Spoiling the "Fruits of Their Own Labor": *Mole' v. City of Durham*[*]

The North Carolina Constitution protects the right of North Carolinians to enjoy "the fruits of their own labor." But the Supreme Court of North Carolina, in its two-sentence decision in Mole' v. City of Durham, *recently employed a contentious procedural mechanism to narrow the scope of that constitutional protection. This Recent Development examines the sharp disagreement within the court about the propriety of that decision and argues that* Mole' *not only leaves North Carolina law less clear and more unpredictable, but also weakens the state constitutional protections available for public employees.*

INTRODUCTION

On June 28, 2016, Sergeant Michael Mole' of the Durham Police Department negotiated the peaceful surrender of Julius Smoot, a barricaded suspect with a loaded gun.[1] Mole' secured that surrender by making an agreement: if Smoot relinquished his weapon and handcuffed himself, Mole' would allow him to smoke a blunt before detaining him.[2] Smoot complied and asked Mole' for a lighter.[3] Mole', upholding the agreement, handed him a lighter, and Smoot smoked half of a blunt.[4] For his successful negotiation ploy, Mole' lost his job. The Durham Police Department fired him for conduct unbecoming of a police officer, and Mole' sued.[5]

One of Mole's claims—that the police department violated its own disciplinary policies in the process of firing him—implicated the North Carolina Constitution's "fruits of their own labor" clause.[6] And when Mole's case reached the North Carolina Court of Appeals, the court ruled favorably for him and extended the Supreme Court of North Carolina's interpretation of that clause.[7] Specifically, the North Carolina Court of Appeals extended the holding in *Tully v. City of Wilmington*,[8] which protected employees from arbitrary and

1. Mole' v. City of Durham, 279 N.C. App. 583, 585, 866 S.E.2d 773, 776–77 (2021), *aff'd*, *ordered not precedential*, 384 N.C. 78, 884 S.E.2d 711 (2023) (per curiam).

2. The blunt was a "marijuana cigarette." *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 585–86, 866 S.E.2d at 777.

6. *Id.* at 588–89, 866 S.E.2d at 777–79. The "fruits of their own labor" clause is a unique provision established in the first section of North Carolina's constitution. *See* N.C. CONST. art. I, § 1 ("We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.").

7. *Mole'*, 279 N.C. App. at 588–92, 866 S.E.2d at 778–81.

8. 370 N.C. 527, 810 S.E.2d 208 (2018).

capricious violations of a government entity's promotional procedures,[9] to apply to a government entity's disciplinary procedures as well.[10]

But, on discretionary review, the Supreme Court of North Carolina undercut this protection, leaving the scope of *Tully* and the "fruits of their own labor" clause even less clear than before. In a two-sentence per curiam opinion, the court held not only that review had been "improvidently allowed," but also that the underlying North Carolina Court of Appeals opinion would be "undisturbed" but "without precedential value."[11]

The brief opinion prompted Justices Morgan[12] and Earls[13] to pen lengthy dissents, which in turn prompted a concurrence from Justice Dietz.[14] Therein, the justices expressed sharp disagreement about the propriety of the court's decision. This Recent Development examines that disagreement and analyzes its primary implication—namely, that in *Mole'*s two sentences the court spoiled the "fruits of their own labor" clause for North Carolina workers. Part I develops *Mole'*s facts and procedural history. Part II examines the propriety of the court's contentious procedural decision to "unpublish" the underlying North Carolina Court of Appeals opinion. Part III argues that the court's procedural choices leave North Carolina law more unpredictable and unclear. Finally, Part IV argues that, despite its brevity, *Mole'* narrows the scope of the North Carolina constitution's unique "fruits of their own labor" clause, weakening its role as a bulwark for the rights of North Carolinians.[15]

I. BACKGROUND: *MOLE' V. CITY OF DURHAM*

When Durham police officers arrived at Julius Smoot's apartment, Smoot barricaded himself in an upstairs bedroom and threatened to shoot himself within ten minutes if he was not allowed to see his wife and son.[16] Officers immediately called for a hostage negotiator, and Sergeant Mole' arrived within five minutes.[17] Mole', who had trained as a hostage negotiator two years prior but never conducted an actual negotiation, was the only hostage negotiator on duty at the time.[18] Not long after Mole' began negotiating, Smoot accidentally

9. *Id.* at 536, 810 S.E.2d at 215–16.

10. *Mole'*, 279 N.C. App. at 589–90, 866 S.E.2d at 779.

11. Mole' v. City of Durham, 384 N.C. 78, 79, 884 S.E.2d 711, 711–12 (2023) (per curiam).

12. *See id.* at 81–91, 884 S.E.2d at 713–18 (Morgan, J., dissenting).

13. *See id.* at 91–101, 884 S.E.2d at 719–25 (Earls, J., dissenting).

14. *See id.* at 79–81, 884 S.E.2d at 712–13 (Dietz, J., concurring).

15. N.C. CONST. art. I, § 1.

16. Mole' v. City of Durham, 279 N.C. App. 583, 585, 866 S.E.2d 773, 776 (2021), *aff'd*, *ordered not precedential*, 384 N.C. 78, 884 S.E.2d 711 (2023) (per curiam).

