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Torts; Defamation; Respondeat Superior; Ratification; Motion to Dismiss

Hendrix v. West Jefferson, ___ N.C. App. ___ (No. COA19-948, Ashe– 8/18/20)

- ***Holding*– In plaintiff's appeal from order dismissing with prejudice plaintiff's defamation claim, Court of Appeals affirms trial court's order granting defendants' motion to dismiss. Liability is not imposed on an employer when an employee engaged in some matter of his or her own or outside the legitimate scope of his or her employment.**

- ***Key Excerpt*–** Plaintiff (a Town employee from 1993-1997) appealed from an order dismissing with prejudice plaintiff's defamation claim against the Town and several other defendants (the Town Manager in his official capacity; the Mayor in his official capacity; and five Aldermen in their official capacities). The Court determined that plaintiff's complaint failed to state a claim against defendants for defamation based on Chief of Police Rose's 2016 statement either: (1) under a theory that Chief Rose was acting in the course and scope of his employment, or (2) that defendants ratified Chief Rose's statement. Accordingly, the Court held that the trial court did not err in granting defendants' motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6).

The Court stated, "First . . . as Plaintiff conceded in the trial court, his Complaint does not contain any allegation Chief Rose was acting in the course and scope of his employment when Chief Rose made the allegedly defamatory statement. *See* Matthews [v. Food Lion, LLC], 205 N.C. App. [279] at 281, 695 S.E.2d [828] at 830 [(2010)] ('Generally, employers are liable for torts committed by their employees who are acting *within the scope of their employment* under the theory of respondeat superior.' (emphasis added) (citation omitted)); *see also* Sanders [v. State Personnel Comm'n], 197 N.C. App. [314] at 319, 677 S.E.2d [182] at 186 [(2009)] (holding to withstand a motion to dismiss, the complaint 'must state sufficient allegations to satisfy the substantive elements of at least some recognized claim' (citation omitted))."

"Second, our Court has explained: 'To be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of

accomplishing the duties of his employment.' Troxler v. Charter Mandala Center, 89 N.C. App. 268, 271, 365 S.E.2d 665, 668 (1988) (citation omitted). 'If an employee departs from that purpose to accomplish a purpose of his own, the principal is not [vicariously] liable.' *Id*. (citation omitted); *see also* BDM Invest. v. Lenhil, Inc., ___ N.C. App. ___, ___, 826 S.E.2d 746, 764 (2019). . . ."

"Here, Plaintiff's allegations establish Chief Rose made the statement regarding the circumstances under which Plaintiff's employment with WJPD ended not in the context of Town or WJPD business but rather in the context of his support of a candidate for the appointment of a new County Sheriff by the County Board, on which Chief Rose served. As such, on its face, Plaintiff's Complaint shows Chief Rose's allegedly defamatory text message was not 'within the scope of his employment' because he was 'engaged in some private matter of his own [and] outside the legitimate scope of his employment[.]' BDM Invest., ___ N.C. App. at ___, 826 S.E.2d at 764 (alteration in original) (citations and quotation marks omitted). Therefore, where the purpose of Chief Rose's defamatory statement was 'to accomplish a purpose of his own, the [Defendants are] not [vicariously] liable.' Troxler, 89 N.C. App. at 271, 365 S.E.2d at 668 (citation omitted)."

"Moreover, our courts have previously held statements made by an employee regarding a plaintiff's discharge from employment after the plaintiff has been discharged are not made within the course and scope of the employment and are not attributable to the employer. Indeed, close to a century ago and relying on even earlier cases, our Supreme Court in Strickland v. Kress explained, 'owing to the facility and thoughtless way that such words are not infrequently used by employees, they should not, perhaps, be imported to the company as readily as in more deliberate circumstances; that is, they should not be so readily considered as being within the scope of the agent's employment." 183 N.C. 534, 537, 112 S.E. 30, 31 (1922). In that case, after a store manager fired the plaintiff, the plaintiff's husband asked the manager for an explanation, leading to the manager's defamatory statements, which were overheard by other employees. *Id*. at 538, 112 S.E. at 31. The Supreme Court characterized the incident: "This was clearly a conversation between the two individuals as to an event that had passed, and, as stated, could in no sense be considered as within the course and scope of [the manager's] employment, or as an utterance by authority of the company, either express or implied." *Id*. at 538, 112 S.E. at 31-32. More recently, our Court has recognized the same principle on at least two occasions [Gibson v. Mutual Life Insurance Co. of New York, 121 N.C. App. 284, 465 S.E.2d 56 (1996); Stutts v. Power Co., 47 N.C. App. 76, 266 S.E.2d 861 (1980)]."

