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## Abdin v. CCC-Boone, LLC: Is Your Flood Complex Or Simple? A better Formula is Needed for Future Plaintiffs as 'Historic' Flooding Becomes more Common

Nicholas Patten

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**ABDIN V. CCC-BOONE, LLC  
IS YOUR FLOOD COMPLEX OR SIMPLE? A BETTER  
FORMULA IS NEEDED FOR FUTURE PLAINTIFFS AS  
'HISTORIC' FLOODING BECOMES MORE COMMON**

NICHOLAS PATTEN<sup>1</sup>

I. INTRODUCTION

Despite what one might conclude following a review of this country's popular media landscape as it relates to climate change, the science has long been settled. Climate change is heating the Earth and its effects are legion.<sup>2</sup> Of notable concern to North Carolinians are the effects of climate change on precipitation amounts and the increasing frequency of weather events previously deemed "historic."<sup>3</sup>

These complications are likely to find themselves in the courtroom, as they did recently in *Abdin v. CCC-Boone, LLC*. In that case, the North Carolina Court of Appeals held that a landowner bringing an action against a neighboring property for its negligent handling of a construction project was required to present expert testimony in order to create a genuine issue of material fact as it relates to causation.<sup>4</sup> In its analysis, the court noted that the existence of multiple factors, such as "corresponding rainfall events" and "evidence of flooding prior to the construction" meant that the flooding was complex in nature, thus plaintiffs were required to present expert testimony to show that the defendants' actions proximately caused the flooding.<sup>5</sup> These

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1. Mr. Nicholas Patten is a second-year law student at North Carolina Central School of Law, serves as the Communications Editor of the NCCU Environmental Law Review (2018-2019), and is the winner of the 2019 NCCU Environmental Law Review Case Note Competition.

2. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Special Report on Global Warming of 1.5 °C* (2018), <https://www.ipcc.ch/sr15/> (last visited Sept. 12, 2019).

3. For instance, 2018 saw statewide precipitation records broken. North Carolina experienced two tropical storm systems, Hurricane Florence and Tropical Storm Michael, within a month. Models project a 45-87 percent increase in the frequency of Category 4 and 5 hurricanes for the Continental United States in the Atlantic Basin. Corey Davis, *A Drenched December Caps a Record Wet Year*, NORTH CAROLINA CLIMATE OFFICE (Jan. 3, 2019), <https://climate.ncsu.edu/climateblog?id=277>; see also CENTER FOR CLIMATE AND ENERGY SOLUTIONS, *Hurricanes and Climate Change*, <https://www.c2es.org/content/hurricanes-and-climate-change/> (last visited Mar. 23, 2019).

4. *Abdin v. CCC-Boone, LLC*, No. COA16-17, 2017 WL 491926, at \*1-4 (N.C. Ct. App. Feb. 7, 2017) (unpublished).

5. *Id.* at \*3.

complex cases, the court reasoned, are distinguished from simple flooding cases where layperson testimony is sufficient to comment on causation. For examples of “simple flooding,” the court cited cases involving adjacent properties and the closure of a drainage ditch, as well as adjacent tracts wherein one property was situated downhill from another, as proper situations for layperson testimony.<sup>6</sup>

Left unanswered by the court is precisely which factors were dispositive in its analysis. Certainly, all rainfall events and floods are a culmination of multiple factors. Curiously missing in the court’s analysis were the undisputed facts that the defendant adjacent landowner’s construction project was found twice to be out of compliance with North Carolina’s Sedimentation Act by the local county’s planning department. As climate change proceeds to complicate environmental matters further, factors such as prior flooding and corresponding rainfall events will become more common.<sup>7</sup> Does this mean that expert testimony will be required to show proximate cause in cases where previously layperson testimony was sufficient? Moreover, given that proximate cause is ordinarily a question for the jury, are such factual considerations of credibility and circumstance questions appropriate for the court to use when granting summary judgement?<sup>8</sup> The court’s approach in *Abdin* fails to properly address these questions and serves to chase unsophisticated plaintiffs trying to seek compensation for their neighbor’s wrongdoing out of court.