17. *Id.*

18. *Id.*

discharged his firearm, leaving no doubt that the stakes were high.[19] But Mole' held steady, staying with Smoot for over two hours.[20]

When Smoot said he wanted to smoke a blunt, Mole' advised against it, seeking to keep his armed suspect from "impair[ing] his mental state" while they negotiated.[21] But Mole' quickly came up with the ploy that would save Smoot's life but destroy Mole's career: Mole' promised Smoot that he could smoke the blunt if he surrendered.[22] In response, Smoot abandoned his weapon, handcuffed himself, and asked Mole' to hand him a lighter.[23] Mole' handed him the lighter, and Smoot took a blunt from behind his ear and began to smoke.[24] Mole' then took Smoot into custody.[25]

According to the Durham Police Department's policy governing negotiation with barricaded suspects, almost all demands are "negotiable" in pursuit of a surrender agreement.[26] When Mole' trained as a negotiator in 2014, the policy had carved out three exceptions, prohibiting acquiescence to demands that (1) "increase the firepower or deadly force" of the suspect, (2) involve "movement or relocation" that "poses an unreasonable further risk to the public," or (3) require "[t]rading of hostages."[27] The policy, which was still in effect in the same form in 2016, described the primary hostage negotiation philosophy as one of "buying time" and set "[t]he saving of human life" as the negotiation's "primary goal."[28] No one disputes that Mole's ploy bought time and saved Smoot's life, securing the peaceful surrender of someone who, armed with a loaded gun, had threatened to kill himself. Nor did Mole's ploy violate any of the policy's exceptions—nothing in the policy prohibited negotiating with demands involving the smoking of marijuana.

But the City of Durham decided to investigate Mole' for his conduct during negotiations with Smoot.[29] On October 24, 2016, the city sent Mole' notice that a pre-disciplinary hearing regarding his conduct would be held the following day.[30] The timing of this notice violated the city's own policies, which require three days' notice prior to a pre-disciplinary hearing.[31]

19. *Id.*
20. *Id.*
21. *Id.* at 585, 866 S.E.2d at 776–77.
22. *Id.* at 585, 866 S.E.2d at 777.
23. *Id.*
24. *Id.*
25. *Id.*
26. DURHAM POLICE DEP'T, GENERAL ORDERS MANUAL 542 (2016).
27. *Id.* at 542–43.
28. *Id.* at 542.
29. *Mole'*, 279 N.C. App. at 585, 866 S.E.2d at 777.
30. *Id.*
31. *Id.*; *see also* DEP'T HUM. RES., CITY DURHAM, DISCIPLINARY POLICY 5–6 (2016), https://www.durhamnc.gov/DocumentCenter/View/29342/Disciplinary-Policy-PDF [https://perma.cc/88ZA-39K2].

Despite Mole's supervisors' recommendations for a reprimand, the city fired Mole' three weeks after the hearing.[32] For its part, the Durham Police Department appeared to recognize the inconsistency in its own decision when it revised the hostage negotiation policy in May 2017 to add a fourth exception, prohibiting demands involving "[c]ontrolled substances or alcohol."[33] By expressly adding this fourth exception, the department implicitly acknowledged that no such exception had previously been in effect—that is, no grounds for disciplining Mole' preexisted his termination.

Mole' sued, alleging violations of the North Carolina Constitution's equal protection, due process, and "fruits of their own labor" clauses.[34] After a trial court dismissed the case for failure to state a claim, the North Carolina Court of Appeals reversed in part, holding that, although Mole's equal protection and due process claims were precluded by precedent, Mole' had stated a "colorable violation" of the "fruits of their own labor" clause.[35] In doing so, the North Carolina Court of Appeals extended the Supreme Court of North Carolina's holding in *Tully* to protect employees not only from violations of a government entity's promotional procedures, but also from violations of a government entity's disciplinary procedures.[36] Moreover, despite holding that Mole's other constitutional claims were precluded, the North Carolina Court of Appeals expressly "urge[d]" the Supreme Court of North Carolina to address them.[37]

Following the North Carolina Court of Appeals' urging, Mole' petitioned the Supreme Court of North Carolina for discretionary review of his otherwise precluded constitutional claims.[38] The City of Durham filed a brief opposing Mole's petition but requested that, if the court did grant review, the court review Mole's "fruits of their own labor" claim as well.[39]

The Supreme Court of North Carolina certified *Mole' v. City of Durham* for review in March 2022.[40] The court heard oral argument in February 2023.[41] But then, in April 2023, the court backtracked, reversing its own decision to

32. *Id.*

33. DURHAM POLICE DEP'T, GENERAL ORDERS MANUAL 425, 428 (2018) (indicating the hostage and/or barricaded suspect incident policy was last revised on May 29, 2017, which included a new exception prohibiting demands involving "[c]ontrolled substances or alcohol").

34. *Mole'*, 279 N.C. App. at 586, 866 S.E.2d at 777.

35. *Id.* at 584, 866 S.E.2d at 776.

36. *Id.* at 589–90, 866 S.E.2d at 779.

37. *Id.* at 598, 866 S.E.2d at 785.

38. *See generally* Petition for Discretionary Review, Mole' v. City of Durham, 384 N.C. 78, 884 S.E.2d 711 (2023) (per curiam) (No. 394PA21) (petitioning the Supreme Court of North Carolina for discretionary review).

39. *See* Defendant's Response to Plaintiff's Petition for Discretionary Review Under N.C. Gen. Stat. § 7A-31(C) at 5–6, *Mole'*, 384 N.C. 78, 884 S.E.2d 711 (No. 394P21), 2021 WL 5626480, at *5–6 [hereinafter Defendant's Response].

40. Mole' v. City of Durham, 381 N.C. 283, 283, 868 S.E.2d 851, 851 (2022) (mem.).

41. *Mole'*, 384 N.C. at 78, 884 S.E.2d at 711.

grant review in a two-sentence per curiam opinion: "Discretionary review improvidently allowed. The decision of the North Carolina Court of Appeals is left undisturbed but stands without precedential value."[42]

Each sentence had independent effect. By ruling that discretionary review was improvidently allowed, the court avoided issuing an opinion on the merits, despite the court's engagement with the constitutional issues at stake in the case during oral argument in February 2023.[43] By ruling that the underlying opinion stood without precedential value, the court effectively "unpublished" the North Carolina Court of Appeals opinion, nullifying any guidance that opinion might have offered to future litigants. Because the underlying opinion had extended *Tully*'s holding, the Supreme Court of North Carolina's "unpublishing" decision effectively unmade the law developed by the North Carolina Court of Appeals.