In closing its opinion, the Court determined that there was no merit to plaintiff's argument that he should be permitted to proceed on the theory that defendants allegedly ratified Chief Rose's statement. "Ratification is 'the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.' Espinosa v. Martin, 135 N.C. App. 305, 308, 520 S.E.2d 108, 111 (1999) (citations and quotation marks omitted). Again, Plaintiff's Complaint does not expressly invoke ratification but rather appears to rest on his allegations Defendants owed him a 'fiduciary responsibility,' including the duty to investigate the truth of Chief Rose's statement and to require a correction or retraction of this statement addressing Chief Rose's opposition to Plaintiff's candidacy for County Sheriff. Plaintiff, however, offers no authority to support the existence of such a duty. Further, the earlier precedent set by Strickland, Stutts, and Gibson, *supra*, runs counter to the existence of such a

duty. *See, e.g.*, Strickland, 183 N.C. at 538, 112 S.E. at 32 (holding statement 'could in no sense be considered . . . as an utterance by authority of the company, either express or implied"). Thus, Plaintiff has not alleged any act by Chief Rose 'done or professedly done' on Defendants' account. Espinoza, 135 N.C. App. at 308, 520 S.E.2d at 111 (citations and quotation marks omitted)." The Court concluded that plaintiff's complaint was legally insufficient to allege defendants should be held liable on the basis of ratification.

- ***Synopsis***— Appeal by plaintiff from June 2019 order. Affirmed. Opinion by Judge Hampson, with Judge Stroud and Judge Dietz concurring.

Immunity; Public Official Immunity; Sufficient Evidence of Malice to Survive Motion for Summary Judgment; Appellate Procedure; Certiorari

Doe v. City of Charlotte, ___ N.C. App. ___ (No. COA19-497, Mecklenburg— 8/18/20)

- ***Holding***— **Where plaintiffs presented evidence *inter alia* that officer ignored other officers who believed there was no probable cause to charge plaintiff with a crime, and charge was subsequently dropped by State and officer was reprimanded by department, trial court erred by granting summary judgment on the ground that there was insufficient evidence of malice to overcome public official immunity.**

- ***Key Excerpt***— After an extensive discussion regarding multiple appellate rules violations and upon issuing a writ of certiorari to review the merits of plaintiffs' defective appeal, the Court reversed the trial court's entry of summary judgment and remanded for further proceedings. The basic facts are as follows: while driving her children to a birthday party, plaintiff Jane Doe became lost en route. Stopping in a parking lot, she exited her vehicle, asking someone nearby for directions. She was gone from her car somewhere between one and two minutes, according to witnesses. In the interim, Captain Smith arrived. According to plaintiff Doe's evidence, he was inexplicably angry and hostile towards her for leaving children in an unattended car. He further allegedly ignored other officers who said plaintiff Doe had done nothing wrong, and he ultimately charged her with misdemeanor child abuse. After the State dropped the charges and Captain Smith received a reprimand from the police department, plaintiff Doe and her spouse sued Smith and the City. The trial court dismissed a number of the claims based on public official immunity, finding that there was insufficient evidence that Smith acted with malice. Plaintiffs appealed.