In the following section, the note provides the reader with a thorough discussion of *Abdin*, including a full explanation of the Court of Appeal’s analysis. Part III investigates the legal framework surrounding the court’s decision as well as the historical trajectory of the law preceding the case. Part IV discusses the durability of the court’s reasoning and where it falls in line within the current legal landscape. Part V comments on the court’s holding as well as implications for future plaintiffs seeking compensation for environmental harms.

## II. THE CASE

*Abdin* involved two landowners on adjacent properties.<sup>9</sup> The plaintiffs were Bassam and Ramsey Abdin, owners of two adjacent tracts located in

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6. *Id.*

7. *Hurricanes and Climate Change*, *supra* note 2.

8. “It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not. But that is rarely the case . . . [h]ence, ‘what is the proximate cause of an injury is ordinarily a question for the jury.’” *Conley v. Pearce-Young-Angel Co.*, 224 N.C. 211, 214, 29 S.E.2d 740, 742 (1944) (citation omitted).

9. *Abdin*, 2017 WL 491926, at \*1.

Boone, North Carolina. The Abdins used the properties for their residence as well as a used car and watercraft dealership. A small creek ran through the two properties by way of an open channel and a series of pipes.<sup>10</sup> Other water sources flowed onto the tracts, including a designated wetlands area, a North Carolina Department of Transportation storm-water box, and run-off from an adjacent shopping center.<sup>11</sup> A highway ran along the north side of the properties; on the south side sat an abutting steeply-sloping mountain.<sup>12</sup>

Defendant CCC-Boone acquired several tracts of land, including sections of the steeply-sloping mountain running along the properties in 2012. Later that year, CCC-Boone started to develop the property into a student housing complex, named The Cottages of Boone.<sup>13</sup> The construction required permits from the Watauga County Planning Department. The department issued two separate Sedimentation Inspection reports in February and March of 2013, each finding that the construction was not in compliance with the Sedimentation Act.<sup>14</sup> The purpose of the Sedimentation Act is to permit developments to conduct construction operations with the least detrimental effects from pollution by sedimentation.<sup>15</sup>

The litigation focused on five floods that occurred on the Abdins' properties between January and July of 2013.<sup>16</sup> The Abdins commenced the lawsuit by filing a complaint against CCC-Boone ("Defendants"), claiming violations of the Sedimentation Act and asserting claims for trespass to real property, private nuisance, unfair and deceptive trade practices, and in the alternative, negligence.<sup>17</sup> Defendants successfully moved to dismiss the unfair and deceptive trade practices claim. Later, they filed a motion for summary judgement on the remaining Sedimentation Act claims. In support of their motions, defendants brought affidavits from two expert witnesses, an environmental management consultant and an engineer; in opposing the motion, the Abdins did not present expert witnesses. Instead, they produced layperson testimony based on their own observations and conversations with a manager who worked on CCC-Boone's construction project, as well as documents gathered from CCC-Boone through discovery.<sup>18</sup> The trial court granted defendant's motion for summary judgement and the Abdins appealed.<sup>19</sup>

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at \*2.

14. *Id.*

15. N.C. GEN. STAT. § 113A-51.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

The sole issue for the Court of Appeals was whether the trial court erred in granting defendant's motion for summary judgement because they could not raise an issue of material fact without presenting expert testimony with regard to proximate cause.<sup>20</sup>

In its analysis, the court first noted that violations of the Sedimentation Act must be shown to be the proximate cause of the plaintiff's injury. The court recognized that there are many situations in which a layperson or "person of average intelligence" can testify as to the cause of an injury. However, when the subject matter is "[so] far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence . . . ."<sup>21</sup>

Next, the court investigated its prior holdings in similar circumstances, beginning with a discussion of *Davis v. City of Mebane*.<sup>22</sup> In that case, which involved plaintiffs who owned property "downstream from a dam and reservoir, which they blamed for repeated flooding of the plaintiff's properties," the court highlighted that expert testimony was needed to establish proximate cause because of the complexity of the circumstances.<sup>23</sup>