The oddity of this procedural development deserves summary here. Mole', after *winning* on his "fruits of their own labor" claim, appealed the dismissals of his equal protection and due process claims.[44] The City of Durham *opposed* discretionary review but requested in the alternative that, if review were granted, the court also review the "fruits of their own labor" claim.[45] The Supreme Court of North Carolina initially granted review, but it reversed its decision to review *after* hearing oral argument.[46] Along the way, the court stripped the precedential value of the North Carolina Court of Appeals opinion's extension of the "fruits of their own labor" clause.[47] That is, the court technically *denied* review, but, through its decision to unpublish, the court also effectively *vacated* the underlying opinion on the one issue for which the

42. *Id.* at 79, 884 S.E.2d at 711.

43. *See* Oral Argument at 10:26, *Mole'*, 384 N.C. 78, 884 S.E.2d 711 (No. 394PA21), https://www.youtube.com/watch?v=D9zjyhFzd94 [https://perma.cc/U9ZV-4HTY] (on file with the North Carolina Law Review).

44. The procedure employed here adds yet another wrinkle. North Carolina law at the time gave a right to appeal to petitioners whose case involved a "substantial" question of state constitutional law or whose North Carolina Court of Appeals decision included a dissent. Act of Dec. 16, 2016, ch. 125, sec. 22.(c), § 7A-30, 2016 N.C. Sess. Laws 15, 36, *repealed by* Current Operations Appropriations Act of 2023, ch. 123, sec. 16.21.(d), § 7A-30, 2023 N.C. Sess. Laws __, __. Here, the North Carolina Court of Appeals opinion urged the Supreme Court of North Carolina to review the other constitutional issues, implicitly suggesting that they involved a substantial question of state constitutional law. *See* Mole' v. City of Durham, 279 N.C. App. 583, 598, 866 S.E.2d 773, 785 (2021), *aff'd*, *ordered not precedential*, 384 N.C. 78, 884 S.E.2d 711 (2023) (per curiam). Justice Morgan, for his part, argued that these questions were "critical" and "substantial." *Mole'*, 384 N.C. at 90, 884 S.E.2d at 718 (Morgan, J., dissenting). But the court instead considered review under its statutory authority to allow *discretionary* review. *Mole'*, 384 N.C. at 78, 884 S.E.2d at 711 (per curiam) (citing N.C. GEN. STAT. § 7A-31). This result demonstrates the narrow options for review by the Supreme Court of North Carolina. And those options have only grown narrower since 2023 because the North Carolina General Assembly enacted legislation that removed the right to appeal appellate cases that include a dissent. *See* Current Operations Appropriations Act of 2023 § 16.21(d).

45. *See* Defendant's Response, *supra* note 39, at 5.

46. *Mole'*, 384 N.C. at 85–86, 884 S.E.2d at 715–16 (Morgan, J., dissenting).

47. *Id.* at 79, 884 S.E.2d at 711–12 (per curiam).

petitioner did *not* ask for review. And the court did all of that in two quick sentences.

The brief opinion prompted lengthy dissents from Justices Morgan and Earls. Justice Morgan contested the majority's decision on substantive grounds, concluding that the majority should not have left "constitutional questions of such jurisprudential import as those presented here without any guiding appellate authority."[48] Justice Earls contested the majority's decision on procedural grounds, finding "no precedent for what the Court does in this case."[49] She concluded that the court's decision marked "a fundamental change in how legal precedent is determined in this state without any opportunity for notice and comment,"[50] and "deprive[d] the parties, the attorneys[,] . . . and the people of North Carolina collectively" of protection from "the exercise of arbitrary power."[51] Across thirteen pages of dissent, Justices Morgan and Earls sounded the alarm about the impropriety and consequences of the court's *Mole'* decision. In response, Justice Dietz authored a concurrence objecting to the dissent's characterization and attempting to locate *Mole'* within the court's precedent.[52]

II. "UNPRECEDENTED" OR "NOTHING NEW"?: EXAMINING THE DECISION TO "UNPUBLISH" THE LOWER COURT'S *MOLE'* OPINION

The Supreme Court of North Carolina's decision to strip the underlying North Carolina Court of Appeals decision of precedential value—to "unpublish" the North Carolina Court of Appeals opinion—marked the central point of tension between Justices Earls and Dietz.[53]

48. *Id.* at 90, 884 S.E.2d at 718 (Morgan, J., dissenting).

49. *Id.* at 91, 884 S.E.2d at 719 (Earls, J., dissenting).

50. *Id.* at 95, 884 S.E.2d at 721.

51. *Id.* at 101, 884 S.E.2d at 725.

52. *Id.* at 79–81, 884 S.E.2d at 712–13 (Dietz, J., concurring).

53. The justices also strongly disagreed about the Supreme Court of North Carolina's decision that discretionary review was improvidently granted. *Id.* at 98–100, 884 S.E.2d at 723–24 (Earls, J., dissenting). However, despite the independent significance of the court's decision to reverse its discretion, the decision to unpublish the underlying North Carolina Court of Appeals opinion will be the primary focus of this part because it has broader import. Notably, over a year passed between the court's certification for review and its per curiam decision. *Compare* Mole' v. City of Durham, 381 N.C. 283, 283, 868 S.E.2d 851, 851 (2022) (mem.) (granting review on March 9, 2022), *with Mole'*, 384 N.C. at 79, 884 S.E.2d at 711–12 (issuing an opinion on April 6, 2023). In the interim, the court's political composition changed in the aftermath of the 2022 election. *See* Will Doran, *GOP Flips Control of NC Supreme Court, After Winning Every Statewide Judicial Race*, NEWS & OBSERVER, https://www.newsobserver.com/news/politics-government/election/article268185877.html [https://perma.cc/F9CA-L9V3 (dark archive)] (last updated Nov. 9, 2022, 5:04 PM). When the court certified the case for review, the court was composed of four Democrats and three Republicans. *Id.* When the court heard the case and issued its per curiam decision, the court was composed of five Republicans and two Democrats—the dissenters, Justices Earls and Morgan. *Id.*