Applying the standard applicable to public official immunity here, Strickland v. Hedrick, 194 N.C. App. 1, 10, 669 S.E.2d 61, 68 (2008), Thompson v. Town of Dallas, 142 N.C. App. 651, 655-56, 543 S.E.2d 901, 904-05 (2001), the Court determined that plaintiffs presented sufficient evidence to create a genuine issue of material fact on the issue of malice. The Court emphasized, "Importantly, Defendants do not assert that the evidence described above is insufficient to establish malice. Instead, Defendants make a series of claims that more closely resemble jury arguments than defenses of a summary judgment ruling. For example, Plaintiffs argue that they presented evidence that, during Captain Smith's encounter with Jane Doe, Smith became angry and hostile toward Doe, began yelling, and acted aggressively without any reasonable basis for doing so. Defendants challenge this argument by repeatedly contending that 'in reality' something else occurred, citing other, competing evidence. But this competing evidence only underscores that there is a genuine issue of fact here. Notably, Defendants do not argue that, as a matter of law, evidence that a law enforcement officer is

inexplicably angry, hostile, or aggressive is not a factor that could support a finding of malice. They instead argue that their own facts rebutting Plaintiffs' claims are more persuasive. That argument is not one for this Court. Lopp v. Anderson, 251 N.C. App. 161, 174–76, 795 S.E.2d 770, 779–81 (2016). If there are competing facts on a potentially determinative issue, the jury must resolve those facts. *Id.*"

"Likewise, Plaintiffs argue that they presented evidence Captain Smith's actions stemmed at least in part from personal biases about Jane Doe's race or socioeconomic status. This evidence comes largely from Captain Smith's own statements during the internal police department investigation. Again, Defendants respond by asserting that those statements were 'after the fact in the Internal Affairs' investigation' and are only relevant 'in that context' because Captain Smith was explaining why he acted more aggressively because he believed his fellow officers were 'intimidated' by Doe. But as with Defendants' previous arguments, this is not a summary judgment argument—it is a jury one. Defendants do not argue that, as a matter of law, evidence of an officer's bias or prejudice toward an accused cannot support a finding of malice. And as for whether Captain Smith's statements about Doe's race or socioeconomic status were signs of malicious intent or instead were simply observations about other officers, this is, again, a fact question for the jury."

"Finally, Plaintiffs presented evidence that Captain Smith ignored other officers who believed there was no probable cause to charge Doe with a crime. Defendants respond by asserting that Plaintiffs 'cannot point to a single case where an officer is found to have acted with malice because he chose to act on his own investigation as opposed to relying on the word of other witnesses who did not have all relevant facts. But again, this argument turns the summary judgment standard on its head by relying solely on the facts favorable to Defendants. *See id.*'"

The Court held that the trial court erred by granting summary judgment on the basis that there was insufficient evidence of malice to overcome public official immunity. "Plaintiffs' evidence is that two other officers were present and observing the scene before Captain Smith arrived—meaning those officers were the ones who had 'all relevant facts.' Plaintiffs' evidence further indicates that Captain Smith saw those officers as he arrived and waved them over, that those officers told Captain Smith that Jane Doe had not committed any crime, and that Captain Smith ignored those officers because of some personal anger and hostility toward Jane Doe. In sum, Plaintiffs presented evidence at the summary judgment stage that (1) there was no probable cause for Captain Smith to arrest Jane Doe; (2) other officers whom Captain Smith knew had more information about the underlying events informed Captain Smith that Jane Doe had done nothing wrong; (3) Captain Smith ignored the views of those other officers; (4) Captain Smith was angry, aggressive, and hostile toward Jane Doe; and (5) that Captain Smith's anger and hostility stemmed from racial or socioeconomic biases. That evidence is sufficient to create a genuine issue of material fact on the question of malice."

Reversing the trial court's entry of summary judgment on all claims challenged in the appeal and remanding for further proceedings, the Court concluded its opinion by stating, "The parties acknowledge on appeal that the lack of malice was the sole basis for entry of summary judgment on the individual-capacity claims against Captain Smith. Moreover, the parties acknowledge that the entry of summary judgment on the remaining claims challenged in this appeal stemmed from the dismissal of those individual-capacity claims."

