four percent (4%) of the total number of registered voters in the county as reflected by the voter registration records of the county. . . except if the office is for a district consisting of less than the entire county, and only the voters in that district vote for that office, the petitions must be signed by qualified voters in that district . . .” (Emphasis added.)

Here, the Plaintiff contends that he is entitled to be placed upon the ballot for the general election for Orange County Commissioner by gathering 4% of the signatures within District 2 despite the statutes stating the contrary, that indicate 4% of the signatures must be gathered within the county as a whole. Summary judgment is proper in that the plain language of the applicable statutes warrant that signatures from 4% of the entire county must

be garnered in order to be placed on the ballot for a general election, not 4% from an individual district.

Under the general principles of statutory construction legislative intent controls the meaning of a statute. State v. James, 371 N.C. 77, 813 S.E.2d 195 (2018). In construing a statute, it is “the plain language of the enabling statute [that] governs.” Quality Built Homes, Inc. v. Town of Carthage, 369 N.C. 15, 19-22, 789 S.E.2d 454, 457, 457-59 (2016).

Statutory interpretation “must begin with the plain meaning of the words.” Jones v. GMRI, Inc., 144 N.C. App. 558, 561, 551 S.E.2d 867, 870 (2001). Further, the courts must apply the plain meaning of unambiguous text. “When the language of a statute is clean and without ambiguity, a court has the duty to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.” Wing v. Goldman Sachs Trust Co., 382 N.C. 288, 292, 876 S.E.2d 390, 395, (2022).

Where one or two statutes might apply to the same situation, the one which deals more directly and specifically with the situation controls over the statute of more general applicability. Here, N.C. Gen. Stat. § 163-122(3) is the more specific statute, and is therefore controlling. Further, when two statutes apparently overlap, it is well established that the statute special and

more recent, unless it clearly appears that the legislature intended the general statute to control. Fowler v. Valencourt, 334 N.C. 345, 349, 435 S.E.2d 530, 533 (1993).

N.C. Gen. Stat. § 163-122(3) in effect creates a default rule that the hurdle is 4% of the voters of the entire county. Any interpretation of N.C. Gen. Stat. § 163-122(3) to the contrary would be misplaced.

The Plaintiff contends that under this statute, he is required to get a petition containing signatures of only 4% of the number of registered voters within District 2 to qualify for a County wide race. Accepting the Plaintiff's argument, he seeks to be placed on a County-wide ballot, in which Districts are no longer at issue. The District primaries are irrelevant in the Plaintiff's circumstances. He seeks to be placed upon the ballot in a county-wide race based upon those within the district which he resides, versus the plain language of the statute which requires garnering the signatures of the voters of a county as whole. To accept the Plaintiff's argument, this would allow members of a particular district to circumvent the statutory process, and allow persons to be placed upon a ballot based upon 4% of those voters within a District, not 4% of those voters within the County as is specifically required by the clear, unambiguous language of the statute. It should be noted that had the Plaintiff devoted time and resources attempting to comply with the



plain language of the statute in gathering 4% of signatures from the county-wide electorate, instead of expending resources, both personal as well as judicial, he arguably could have easily made the required threshold of 4% of the County residents' signatures as set forth.

A. The trial court did not err because its adopted statutory interpretation does not lead to unconstitutional results.

A review of the Plaintiff's filed declaratory judgment action does not seek a review of the constitutionality of the statutes or ordinances in question, only an interpretation as to how they should be applied in light of the Plaintiff's attempted write-in candidacy for a County-wide office. Further, no constitutional challenges are raised in the Motion for Summary Judgment filed with the trial court. The Plaintiff has waived his rights as it relates to any constitutional review of the statutes at hand as such challenges were not raised in the trial court.

"[W]aiver. . . . arises out of a party's failure to properly preserve an issue for appellate review." Constitutional review of this statute by this Court has been waived, as "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." State v. Hunter, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (citation omitted).

“Where there was no constitutional issue before the trial court, and where defendant failed to raise any objection on a constitutional basis, this court is precluded from considering whether a statute is constitutionally valid. State v. Lloyd, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (citation omitted). Applying the applicable law as it relates to constitutional review, this assignment of error is without merit and should therefore, be dismissed, as it was not properly plead nor presented before the trial court.

B. The trial court did not err because even if the statutes are ambiguous, the canons of statutory interpretation do not require a different conclusion than the trial court reached.

Orange County hereby incorporates by reference its arguments raised in “Section A” of this brief in support of its argument that the canons of statutory interpretation do not require a different conclusion than the trial court reached.

CONCLUSION

For the foregoing reasons, Defendant Orange County respectfully prays that this Court affirm Judge Baddour's decision granting its motion for summary judgment.

Respectfully submitted this the 15th day of May, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, the undersigned certifies that the foregoing brief contains less than 8,750 words (excluding the cover, caption, index, table of authorities, signature block, certificate of service, and this certificate of compliance) as reported by the word-processing software.

This the 15th day of May, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, a copy of the foregoing document was served by depositing a copy of the same with the United States Postal Service, first-class mail, postage prepaid, and addressed and via electronic mail as follows:

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