Justice Earls argued that the court's decision to "unpublish" the lower court's opinion was not only "unprecedented," but a "hasty and unexamined, yet fundamental and radically destabilizing shift in the authority to determine legal precedent."[54] Previously, the Supreme Court of North Carolina had held that North Carolina Court of Appeals decisions constituted "binding precedent unless reversed."[55] And the North Carolina Rules of Appellate Procedure include no provisions providing for the Supreme Court of North Carolina's ability to strip precedent set by an underlying opinion without reversing the decision.[56] Consequently, according to Justice Earls, the court's decision effectively granted itself a "new power"—the power to unmake law without a decision on the merits—and changed the rules for determining legal precedent in North Carolina without providing "notice and comment" to interested parties.[57]

But Justice Dietz retorted that the court's decision to "unpublish" a North Carolina Court of Appeals opinion was "nothing new" and "far from unprecedented," noting that the court had done so "just shy of 100 times in the last fifty years."[58] This point—that the court had acted similarly in the past—became the touchstone of disagreement. The cases Justice Dietz marshalled to support his claim fell into one of two categories: (1) cases where the court was equally divided due to a single recusal,[59] or (2) cases where there was no "majority of the *full court*" due to multiple recusals.[60] Neither circumstance existed in *Mole'*, where the full court heard the argument.[61] Nevertheless, Justice Dietz asserted that the court has "long had the *option*" to unpublish a North Carolina Court of Appeals opinion whenever there is no "majority of the *full court*."[62]

54. *Mole'*, 384 N.C. at 91–92, 884 S.E.2d at 719 (Earls, J., dissenting).

55. *Id.* at 91, 884 S.E.2d at 719 (citing *In re* Civil Penalty, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)).

56. *Id.* at 92–93, 884 S.E.2d at 719–20 (citing N.C. R. APP. P. 30(e)).

57. *Id.* Justice Earls acknowledged that "there is no constitutional or other mandate requiring this Court to consult with interested stakeholders prior to revising the Rules of Appellate Procedure," but she concomitantly noted that "it is universally understood throughout the legal profession to be good practice to engage the most esteemed and experienced legal experts before modifying the rules that govern our legal system." *Id.* at 94, 884 S.E.2d at 721. In doing so, Justice Earls implicitly critiqued the majority for using *Mole'* as a means to change rules that were not themselves at issue in the case. *See id.*

58. *Id.* at 79, 884 S.E.2d at 712 (Dietz, J., concurring).

59. *Id.* (citing Townes v. Portfolio Recovery Assocs., LLC, 382 N.C. 681, 682, 878 S.E.2d 797, 798 (2022)).

60. *Id.* at 80, 884 S.E.2d at 712 (first citing Costner v. A.A. Ramsey & Sons, Inc., 318 N.C. 687, 687, 351 S.E.2d 299, 299 (1987); and then citing Nw. Bank v. Roseman, 319 N.C. 394, 395, 354 S.E.2d 238, 238 (1987)).

61. *Id.* at 91, 884 S.E.2d at 719 (Earls, J., dissenting).

62. *Id.* at 80, 884 S.E.2d at 712 (Dietz, J., concurring).

Justice Morgan noted two significant distinctions between *Mole'* and past instances where the court reversed review and decided to unpublish the lower opinion: (1) past cases always included a "numerical breakdown of the Justices favoring affirmance or reversal," and (2) past cases always ended with a "clear declaration of the outcome of the case—'AFFIRMED' or 'REVERSED.'"[63] The court included neither in *Mole'*.[64]

The decision to unpublish was not the only source of disagreement: both Justices Morgan and Earls also disagreed with the court's decision that discretionary review had been improvidently granted.[65] Specifically, they argued that Mole's case met the statutory standards for discretionary review and that neither the court's opinion nor Justice Dietz's concurrence established any reason to think otherwise.[66] Both dissenting justices acknowledged that the Supreme Court of North Carolina has the *authority* to determine that review was improvidently granted.[67] But they argued that the court's decision about improvident review, when combined with the court's decision to "unpublish" the underlying North Carolina Court of Appeals opinion, amounted to an "arbitrary exercise of power"[68] that left North Carolinians "without any guiding appellate authority" on the constitutional issue "due to a clear and convenient unwillingness to engage with the issues at hand."[69]

But Justice Dietz defended both aspects of the court's decision.[70] In doing so, he cited a law review article written about the history of the Supreme Court of North Carolina's practice of unpublishing opinions by the North Carolina Court of Appeals.[71] But that same article draws a conclusion antithetical to Justice Dietz's position:

> [T]here is no reason to continue to treat a decision of the court of appeals as if it were the judgment of a trial court. When the justices of the supreme court are unable to decide a case on review from the court of appeals because they are equally divided, the decision of the court of

63. *Id.* at 88, 884 S.E.2d at 717 (Morgan, J., dissenting).
64. *See id.* at 79, 884, S.E.2d at 711–12 (per curiam).
65. *See id.* at 81–91, 884 S.E.2d at 713–18 (Morgan, J., dissenting).
66. *See id.* at 98–101, 884 S.E.2d at 723–25 (Earls, J., dissenting).
67. *See id.*
68. *Id.* at 101, 884 S.E.2d at 725.
69. *Id.* at 90–91, 884 S.E.2d at 718 (Morgan, J., dissenting).
70. *See id.* at 79–81, 884 S.E.2d at 712–13 (Dietz, J., concurring).
71. *Id.* at 79–80, 884 S.E.2d at 712 (citing John V. Orth, *"Without Precedential Value": When the Justices of the Supreme Court of North Carolina Are Equally Divided*, 93 N.C. L. REV. 1719, 1735 (2015)).

> appeals should be left undisturbed and stand as the decision in this case. Period.[72]

That is, the article concludes that, unless the court reaches the merits of a case, the court should leave the underlying North Carolina Court of Appeals opinion "undisturbed."[73] But Justice Dietz, in reliance on that article, did the opposite—he defended the decision to unpublish the North Carolina Court of Appeals opinion.