- ***Synopsis***— Appeal by plaintiffs from January 2019 order. Reversed and remanded. Opinion by Judge Dietz, with Judge Dillon and Judge Arrowood concurring.

Nota Bene (N.B.)
Other Recent Decision of Note

Procedure; Administrative Law; Petition for Judicial Review; Appellate Procedure; Jurisdiction; Rules Violations; Dismissal; *Pro Se* Fairley v. N.C. Dep't. of Transp., ___ N.C. App. ___ (No. COA19-784, Wake— 7/21/20) (***unpublished***) (In dismissing petitioner's appeal, the Court held *inter alia* that petitioner failed to timely serve notice of appeal and that his appeal should be dismissed accordingly for lack of jurisdiction. "[T]he Superior Court's judgment was entered and served on 4 October 2017. Under Rule 3, Petitioner was required to file his Notice of Appeal on or before 3 November 2017. *See* N.C. R. App. P. 3(c)(1), (2). However, Petitioner's Notice of Appeal was not filed and served until 6 November 2017, thirty-three days after the order was served. By the plain language of Rule 3, Petitioner did not timely file his Notice of Appeal, and this Court does not have jurisdiction to hear the appeal. N.C. R. App. P. 3(c); *see* Dogwood [Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.], 362 N.C. [191] at 198, 657 S.E.2d [361] at 365 [(2008)] ('[A] jurisdictional default brings a purported appeal to an end before it ever begins.'). Accordingly, Petitioner's appeal must be dismissed." Turning to the nonjurisdictional violations of appellate procedure, the Court further held that petitioner made multiple substantial violations of the North Carolina Rules of Appellate Procedure, rendering the appeal appropriate for dismissal, given the nature and severity of petitioner's appellate rule violations. The Court observed *inter alia*, "[P]etitioner's brief inaccurately states the procedural history and fails to cite to the record on appeal in his fact section, making the appeal more difficult for this Court to review. In addition, Petitioner's brief contains no arguments in support of the issues he presented on appeal. Instead, Petitioner merely states the elements of a cause of action under Title VII. Since Petitioner presents issues 'in support of which no reason or argument is stated, [the issues presented] will be taken as abandoned.' N.C. R. App. P. 28(b)(6); *see also* N.C. R. App. P. 28(a) ('Issues not presented and discussed in a party's brief are deemed abandoned.'). Together, these violations render Petitioner's appeal impossible for this Court to adequately review. *Cf.* Pers. Earth Movers, Inc. v. Thomas, 182 N.C. App. 329, 333, 641 S.E.2d 751, 754 (2007) ('To address this issue, this Court would be required to reconstruct the case and articulate an argument for defendant.')." Determining that that the circumstances of the case did not justify invoking N.C. R. App. P. Rule 2, the Court stated, "[T]he residual power vested in our appellate courts has limits. The Supreme Court explained in Viar v. North Carolina Department of Transportation [359 N.C. 400, 610 S.E.2d 360 (2005) (*per curiam*)] that an appellate court's use of Rule 2 is limited to the issues 'raised and argued by the plaintiff.'" Viar, 359 N.C. at 402, 610 S.E.2d at 361; *see id.* ('[I]t is not the role of the appellate courts . . . to create an appeal for an appellant.'). Under Rules 28(a) and 28(b)(6), Petitioner has abandoned his issues on appeal and left nothing for this Court to review. *See* N.C. R. App. P. 28; Viar, 359 N.C. at 402, 610 S.E.2d at 361 (dismissing an appeal because the plaintiff failed to present an argument in support of a presented issue in violation of Rule 28(b)(6)). We are mindful of the difficulties a *pro se* party faces in navigating our appellate courts. However, as our Supreme Court noted in Viar, 'the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule.' *Id.* at 402, 610 S.E.2d at 361 (citation omitted)." (Appeal by petitioner from October 2017 order affirming State Human Resources Commission's Final Decision and Order issued October 2016. Dismissed. Opinion by Chief Judge McGee, with Judge Murphy and Judge Brook concurring.))