Then, the court contrasted this situation with the facts of two cases: *BNT Co. v. Baker Precythe Development Co.* and *Banks v. Dunn*.<sup>24</sup> Both cases held that layperson testimony was appropriate for establishing proximate cause as it relates to flooding when the damage was caused by the "closing of a ditch" or when the case does not involve

a reservoir, dam, or other large scale municipal project; nor does it involve the interplay of water currents upstream and downstream of [the] plaintiff's property; the calculation of water flow rates; consideration of rainfall rates; determination of the boundary of the 100 year flood plain; or any other complex calculation.<sup>25</sup>

Finally, the court held that the Abdins' flooding was more consistent with *Davis* than *BNT*. With regard to factors, the court provided:

Much like *Davis*, the factors related to causation in this case included corresponding rainfall events, a designated wetlands area, water flow patterns through open channels and corrugated metal pipes, sedimentation deposits, and runoff from various sources including a NC DOT storm-water box that directed water from an adjacent highway onto the Properties. Because of these multiple factors as well as evidence of flooding on the Properties prior

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20. *Id.* at \*3

21. *Id.* at \*3 (citing *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965)).

22. *Davis v. City of Mebane*, 132 N.C. App. 500, 504-05, 512 S.E.2d 450, 453 (1999).

23. *Abdin*, 2017 WL 491926 at \*3.

24. *Id.*

25. *Id.* at \*4.

to the construction of the Cottages, the trial court did not err in concluding that Plaintiffs could not raise a genuine issue of material fact regarding proximate cause without introducing expert testimony.<sup>26</sup>

Accordingly, the court held that because the Abdins had failed to raise a genuine issue of material fact with regard to causation, the trial court did not err in granting summary judgment for the defendants.<sup>27</sup> Upon petition by the Abdins, the North Carolina Supreme Court denied review.<sup>28</sup>

### III. BACKGROUND

The sufficiency of layperson testimony in forming a genuine issue of material fact with respect to proximate cause as it relates to “complex” and “simple” flooding originates with an evidentiary holding by the North Carolina Supreme Court in *Gilikin v. Burbage*.<sup>29</sup> In that case, Justice Sharp wrote there are several situations wherein an expert is necessary in order to comment on proximate cause:

There are many instances in [sic] which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of . . . Where, however, the subject matter . . . is “so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of . . . [the] condition.”<sup>30</sup>

Relying on the guidance of Justice Sharp in *Gilikin*, the North Carolina Court of Appeals has applied the rule with divergent results in various factual scenarios surrounding flooding and expert testimony. In *Davis v. City of Mebane*, the plaintiffs were property and business owners whose properties were situated downstream from a recently-constructed dam and reservoir; they alleged that since the dam was constructed, their properties flooded repeatedly.<sup>31</sup> Additionally, the plaintiffs argued that the trial court had erred in granting summary judgment for the defendants; specifically, they alleged that lay testimony was sufficient to create a genuine issue of material fact with regard to whether the dam was the cause of the flooding.<sup>32</sup> In support of this, the plaintiffs pointed toward layperson testimony that:

[T]he dam was the only significant change in the watershed; the absence of floods before the dam and the emergence of recurring floods after

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26. *Id.*

27. *Id.*

28. *See Abdin v. CCC-Boone, LLC*, 370 N.C. 66, 803 S.E.2d 159 (2017).

29. *Gilikin v. Burbage*, 263 N.C. 317, 321, 139 S.E.2d 753, 757 (1965).

30. *Id.* at 325, 139 S.E.2d 760.

31. *Davis*, 132 N.C. App. at 501, 512 S.E.2d at 451.

