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Torts; Law Enforcement; Public Duty Doctrine; Exceptions; Dismissal

Racine v. City of Raleigh, 2022-NCCOA-324 (No. COA21-406, Wake– 5/17/22) (***unpublished***)

- ***Holding***– Placing an unreasonable hindsight-based standard of liability upon a law enforcement officer when performing public duties is exactly that which the public duty doctrine seeks to alleviate.

- ***Key Excerpt***– Plaintiff, individually and as administratrix, appealed from an order granting defendants' (City and its Police Department) motion to dismiss. The Court affirmed.

In September 2018, Geoffrey Shobel drove to a gas station shortly after noon. He got out of the vehicle to prepay for gas, then returned to his vehicle: he sat on the driver's side seat, and passed out. When he was unconscious for over 45 minutes, gas station employees called the police, and officers were dispatched. The officers were able to interact with Mr. Shobel. He initially agreed to a search of his vehicle, but subsequently changed his mind and refused. Upon Mr. Shobel presenting his driver's license, the officers discovered that his license had been revoked: they asked him to move and park his vehicle and told him not to drive. (He was not taken into custody, and the officers did not take his keys or otherwise disable the vehicle.) After the officers left, Mr. Shobel got back into the vehicle, driving away from the gas station. Just within an hour of his arrival at the gas station, his vehicle veered off the street onto the curb, striking a pedestrian on the sidewalk.

In the sole argument on appeal, plaintiff-administratrix contended that the public duty doctrine was inapplicable here. The Court disagreed. Within that argument, it was contended that an exception to the doctrine should be recognized where the affirmative actions of law enforcement allegedly place an innocent person in peril.

The Court stated, "We hold that none of the exceptions apply here and that the public duty doctrine bars Plaintiff's claims. Mr. Shobel was responsible for [decedent's] death, not the police officers who failed to take him into custody or disable his vehicle…. That the officers failed to control Mr.

Shobel did not create any future obligation to unknown parties that might or might not be threatened or harmed. Indeed, the facts of this case illustrate the necessity of the doctrine: 'placing [an] unreasonable hindsight based standard of liability upon a police officer when performing public duties [] is exactly that which the public duty doctrine seeks to alleviate.' Lassiter [v. Cohn], 168 N.C. App. [310] at 318, 607 S.E.2d [688] at 693 [(2005)]. Plaintiff has not alleged that the officers had a special relationship with or owed a special duty to Mr. Racine, as would be required for her complaint to survive Defendants' motion to dismiss."

In closing its opinion, the Court, citing Foster v. Crandall, 181 N.C. App. 152, 170-71, 638 S.E.2d 526, 538-39 (2007), stated that there was no valid claim for negligent hiring or retention against defendants, as Mr. Shobel (the tortfeasor causing decedent's death) was not an employee of defendants. "A claim for negligent supervision and training against an employer is derivative from and dependent on the existence of a viable claim against an employee, Prior v. Pruett, 143 N.C. App. 612, 622, 550 S.E.2d 166, 172-173 (2001), and there can be no derivative claim against the City of Raleigh because Plaintiff has no claim against the officers."

- ***Synopsis***— Appeal by plaintiff-administratrix from March 2021 order. Affirmed. Opinion by Judge Jackson, with Judge Dietz and Judge Murphy concurring.

Torts; Law Enforcement; Summary Judgment; Individual Capacity Claims; Malice; Genuine Issue of Material Fact; Public Official Immunity

Bartley v. City of High Point, 2022-NCSC-63 (359A20, 6/17/22)

- ***Holding***— In appeal from 2-1 decision affirming order partially denying defendant-officer's summary judgment motion, Supreme Court of North Carolina holds 4-3 that Court of Appeals properly affirmed trial court's partial denial of defendant's motion for summary judgment as to claims against him in his individual capacity, finding genuine issues of material fact as to whether defendant-officer acted with malice when arresting plaintiff, thereby overcoming the presumption of public official immunity that would otherwise bar such claims against defendant-officer.

- ***Key Excerpt***— In upholding the Court of Appeals' affirmance of the trial court's order that defendant-officer was not entitled to summary judgment based upon public official immunity, the majority initially stated, "The sole question we consider in this appeal is whether the Court of Appeals erred in affirming the trial court's denial of Defendant Officer Matt Blackman's (Officer Blackman) motion for summary judgment with respect to Plaintiff Bruce Bartley's (Mr. Bartley) claims against him in his individual capacity based upon the defense of public official immunity, concluding that genuine issues of material fact exist as to whether Officer Blackman acted with malice when he arrested Mr. Bartley for unlawfully resisting, delaying, or obstructing a public officer in discharging or attempting to discharge a public duty in violation of [G.S.] 14-223. We hold that when viewing the evidence in the light most favorable to Mr. Bartley, genuine issues of material fact do exist as to whether Officer Blackman acted with malice in the performance of his duties when he allegedly used excessive force in arresting Mr. Bartley." The majority was of the opinion that where a plaintiff comes forward with

evidence that an officer used excessive force to execute an otherwise valid arrest, such evidence may be sufficient to establish a genuine dispute of material fact concerning whether the officer acted wantonly or contrary to his duty within the meaning of the malice exception to public official immunity.