This disagreement exists because the Supreme Court of North Carolina's decision is ultimately a discretionary one. No law requires the court to actually review the merits of cases it initially says it will review. And no law prohibits the court from unpublishing a North Carolina Court of Appeals opinion without reaching the merits of the case. Justice Dietz is not wrong that the court has the *authority* to act as it did in *Mole'*. But neither are Justices Morgan and Earls wrong that the court has never *exercised* that authority under circumstances like those in *Mole'*. The disagreement between Justice Dietz and Justices Morgan and Earls concerns what the court *should* do, and what the effects of the court's decision will be.

III. UNPREDICTABLE AND UNCLEAR LAW: THE EFFECTS OF *MOLE'*

The sharp disagreement between Justices Earls and Dietz suggests that the stakes of the *Mole'* decision may be higher than would appear from a two-sentence opinion. The effects may be far-reaching, yielding unpredictability for future cases and a lack of clarity about the positive law.

First, North Carolina law may become more unpredictable, subject to change without positive guidance from the Supreme Court of North Carolina. Justice Earls was clearly concerned with this possibility when she described the court's exercise of authority as "arbitrary," leaving future litigants not only without clarity on the law, but also without clarity about how their cases will be decided.[74] *Mole'* presents a clear example: if Mole' had chosen *not* to seek review of his other constitutional issues, then the court would not have had opportunity to reach out and alter his case. Yet, following the North Carolina Court of Appeals' urging to appeal, the law supporting his *successful* claim was stripped of precedential value. This outcome disincentivizes future litigants from pursuing the full scope of their claims—not because their arguments lack merit, but because they fear that an appeal will leave them in an even worse position than before. The court's decision did not preclude Mole' from continuing his case on remand—but it did significantly weaken the case's prospects. Had Mole' foregone his final appeal, he could have returned to the trial court with a success

72. Orth, *supra* note 71, at 1738–39.

73. *Id.*

74. *Mole'*, 384 N.C. at 101, 884 S.E.2d at 725 (Earls, J. dissenting).

in the North Carolina Court of Appeals and newly minted constitutional law on his side. Instead, he left the Supreme Court of North Carolina with less than he entered. Future litigants, seeing this result, may be less likely to pursue similar appeals.

Moreover, soon after *Mole'*, Justice Earls's concerns about a new norm were substantiated by *Walker v. Wake County Sheriff's Department*,[75] where the Supreme Court of North Carolina vacated a North Carolina Court of Appeals opinion despite the absence of a "live controversy."[76] There, the court again issued a two-sentence opinion: "Plaintiff's consent motion to dismiss appeal is allowed. The decision of the Court of Appeals is vacated."[77] And, again, Justices Earls and Dietz fought over the opinion's effect. Justice Earls accused the court of "brazenly warp[ing] the law to its policy preferences" and "injecting yet more confusion, arbitrariness, and partisanship into North Carolina's legal system."[78] Justice Dietz struck back, characterizing Justice Earls's dissent as "exaggerated," "hyperbolic," and full of "needless, toxic disparagement."[79] But as between two points one may draw a line, between *Walker* and *Mole'* one may draw an inference that the court is ready to change North Carolina precedents from the relative shadows. In *Mole'* and *Walker*, the court changed the law without providing affirmative guidance. Since then, the court has gone even further, at times, taking the opportunity to affirmatively change the law even in the absence of a live controversy.[80]

Second, North Carolina law itself may become less clear. When the Supreme Court of North Carolina decides to unpublish a North Carolina Court of Appeals opinion, it effectively does two things at once: it refuses to issue a ruling on the merits, and it undermines any ruling on the merits developed in the underlying North Carolina Court of Appeals opinion. Cases seeking and at least initially receiving discretionary review often lie in areas of law that lack clarity—they involve difficult legal issues or the extension or application of law

75. 385 N.C. 300, 890 S.E.2d 905 (2023). Besides the distinct issue of mootness, the *Walker* decision represents a significant contrast with *Mole'* in that the decision to certify the case for review was made by the current members of the court, whereas in *Mole'* the court's composition changed in the period between certification for review and the ultimate decision. *See supra* note 53 and accompanying text.

76. The case was settled prior to being heard by the Supreme Court of North Carolina. *Walker*, 385 N.C. at 308, 890 S.E.2d at 910 (Earls, J., concurring in part and dissenting in part).

77. *Id.* at 300, 890 S.E.2d at 905 (per curiam).

78. *Id.* at 308, 890 S.E.2d at 910 (Earls, J., concurring in part and dissenting in part).

79. *Id.* at 301, 303, 890 S.E.2d at 906–07 (Dietz, J., concurring).

80. In *State v. Daw*, No. 174PA21, 2024 WL 3909555 (N.C. Aug. 23, 2024), no one disputed that the case, by the time it reached the Supreme Court of North Carolina, was moot. *Id.* at *2. But the court not only issued a ruling—it used the case as an opportunity to reinterpret a habeas statute. *See id.* at *12 (Earls, J., dissenting) ("The majority makes clear the real reason for discarding the usual mootness rules: It disagrees with the Court of Appeals and hopes to extirpate its decision, root and branch.").

to a new category of facts. In theory, every North Carolina Court of Appeals opinion brings an additional measure of clarity—a binding statement of the law and an application of that law to a set of facts. Thus, unpublishing a North Carolina Court of Appeals opinion muddles something that would otherwise be clear. In *Walker*, Justice Earls put a similar point this way: "[f]or trial courts and future appellate panels, the Court mysteriously sends the message that the Court of Appeals is wrong without explaining how or why."[81] As a result, the effect extends beyond unpredictability about what courts will do in the future—it also produces confusion about how to interpret decisions that have already been decided.

Mole' presents an apt example of this dynamic. The next part examines the effects of the court's decision on the clarity of the "fruits of their own labor" clause in North Carolina's constitution as a case study for the effects that comparable decisions might have in other areas of law.