32. *Id.* at 503-4, 512 S.E.2d at 453.

it was built; that rainfalls both before and after the dam have been the same; and that rainfalls less than half the 100-year rain resulted in floods well beyond the 100-year floodplain as it existed before the dam was built.<sup>33</sup>

Furthermore, the plaintiffs cited testimony of a city employee that the defendants had the power to stop the flooding by changing or diverting the water flow.<sup>34</sup>

In finding the trial court's summary judgement proper, the court cited *Gilkin* and held: "Here, lay testimony would not be sufficient to explain changes in the watershed or in the downstream water flow. Accordingly, we find that "[c]ausation of flooding is a complex issue which must be addressed by experts."<sup>35</sup>

The Court of Appeals was confronted with the issue again in *BNT Co. v. Baker Precythe Development Co.*, with a divergent result.<sup>36</sup> In that case, the plaintiffs sought monetary damages and injunctive relief against a neighboring developer, alleging they had created a private nuisance by filling in a drainage ditch.<sup>37</sup> The defendant had purchased a tract adjacent to the plaintiff's property for development and a drainage ditch ran across both party's properties.<sup>38</sup> Later, defendant Baker began constructing a subdivision and closed the drainage ditch in question on its tract, located directly north of the plaintiff's property.<sup>39</sup> The plaintiffs alleged that since the closing, they had experienced "repeated flooding resulting in substantial property damage."<sup>40</sup>

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33. *Id.* at 504, 512 S.E.2d at 453.

34. *Id.*

35. *Id.* at 505, 512 S.E.2d at 453 (citing *Hendricks v. United States*, 14 Cl.Ct. 143, 149 (1987)). The Federal Claims court later disagreed with the language in *Hendricks* in the discussion of a 2015 decision: "It is true that the Court of Claims in *Hendricks* observed that '[c]ausation of flooding is a complex issue which must be addressed by experts,' but it elaborated, in the very next sentence, that 'the bulk of the lay testimony is accorded very little weight in the court's decision of the legal issues.' ... [a]s such, the Court of Claims did not endorse the concept that only experts could proffer relevant evidence of causation, instead that lay evidence is not dispositive of legal issues." *St. Bernard Par. Gov't v. United States*, 121 Fed. Cl. 687, 717 (2015), rev'd, 887 F.3d 1354 (Fed. Cir. 2018).

36. *BNT Co. v. Baker Precythe Dev. Co.*, 151 N.C.App. 52, 564 S.E.2d 891 (2002).

37. *Id.* at 54, 564 S.E.2d 893-4.

38. *Id.*

39. *Id.* at 55, 564 S.E.2d 894.

40. In support of these allegations, layperson testimony of plaintiff landowner Harold Roseman was presented: "Harold Roseman testified that he never experienced flooding on his tract of land prior to the closing of the ditch. After defendant closed the ditch, Roseman stated that his property flooded 'every time it rains.' Roseman testified that he incurred damages to a mobile home, dogwood trees, azaleas and other plants. He also lost fish from his fish pond. Bill Saffo, a one-third interest partner in plaintiff BNT Company, testified that the partnership rented houses on its lots to plaintiffs Marc Gilson and the Kapachs. Saffo testified that the lots did not flood following Hurricane Bertha in July 1996, nor did they flood following Hurricane Fran in September 1996. Following the closing of the ditch, however, the lots and homes began experiencing flooding 'on numerous occasions.' Saffo stated that he had not been able to rent the houses since September 1998 because they 'continuously flood.' Saffo stated that a general contractor estimated repairs totaling \$35,000 to the home previously occupied by Gilson and \$14,000 for the

Defendant Baker argued on appeal that the trial court erred in denying its motions for directed verdict and pushed for a judgement notwithstanding the verdict regarding causation; specifically, Baker argued that it was necessary for the plaintiffs to present expert testimony in order to establish that the defendant's actions were the cause of the flooding on the plaintiffs' property.<sup>41</sup> In support of their argument, Baker directed the court's attention to the previous holdings in *Gilikin* and *Davis*.<sup>42</sup>