Turning to the main issue presented, the majority stated, "Mr. Bartley claims that Officer Blackman acted with malice by body slamming him against the trunk of his car and tightly handcuffing him without justification. Thus, we decide whether, viewed in the light most favorable to Mr. Bartley, the evidence raises a genuine issue of material fact concerning whether Officer Blackman acted with malice; that is, whether his actions were wanton, contrary to his duty, and intended to injure Mr. Bartley…. [T]he evidence in this case does raise an issue of material fact with respect to this question."

Viewing the facts plaintiff-Bartley proffered in the light most favorable to him, the majority concluded that there was a genuine issue of material fact as to whether the officer acted with malice in carrying out his official duties. The Court observed, "Mr. Bartley testified that Officer Blackman approached him from behind and 'body slammed' him against the trunk…. Officer Blackman acknowledged during his deposition that Mr. Bartley did not resist arrest, verbally or physically threaten him, or try to evade the arrest before he placed Mr. Bartley in handcuffs. It is also undisputed that Mr. Bartley was unarmed during the encounter. Officer Blackman's actions in these circumstances, as described by Mr. Bartley, using a body slam maneuver to subdue an unarmed, nonresistant individual who posed no threat to him is evidence of malice."

The majority further observed, "Additional evidence of malice comes from Mr. Bartley's testimony about how tightly Officer Blackman handcuffed him, Officer Blackman's refusal to loosen the handcuffs, and the red marks and bruises that Mr. Bartley sustained to his wrist as a result. Furthermore, Mr. Bartley testified that Officer Blackman stated that if Mr. Bartley had done as he was initially told, he would not be in the situation that he was in, and that Mr. Bartley remained handcuffed for at least twenty minutes in front of neighbors, which is evidence of retaliation." The majority reviewed cases, from a couple of other circuits, deemed instructive on the question of whether tight handcuffing resulting in physical injury constitutes excessive force (and therefore some evidence of malice). Noting the conflicting testimony on this issue, the majority emphasized that, "[I]t is not the version of events that is determinative on summary judgment, where the question before us is whether the evidence in the light most favorable to the non-moving party is sufficient to establish malice that defeats a claim of public official immunity."

The majority concluded by stating, "[G.S.] 15A-401(d), as does the common law, prescribes that police officers have a duty to use only the force that is reasonably necessary in detaining an individual. The use of unreasonable, unnecessary, and excessive force is prohibited by law. Considering the facts in the light most favorable to Mr. Bartley, as we must, there is a panoply of evidence which establishes that a genuine issue of material fact exists as to whether Officer Blackman's allegedly forcible tactics were contrary to his duty for purposes of establishing the first element of malice. Furthermore, Officer Blackman's alleged statement to Mr.

Bartley that he would not have been 'in this situation' had Mr. Bartley obeyed commands from Officer Blackman raises questions that can only be resolved by a jury. For example, is 'this situation' that Officer Blackman referenced the situation of having just been body slammed and thrown into the trunk of a car, tightly handcuffed and bruised, and humiliated in front of neighbors following the commission of a traffic infraction? This statement creates a genuine issue of material fact concerning whether Officer Blackman's allegedly gratuitous tactics manifested a reckless indifference to Mr. Bartley's rights and were so reckless or manifestly indifferent to the consequences, where the safety of life and limb are involved, as opposed to being necessary for officer safety as Officer Blackman insists." (Citations omitted.)

- **Dissent**— The dissent stated that Officer Blackman was entitled to summary judgment as a matter of law. The dissent initially observed that one who challenges the validity of public officials' actions bears a heavy burden, as competent and substantial evidence is required to defeat the presumption that they will "'discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law.'" Leete v. Cty. of Warren, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995). The dissent emphasized the existence of probable cause to arrest. "Bartley committed a traffic infraction by crossing over a double yellow line to pass another vehicle, did not immediately pull over when Officer Blackman initiated his siren and strobe light, and resisted arrest after Officer Blackman had issued multiple commands which Bartley acknowledged he heard. Bartley admitted that refusing to obey a police officer's command is unlawful and acknowledged that he could understand Officer Blackman's perspective in arresting Bartley."

  The dissent stated that there was a lack of a forecast of evidence for each element of malice, and that summary judgment was appropriate. "It is undisputed that Officer Blackman had probable cause to arrest Bartley, and Officer Blackman was not acting contrary to his duty when he detained and handcuffed Bartley." As to the majority's cited circuit cases regarding handcuffing, the dissent countered with cases from within the Fourth Circuit. Carter v. Morris, 164 F.3d 215, 219 n.3 (4th Cir. 1999); Cooper v. City of Virginia Beach, 817 F. Supp. 1310, 1319 (E.D. Va. 1993), *aff'd*, 21 F.3d 421 (4th Cir. 1994).