IV. THE "FRUITS OF THEIR OWN LABOR": *MOLE'* AND THE UNCERTAIN RIGHTS OF NORTH CAROLINIANS

Sergeant Mole' disagreed with the grounds for his firing: he successfully negotiated Smoot's peaceful surrender, and his willingness to negotiate Smoot's desire to smoke did not violate the negotiation policy in effect at the time.[82] But that disagreement was not the source of his claim against the City of Durham. Instead, the source of Mole's claim lay in the city's violation of its own personnel policies when it gave him only one day's notice—instead of the required three—before his disciplinary hearing.[83] That policy violation, according to Mole', constituted a violation of the North Carolina Constitution's "fruits of their own labor" clause.[84]

And the North Carolina Court of Appeals agreed.[85] To do so, the court explicitly decided to extend the holding of *Tully* to a new set of circumstances.[86] *Tully*, like *Mole'*, arose from a compelling set of facts that detrimentally affected a police officer's employment. Kevin Tully, a corporal, sought to become a sergeant and had to pass a written test as a part of the promotion process.[87] Tully failed the test, but only because the test's answer key was based on

81. *Walker*, 385 N.C. at 307, 890 S.E.2d at 910 (Earls, J., concurring in part and dissenting in part).

82. Brief of Appellant at 11, Mole' v. City of Durham, 279 N.C. App. 583, 866 S.E.2d 773 (2021) (No. COA 19-683), 2019 WL 6247758, at *11, *aff'd*, *ordered not precedential*, 384 N.C. 78, 884 S.E.2d 711 (2023) (per curiam).

83. *Mole'*, 279 N.C. App. at 585–86, 866 S.E.2d at 776–77; *see also* DEP'T HUM. RES., CITY DURHAM *supra* note 31, at 5–6.

84. *Id.* at 586–88, 866 S.E.2d at 777–78.

85. *Id.* at 588–92, 866 S.E.2d at 778–81.

86. *Id.*

87. Tully v. City of Wilmington, 370 N.C. 527, 528, 810 S.E.2d 208, 211 (2018).

outdated law.[88] Had the answer key actually tracked good law, Tully would have received a passing score.[89] But when Tully attempted to challenge the result, he was denied an opportunity to appeal, despite the police department's policy expressly allowing for appeal.[90] Tully sued, arguing that the department's violation of its own appeal policy constituted a violation of Tully's rights pursuant to the "fruits of their own labor" clause in the state constitution, and his case reached the Supreme Court of North Carolina.[91]

Like Mole's claim, Tully's claim was initially dismissed by the trial court but accepted by the North Carolina Court of Appeals, which held that, under the North Carolina Constitution, Tully had a right to a "non-arbitrary and non-capricious promotional process."[92] Applying that standard, the North Carolina Court of Appeals held that the department's decision to violate its own promotional process policy was arbitrary and capricious, and thus that Tully had stated a claim under the North Carolina Constitution.[93]

The Supreme Court of North Carolina affirmed. In doing so, the court established a standard for future claims brought by public employees under the "fruits of their own labor" clause:

> [A] public employee must show that no other state law remedy is available and plead facts establishing three elements: (1) a clear, established rule or policy existed regarding the employment promotional process that furthered a legitimate governmental interest; (2) the employer violated that policy; and (3) the plaintiff was injured as a result of that violation.[94]

Mole' brought his "fruits of their own labor" claim under this standard from *Tully*, with one alteration: instead of arguing that the violated policy concerned a *promotional* process, Mole' argued that the violated policy concerned a *disciplinary* process.

The North Carolina Court of Appeals recognized this tension, writing that, although a "strict reading of *Tully* would foreclose [Mole's] claim," the "logic employed in [*Tully*] applies with equal force to the disciplinary action taken against Sergeant Mole'."[95] At root, the same kind of conduct applied in

88. *Mole'*, 279 N.C. App. at 587, 866 S.E.2d at 778 ("His exam answers were correct based on the current state of the law, but he failed the exam because the answer key was outdated." (citing *Tully*, 370 N.C. at 528–29, 810 S.E.2d at 211)).

89. *Id.*

90. *Tully*, 370 N.C. at 528–30, 810 S.E.2d at 211.

91. *Id.* at 530–31, 810 S.E.2d at 212.

92. *Id.* at 531, 810 S.E.2d at 212.

93. *Id.*

94. *Id.* at 537, 810 S.E.2d at 216.

95. Mole' v. City of Durham, 279 N.C. App. 583, 588, 866 S.E.2d 773, 788 (2021), *aff'd*, *ordered not precedential*, 384 N.C. 78, 884 S.E.2d 711 (2023) (per curiam).

both cases: unreasonable government action that affected a public employee's employment status. As a result, the City of Durham's personnel policy requiring three days' notice before a disciplinary hearing, and the city's violation of that policy, satisfied the first two *Tully* factors.[96] The North Carolina Court of Appeals found that Mole' also satisfied the third factor insofar as he pled that had he been given the additional required time before his hearing, he would have been able to better prepare his case and thereby protect his employment status.[97] The decision avoided commenting on Mole's employment status, instead holding narrowly that the City of Durham was required, under the "fruits of their own labor" clause, to follow its own disciplinary policies but had failed to do so.[98]

By expressly extending the Supreme Court of North Carolina's holding in *Tully*, the North Carolina Court of Appeals bolstered the rights of North Carolina workers. Effectively, the North Carolina Court of Appeals held that the government must adhere to *all* of its employment policies—regardless of whether the policies dealt with promotion, discipline, or any other subcategory. The rule adopted from *Tully* and extended by *Mole'* was that government actors cannot arbitrarily or capriciously disregard any of their clearly established employment policies. In theory, this extension expanded worker protections without destabilizing the law by drawing a common-sense implication from prior precedent: because hiring and firing are of a piece, the same protections should apply in both contexts.