In rejecting the defendant's argument, Judge Martin, writing for the court, distinguished the "unusual circumstances" in *Davis* from the flooding in *BNT*.<sup>43</sup> He pointed out that the testimony on causation presented was similar to that accepted by the Supreme Court of North Carolina in *Cogdill v. North Carolina State Highway Commission*, and highlighted the testimony of plaintiff Harold Roseman.<sup>44</sup> Roseman had lived on the property for decades and had never experienced flooding on his property prior to the closing of the ditch, after which it flooded every time it rained.<sup>45</sup> Furthermore, Judge Martin noted testimony of a fifty percent shareholder in the defendant company, who testified that when he filled in the ditch, he realized that he would be stopping water that would likely flood the plaintiff's ditches.<sup>46</sup> In light of this, the court held "that the plaintiffs had presented sufficient testimony to support the jury's verdict" and accordingly overruled the defendant's assignments of error.<sup>47</sup>

In its most recent case about this issue prior to *Abdin*, the Court of Appeals was once again confronted with the question of the sufficiency of layperson testimony as it relates to flooding cases in *Smith v. Blythe Development Co.*<sup>48</sup> In *Smith*, the defendant contracted with the North Carolina Department of Transportation ("NCDOT") to "widen, resurface and expand" the shoulder of a road that ran adjacent to plaintiffs' residence. After the project was completed, a heavy rainstorm flooded plaintiffs' basement.<sup>49</sup> The plaintiffs alleged that the negligent blocking and removal of a drainage ditch in front of their property was the cause of the flooding.<sup>50</sup>

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home rented by the Kapachs. In addition, at the time of trial BNT had lost two years' worth of rental income." *Id.*

41. *Id.* at 56-57, 564 S.E.2d 895.

42. *Id.* at 57, 564 S.E.2d 895.

43. *Id.*

44. *Id.* at 57-58, 564 S.E.2d 895-6.

45. *Id.*

46. *Id.* at 58, 564 S.E.2d 896.

47. *Id.*

48. *Smith v. Blythe Dev. Co.*, 192 N.C. App. 219, 665 S.E.2d 154, (2008), *aff'd*, 363 N.C. 119, 678 S.E.2d 657 (2009).

49. *Id.* at 220, 665 S.E.2d at 154.

50. *Id.* at 220-1, 665 S.E.2d at 154.

The trial court granted summary judgement in favor of the defendants “on the basis that an expert witness is required to prove negligence.”<sup>51</sup> In an opinion authored by Judge Tyson, the Court of Appeals reversed, finding the case to be similar to the factual scenario in *BNT*. Judge Tyson commented on the case-by-case nature of its inquiry: “This Court has addressed the issue of whether expert testimony is required to establish the element of causation in flooding cases with differing results based upon the complexity of the facts presented.”<sup>52</sup> In its analysis, the court specifically pointed to four indicators from the testimony in *BNT*:

- (1) one of the plaintiffs had owned his property since 1962 and had never experienced any flooding prior to the defendant closing the ditch in 1998;
- (2) once the ditch was closed the plaintiffs’ land flooded “every time it rained[;]”
- (3) BNT properties did not flood during the rainstorms that accompanied Hurricanes Bertha and Fran in 1996, but following the closing of the ditch in June 1998, those properties flooded on several occasions; and
- (4) BNT was unable to rent the houses on its lots due to repeated flooding.<sup>53</sup>

In concluding that the plaintiffs had established genuine issues of material fact with regard to flooding, Judge Tyson noted that the plaintiffs had lived on the property for twenty-two years and had never experienced flooding prior to the defendant’s roadwork.<sup>54</sup> Furthermore, he noted that as part of the construction, the defendant admitted they had moved dirt to fill in gaps between the old road and the new.<sup>55</sup> Additionally, the plaintiffs’ allegations that their drainage ditch had been “filled in” causing runoff into their yard was “substantiated by the defendant’s own employees.” Moreover, after the ditch was cleared, the flooding issue had not recurred.<sup>56</sup>

Judge Jackson engaged in a factual discussion in her dissent, pointing out that because the defendants had submitted their own expert testimony in the form of signed affidavits indicating that the plaintiffs had not shown causation, the plaintiffs were required to rebut the defendant’s expert opinions. She wrote that once this showing had been made, “[I]t was incumbent upon plaintiffs to ‘produce a forecast of evidence demonstrating specific facts, as opposed to allegations,’ rebutting defendant’s evidence.”<sup>57</sup>

The Court of Appeals has also commented more generally on the appropriateness of summary judgement in flooding cases when differing forecasts of evidence are presented. In *Bjornsson v. Mize*, plaintiffs sought to prevent

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51. *Id.* at 222, 665 S.E.2d at 155.

52. *Id.*

53. *Id.* at 223, 665 S.E.2d at 156.

54. *Id.* at 224, 665 S.E.2d at 156.

55. *Id.*

56. *Id.* at 224, 665 S.E.2d at 156-7.

57. *Id.* at 227, 665 S.E.2d at 158.

additional development of the defendants' adjacent properties.<sup>58</sup> In their complaint, the plaintiffs alleged that the development of the neighboring land was causing their land to flood; both parties submitted opposing affidavits on the issue of causation and the trial court granted defendants' motion for summary judgement.<sup>59</sup> In an opinion written by Judge Arnold, the Court of Appeals found summary judgement to be improper; Judge Arnold wrote that the dueling affidavits created a conflict in the forecasts of evidence offered by the parties: "The question of causation is a question of fact; therefore, the trial court erred in granting summary judgment in favor of the Mize defendants."<sup>60</sup>

#### IV. ANALYSIS

The court's rationale in *Abdin* was straightforward and boiled down to a comparison of precedential decisions on the issue of whether expert testimony is necessary to create a genuine issue of material fact with respect to flooding cases. Writing for the court, Judge Inman pointed out that layperson testimony is often appropriate, however, where "the subject matter . . . is so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence"<sup>61</sup>

Next, Judge Inman outlined the court's contrasting precedent in *Davis* and *BNT*. In *Davis*, the court provided that lay testimony was not appropriate to explain changes in downstream water flow or changes in watershed, and that causation as it relates to flooding must be addressed by experts.<sup>62</sup> Further, Judge Inman reiterated some of the facts and circumstances of *Davis*: "In *Davis*, the plaintiffs owned homes and businesses downstream from a dam and reservoir which they blamed for repeated flooding of the plaintiffs' properties."<sup>63</sup> Finally, she noted the *Davis* court held that due to the complex nature of the "events surrounding the flooding," expert testimony was required on the issue of proximate cause.<sup>64</sup>

Inman moved on to outline cases of simple flooding, where the court has found that lay testimony is sufficient in establishing proximate cause.<sup>65</sup> Specifically, she points to the *BNT* and *Banks* decisions, which reasoned that a

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58. *Bjornsson v. Mize*, 75 N.C.App. 289, 330 S.E.2d 520 (1985).

59. *Id.* at 290-2, 330 S.E.2d at 521-2.

60. *Id.* at 293, 330 S.E.2d at 523.

61. *Abdin*, 2017 WL 491926 at \*3.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at \*4.

layperson could form an intelligent opinion about causation when the flooding is due to the closing of a ditch, as well as where the flooding

... does not involve a reservoir, a dam, or other large scale municipal water project; nor does it involve the interplay of water currents upstream and downstream of [the] plaintiff's property; the calculation of water flow rates; consideration of rainfall rates; determination of the boundary of the 100 year flood plain; or any other complex calculation.<sup>66</sup>

In her analysis, Judge Inman agreed with the defendants in finding that the facts of *Abdin* ran much closer to those presented in *Davis*. She wrote that both cases dealt with similar factors related to causation, including: "corresponding rainfall events, a designated wetlands area, water flow patterns through open channels and corrugated metal pipes, sedimentation deposits, and runoff from various sources."<sup>67</sup> Additionally, she pointed out evidence of flooding on the plaintiff's properties prior to the defendant's construction project. Such factors, she reasoned, supported the holding that the trial court did not err in concluding that expert testimony was necessary in order to establish a genuine issue of material fact.<sup>68</sup>