But the Supreme Court of North Carolina's decision to unpublish the Court of Appeals opinion muddied those waters. By undermining *Mole'*s precedential value, the precedent reverts to *Tully*. Yet this reversion is not neutral. Future litigants are left to wonder whether the court's refusal to issue a ruling on *Mole'* indicates a negative view of the North Carolina Court of Appeals' decision to extend *Tully*. Or, by contrast, if the court's willingness to allow *Mole'*s claim to continue in the lower courts—by virtue of allowing the judgment to stand—indicates a willingness by the court to entertain extensions of *Tully* to other employment contexts. In either case, however, the decision likely leaves future litigants hesitant to raise comparable "fruits of their own labor" claims under *Tully*, since doing so may prove to be a waste of time and resources in the event the court decides not to abide by its own decision to review a case.[99] Mole's decision to appeal presents a case in point: had he not

96. *Id.* at 591, 866 S.E.2d at 780.

97. *Id.*

98. *Id.* at 592, 866 S.E.2d at 781.

99. In fact, courts have already looked to *Mole'* as an interpretive lens for *Tully* and concluded that *Tully* applies, at most, to promotional policies and no other employment contexts. *See, e.g.*, Soto v. Town of Rolesville, No. 5:23-CV-446-D, 2024 WL 1546918, at *4 n.4 (E.D.N.C. Apr. 9, 2024)

appealed the lower court's unfavorable rulings, the Supreme Court of North Carolina would not have had the opportunity to effectively undermine the favorable ruling he did receive.

Additionally, because no explanation accompanies the decision to unpublish, *Mole'* future litigants have no tea leaves to read about where the North Carolina Court of Appeals went wrong and what the Supreme Court of North Carolina might hold next. Assuming that promoting and disciplining are truly of a piece, future litigants may reasonably wonder whether *Tully* itself will remain good law for long. After all, the *Mole'* and *Tully* courts represent significantly different political compositions.[100] If the Supreme Court of North Carolina is willing to unpublish North Carolina Court of Appeals opinions summarily, future litigants may wonder how much deference the court will give to its own opinions. And the court may have already answered that question when—just one month after *Mole'*—it reversed a series of its own decisions regarding redistricting and voting.[101]

The knock-on effects of the court's *Mole'* decision are already beginning to reveal themselves. In August 2024, the Supreme Court of North Carolina decided another "fruits of their own labor" claim in *Kinsley v. Ace Speedway Racing, Ltd.*[102] There, unlike *Mole'*, the court ruled in favor of the plaintiff and found that the plaintiff had adequately stated a claim for a "fruits of their own labor" violation.[103] But *Ace Speedway* did not clarify the mess made by *Mole'*, which specifically concerned the rights of public employees subject to employment policies established by their governmental employers. *Ace Speedway* concerned a different kind of plaintiff—a private business rather than a public employee.[104] And it arose from significantly different circumstances—a private business owner's refusal to comply with executive orders during the COVID-19 pandemic.[105]

Justice Dietz, writing for the court in *Ace Speedway*, acknowledged that the framers of North Carolina's constitution, in adding the "fruits of their own labor" clause, "added something new"—an "inalienable right" not articulated in

(rejecting a "fruits of labor" claim based on a "discretionary pay policy" because that policy was not "promotional" and because the court could not rely on "the analysis of the North Carolina Court of Appeals in *Mole'*").

100. Harper v. Hall (*Harper III*), 384 N.C. 292, 398, 886 S.E.2d 393, 461 (2023) (Earls, J., dissenting) (noting the change in political composition in the Supreme Court of North Carolina); *see also supra* note 53 and accompanying text.

101. *See generally Harper III*, 384 N.C. 292, 886 S.E.2d 393 (redistricting); Holmes v. Moore, 384 N.C. 426, 886 S.E.2d 120 (2023) (voter identification); Cmty. Success Initiative v. Moore, 384 N.C. 194, 886 S.E.2d 16 (2023) (felon enfranchisement).

102. Kinsley v. Ace Speedway Racing, Ltd., 386 N.C. 418, 423–429, 904 S.E.2d 720, 726–29 (2024).

103. *See id.* at 426–29, 904 S.E.2d at 728–29.

104. *Id.* at 418–23, 904 S.E.2d at 723–25.

105. *Id.*

the United States Constitution or the Declaration of Independence.[106] In doing so, Justice Dietz reprised a conclusion from an article he wrote about the potential for North Carolina's constitution to serve as a "font of constitutional experimentation."[107] There, Justice Dietz lamented that the "fruits of their own labor" clause had been weakened and underutilized, despite the framers' intent for it to be one of several "powerful protections against specific state action that the framers viewed as repugnant."[108] He argued that the court had "never explained" its rationale for weakening the clause's effect and had never "applied any theory of constitutional interpretation to its distinctive text," leaving the clause in "redundancy and obscurity."[109] Instead of treating the clause as distinctive, it was "lumped . . . together with due process," subjecting the clause to a form of "lockstepping" that Justice Dietz argued against at length, insistent that the framers wanted the clause to "mean *something*."[110]

Ace Speedway offers a first glimpse into what Justice Dietz thinks the clause might mean. There, Justice Dietz analyzed the "fruits of their own labor" claim under the two-part inquiry the Supreme Court of North Carolina established in *Poor Richards, Inc. v. Stone*.[111] That inquiry asks whether a challenged state action served a "proper governmental purpose," and whether "the means chosen to effect that purpose [are] reasonable."[112] But Justice Dietz's favorable application of that test for the plaintiffs in *Ace Speedway* is instructive, particularly in contrast with his position in *Mole'*. In *Ace Speedway*, Justice Dietz readily found that the "fruits of their own labor" clause protects private business interests from government regulation, but in *Mole'*, Justice Dietz disregarded the possibility that the clause likewise protects employees from their employer's arbitrary and capricious employment decisions.

This result corroborates suspicion that the *Mole'* decision indicates that the current court has a negative view of *Tully*. Although *Tully* was the Supreme Court of North Carolina's most recent "fruits of their own labor" opinion, and although it sets out its own test for claims falling under that clause, Justice Dietz did not cite to *Tully* one time across the entirety of his opinion in *Ace Speedway*.[113] He relied on "fruits of their own labor" cases from 1949, 1957, and

106. *Id.* at 423–26, 904 S.E.2d at 726–27.