The reasoning employed by the Court of Appeals in *Abdin* provides little guidance for future litigants and fails to form a coherent, employable rule regarding the court's divergent precedent as it relates to expert testimony in flooding cases. For instance, like the plaintiffs in *Banks* and *BNT*, the *Abdin* plaintiffs' properties were adjacent to the defendants' construction project.<sup>69</sup> Furthermore, the court in *BNT* emphasized the importance of layperson testimony that described the historical rate of flooding prior to the defendants' development next door.<sup>70</sup> The court also found testimony from an independent engineer, as well as a shareholder of the defendant company to be important.<sup>71</sup> Similarly, the plaintiffs in *Abdin* owned the subject property for at least ten years prior to the litigation and presented their own layperson testimony in two forms: first, affidavits based on their personal observations of the flooding, and second, testimony as to conversations with a superintendent that had worked on the defendants' construction project.<sup>72</sup> Additionally, Judge Inman is silent in her final analysis on some of the key distinguishing features that the court emphasized in *Banks* when comparing it with *Davis*, namely that the case:

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66. *Id.* (citing *Banks v. Dunn*, 177 N.C. App. 252, 256, 630 S.E.2d 1, 3 (2006)).

67. *Id.*

68. *Id.*

69. *Id.* at \*1.

70. *BNT Co.*, 151 N.C.App. at 57-58, 564 S.E.2d at 895-96.

71. *Id.* at 58, 564 S.E.2d at 896.

72. *Abdin*, 2017 WL 491926 at \*2.

... [did] not involve a reservoir, dam, or other large municipal water project; nor [did] it involve the interplay of water currents upstream and downstream of plaintiff's property; the calculation of water flow rates; consideration of rainfall rates; determination of the boundary of the 100-year flood plain; or any other complex calculation.<sup>73</sup>

As the facts provided, *Abdin* did not involve any of these complex water systems, but instead concerned a creek that ran through both the plaintiff and defendants' adjacent land.<sup>74</sup> What's more, the land that the defendants were developing included a "steeply sloping mountain abutting the [plaintiffs'] [p]roperties."<sup>75</sup> Even so, Inman's analysis failed to draw attention to certain common sense inferences the court was willing to utilize in *Banks*, such as: "determination of the causal relationship between the fill dirt dumped on the hillside above the creek and the subsequent flooding in plaintiff's yard, implicates no scientific principle more complex than the truism that water flows downhill."<sup>76</sup> Accordingly, by engaging in this compare-and-contrast analysis, the court has at the very least presented an inconsistent vision as it relates to a set of factors that potential plaintiffs could reasonably rely on when determining whether or not their factual scenario is a complex or simple flooding situation. Such a situation will make things difficult when deciding whether to expend extra resources in order to retain expert testimony.

In addition to these inconsistencies, *Abdin* and its predecessors present future practical and policy concerns. The factors that the court has emphasized will only become less useful as terms such as "corresponding rainfall events" and "historic floodplains" lose their meaning due to the effects of climate change.<sup>77</sup> Moreover, the type of causation inquiry that the court finds itself engaging in with cases like *Davis*, *BNT*, and *Abdin* is ambiguous and encroaches on an issue usually reserved for the trier of fact.<sup>78</sup> As historic floodplains become less historic and rainfall events more common, plaintiffs seeking to take neighboring wrongdoers to task for failing to adhere to a reasonable standard of care will have more trouble showing that a specific flooding scenario is simple and not complex. This trajectory serves to advantage sophisticated and resourceful defendants able to afford expert witnesses. At the very least, a bright-line rule mandating expert testimony tracking the language referenced in *Davis* would signal to plaintiffs what is needed to prove

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73. *Banks v. Dunn*, 177 N.C. App. 252, 256, 630 S.E.2d 1, 3 (2006).

74. *Abdin*, 2017 WL 491926 at \*1.

75. *Id.*

76. *Banks*, 177 N.C. App. at 257, 630 S.E.2d at 4.

77. See *Hurricanes and Climate Change*, *supra* note 2.

78. See generally *Conley v. Pearce-Young-Angel Co.*, 224 N.C. 211, 29 S.E.2d 740 (1944).

their case.<sup>79</sup> A similar rule has been implemented with regard to proximate cause in cases of medical malpractice in North Carolina.<sup>80</sup> Preferably, the court should refuse such evidentiary regulations as it relates to causation, as the issue of proximate cause is based on facts and circumstances and ordinarily a question for the jury.<sup>81</sup>

It is also worth noting that the language originally used in *Davis* for the proposition that causation of flooding is a complex matter and “must be addressed by experts” was taken from a case out of the United States Claims Court and later disagreed with by the very same court:

It is true that the Court of Claims in *Hendricks* observed that “[c]ausation of flooding is a complex issue which must be addressed by experts,” but it elaborated, in the very next sentence, that “the bulk of the lay testimony is accorded very little weight in the court’s decision of the *legal* issues.” As such, the Court of Claims did not endorse the concept that only experts could proffer relevant evidence of causation, instead that lay evidence is not dispositive of legal issues.<sup>82</sup>

To date, only one other state’s jurisdiction has applied the original proposition in *Hendricks* as it relates to expert testimony in flooding cases.<sup>83</sup>

## V. CONCLUSION

As this investigation into *Abdin* and its precedent has shown, the Court of Appeal’s approach leaves the issue of the sufficiency of layperson testimony in flooding cases unclear for future plaintiffs. Such ambiguity serves to disadvantage less-resourceful plaintiffs when attempting to determine whether an expensive expert is necessary. This concern will only increase as the effects of climate change take root in North Carolina. Furthermore, victims of flood and rainfall events in this state are disproportionately poor and underserved.<sup>84</sup> The implications of this situation are clear: more plaintiffs will find themselves unable to bring their case in front of a jury because the court has determined, as a matter of law, that their lay witness is insufficient to posit

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79. As discussed earlier, in *Davis*, the court referenced the United States Claims Court case *Hendricks v. United States*, 14 Cl. Ct. 143, 149 (1987) (citation omitted).

80. “To forecast evidence of proximate causation in a medical malpractice action, expert testimony is needed.” *Cousart v. Charlotte–Mecklenburg Hos. Auth.*, 209 N.C.App. 299, 303, 704 S.E.2d 540, 543 (2011).

81. *Conley*, 224 N.C. at 214, 29 S.E.2d at 742.

82. *St. Bernard Par. Gov’t v. United States*, 121 Fed. Cl. 687, 717 (2015), rev’d, 887 F.3d 1354 (Fed. Cir. 2018). (citation omitted).

83. *Garr v. City of Ottumwa*, 846 N.W.2d 865, 872 (Iowa 2014).

84. Adam Gabbatt & Oliver Laughland, *In North Carolina, it’s the poorest who bear the brunt of flooding*, GUARDIAN (Sep. 18, 2018), <https://www.theguardian.com/world/2018/sep/17/north-carolina-florence-flooding>.

that their neighbor's negligent behavior was the cause of the flood that damaged their property. By making such determinations, the court has engaged itself in the realm of lay witness credibility and the proximate cause of a plaintiff's injury, which are ordinarily questions for a jury.<sup>85</sup> At the very least, the court should adopt a bright line approach such as the rule in *Davis*, or the requirement utilized in malpractice actions.<sup>86</sup> Preferably, the court should endorse the rationale of *BNT*, *Banks*, and *Bjornson*, and conclude simply that when "there is a conflict in the forecasts of the evidence offered by the parties" on the issue of causation, there is properly a question of fact, thus summary judgement is improper.<sup>87</sup> Such solutions would better guide plaintiffs when deciding how to conduct their cases, and provide a more consistent standard for judges in future flood damage litigation.

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85. See *Conley*, 224 N.C. at 214, 29 S.E.2d at 742.

86. See *Cousart*, 209 N.C.App. 299, 704 S.E.2d 540.

87. *Bjornsson v. Mize*, 75 N.C. App. 289, 293, 330 S.E.2d 520, 523 (1985).