107. Richard Dietz, *Factories of Generic Constitutionalism*, 14 ELON L.J. 1, 4 (2022).

108. *Id.* at 3.

109. *Id.* at 24.

110. *Id.* at 24, 35.

111. *Ace Speedway*, 386 N.C. at 425–28, 904 S.E.2d at 727–28 (citing Poor Richards, Inc. v. Stone, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988)).

112. *Id.*

113. *See id.* at 418–30, 904 S.E.2d at 723–30.

1988, but completely disregarded the court's 2018 decision in *Tully*.[114] That omission, and the *Ace Speedway* decision generally, suggests that Justice Dietz has a narrow view of what the "fruits of their own labor" clause means: the clause, which expressly establishes that "all persons" have a right to "the fruits of their own labor,"[115] protects private businesses even when they refuse to comply with state health mandates, but it may not protect public employees even when their employers violate their own employment policies.[116] This may be "constitutional experimentation" of the form Justice Dietz envisioned, and it may provide "broader rights than those provided through the federal constitution."[117] But in providing those rights to private businesses and not to the average worker, this experimentation is less consistent, less predictable, and less protective than North Carolinians otherwise might have hoped.

Whether the court revisits *Tully* will determine the extent to which North Carolinians can reasonably rely on constitutional protections of the right to work. Prior to *Tully*, the court had little to say about this right.[118] *Mole'* gave the court an opportunity to more thoroughly develop an account of those worker protections, but the court refused to do so. Instead, in *Mole'*, Justice Dietz took the opposite approach, allowing the "fruits of their own labor" clause to mean *less* than it had before by stripping the lower court's opinion of its otherwise binding precedential value. In theory, Justice Dietz has acknowledged the clause's "distinctive text" and argued that it represented the "framers' view" that "the right to work and the right to own what that labor produces is a natural right as important as life and liberty."[119] But in practice, he has undercut the attempt by the North Carolina Court of Appeals to develop that right for public employees in *Mole'* and then narrowly applied the "fruits of their own labor"

114. *See id.* (first citing first citing State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949); then citing *Poor Richard's, Inc.*, 322 N.C. 61, 366 S.E.2d 697; and then citing Roller v. Allen, 245 N.C. 516, 96 S.E.2d 851 (1957)).

115. N.C. CONST. art. I, § 1.

116. *See Ace Speedway*, 366 N.C. at 423–28, 904 S.E.2d at 726–28. Justice Dietz's opinion emphasized two points: first, that the court was required to treat Ace Speedway's allegations as true, and second, that Ace Speedway alleged that it had been singled out for enforcement because it had spoken out against the executive orders. *Id.* at 425–28, 904 S.E.2d at 727–28. And from those two points he drew the critical implication—namely, that the challenged state action did not, under the facts as alleged, serve a proper governmental purpose. *Id.* 426–28, at 904 S.E.2d at 728. But that result underscores the extent to which private businesses receive greater protections from the "fruits of their own labor" clause than do public employees. Unlike the allegations in *Ace Speedway*, the facts in *Mol*e' had already been determined—the city *did* violate its own disciplinary procedure. But the court turned Mole's claim away, and it allowed Ace Speedway's claim to proceed. The court readily recognized protections for the private business that it refused to grant a public employee.

117. Dietz, *supra* note 107, at 4.

118. *See* James W. Whalen, Recent Development, Tully v. City of Wilmington*: A Fundamental Right to Be Treated Reasonably at Work*, 98 N.C. L. REV. F. 1575, 1577–79 (2020) (providing a brief history of the fruits of their own labor clause).

119. Dietz, *supra* note 107, at 21, 24.

clause's protections to private businesses in *Ace Speedway*. North Carolinians can only be uncertain as to what he and the court will decide next.[120] The scope of North Carolina constitutional law and the protections afforded to North Carolina's public employees hang in the balance.

CONCLUSION

When Sergeant Mole' successfully negotiated Julius Smoot's surrender, he employed a creative solution that followed the law and protected Smoot. But the Durham police department changed its mind in the shadows. First, it fired Mole', disregarding its own personnel policies along the way. Then, it introduced a new negotiation policy to justify the decision it had already made. But the damage to Mole' was already done.

When the Supreme Court of North Carolina heard Mole's case, they engaged in a similar sleight of hand. First, after deciding to hear Mole's case, the court reversed its own decision and unpublished the underlying North Carolina Court of Appeals opinion, disregarding its own practices along the way. Now, North Carolina citizens must grapple with the damage done: unpredictable and unclear law, and uncertain protections for public employees. In *Mole'*s two quick sentences, the Supreme Court of North Carolina spoiled the "fruits of their own labor" clause for North Carolina workers.

DREW ALEXANDER**

120. The Supreme Court of North Carolina heard argument on two more "fruits of their own labor" cases in October 2024: *Howell v. Cooper*, __ N.C. __, __, 900 S.E.2d 928, 928 (2024) (mem.), and *N.C. Bar & Tavern Ass'n v. Cooper*, __ N.C. __, __, 901 S.E.2d 232, 232 (2024) (mem.). Both cases are analogous to *Ace Speedway*—they arise from private businesses refusing to comply with Governor Cooper's COVID-era mandates, and in both, the North Carolina Court of Appeals held that the private business plaintiff had a viable "fruits of their own labor" claim. *See* Howell v. Cooper, 290 N.C. App. 287, 289, 892 S.E.2d 445, 448 (2023), *review allowed*, __ N.C. App. at __, 900 S.E.2d at 928; N.C. Bar & Tavern Ass'n v. Cooper, __ N.C. App. __, __, 901 S.E.2d 355, 360 (2024), *review allowed*, __ N.C. App. at __, 901 S.E.2d at 232. The decisions in these cases will shed more light on the future protections afforded, or not, by the "fruits of their own labor" clause.

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