  The dissent observed, "[A]s evidence of actual intent, the majority cites Bartley's testimony that Officer Blackman made the comment that if Bartley had done as he was instructed, he would not be in 'this situation.' The majority also cites the fact that Mr. Bartley remained handcuffed for at least twenty minutes in front of neighbors as evidence of retaliation. This is not the 'competent and substantial evidence' that plaintiff needs to overcome his heavy burden. Officers routinely make remarks to inform individuals why they have been placed into handcuffs or in the patrol vehicle. An officer acting in accordance with his training would attempt to deescalate the situation by explaining to an individual who refused to follow commands that his or her actions are the reason for their situation. It certainly is an accurate statement that had Bartley simply complied with the officer's instructions he would not have been handcuffed and arrested."

- ***Synopsis***— Appeal pursuant to G.S. 7A-30(2) from decision of divided panel of Court of Appeals, 272 N.C. App. 224 (2020),

affirming an October 2019 order partially denying defendant's motion for summary judgment. Affirmed in a 4-3 decision. Majority opinion by Justice Earls. Dissent by Justice Berger, with Chief Justice Newby and Justice Barringer joining in the dissenting opinion.

Public Records; Temporary Protective Order; Lack of Subject Matter Jurisdiction

In re: Pub. Records Request to DHHS, 2022-NCCOA-284 (No. COA21-495, Forsyth— 5/3/22)

- ***Holding***— Citing City of Burlington v. Boney Publishers, Inc. and McCormick v. Hanson Aggregates Southeast, Inc., Court of Appeals holds that utilization of a request for a temporary protective order under the Public Records Act, G.S. 132-9, is improper.

- ***Key Excerpt***— The Court observed, "Previously, in McCormick v. Hanson Aggregates Southeast, Inc., this Court addressed the issue of whether it was proper for a city attorney to file a complaint 'seeking a declaratory judgment from the trial court that certain documents defendant sought to obtain via a public records request ... were not subject to disclosure.' 164 N.C. App. 459, 461, 596 S.E.2d 431, 432, *writ denied, disc. review denied, appeal dismissed*, 359 N.C. 69, 603 S.E.2d 131 (2004). Citing [G.S.] 132-9, we concluded that 'the Public Records Act does not appear to allow a government entity to bring a declaratory judgment action; only the person making the public records request is entitled to initiate judicial action to seek enforcement of its request.' *Id.* at 464, 596 S.E.2d at 434 (citation omitted). Accordingly, we held 'that the use of a declaratory judgment action in the instant case was improper.' *Id.*"

"We later relied on this excerpt from McCormick when deciding City of Burlington v. Boney Publishers, Inc., in which we also held that 'use of a declaratory judgment action under the Public Records Act was improper....' 166 N.C. App. 186, 192, 600 S.E.2d 872, 876 (2004). The same must be said here. Under our precedent and [G.S.] 132-9, it was improper for the District Attorney in the case *sub judice* to file a request for temporary protective order to keep the media coalition from accessing the records."

In concluding its opinion, the Court stated, "Because the District Attorney failed to follow the requirements of the Rules of Civil Procedure in filing its Objection and Request for Temporary Protective Order, and because no authority exists to provide the trial court jurisdiction over the relief sought by the District Attorney, we dismiss this appeal. We do not reach the underlying issue as to whether the documents at issue are public records within the meaning of the Public Records Act, and leave that issue to be determined in a subsequent proceeding brought pursuant to the provisions of the Act. This matter is remanded with instructions for the trial court to dismiss the underlying proceeding for lack of jurisdiction."

- ***Synopsis***— Appeal by the State from February 2021 order. Dismissed and remanded. Opinion written by Judge Arrowood, with Judge Murphy and Judge Griffin concurring.

Nota Bene (N.B.)— Other Recent Decisions of Note

Eminent Domain; Inverse Condemnation; Public Enterprises; Utility

Easements; Spite Fence; Restriction of Access Cty. of Moore v. Acres, 2022-NCCOA-446 (No. COA21-552, Moore— 7/5/22) (Plaintiff-County appealed a summary judgment order dismissing its complaint for declaratory and injunctive relief seeking to require defendants to remove an alleged "spite fence," erected along their rear property line: the complaint alleged defendants built the new fence, and planted invasive holly trees, restricting access to the public underground water and sewer infrastructure. Upon observing the time to file an inverse condemnation action had expired, G.S. 40A-51(a), the Court stated, "The record evidence reveals Defendant Randy Acres purchased the Property in late 2004 with the abutting gravel throughway and water and sewer mains already constructed and in operation. The trial court nevertheless agreed with Defendants that the County failed to show it took title to a utility easement and therefore could not restrict Defendants' use of the Property." Concluding that the trial court erred and reversing the summary judgment order, the Court noted *inter alia* that the record unequivocally revealed that the County had continuously used and operated the lines on the property for a public purpose since 1999, and the County asserted it maintained ownership of the lines and an attendant easement. Regarding defendants' cited case of Juhan v. Cozart, 102 N.C. App. 666, 403 S.E.2d 589 (1991), the Court stated, "Juhan's limited holding is thus inapposite. To the contrary, the taking of the lines beneath the Property has necessarily vested in the County title to an easement along the surface of the Property to service, maintain, and repair the lines. *See* Central Carolina Developers, Inc. [v. Moore Water & Sewer Auth.], 148 N.C. App. [564] at 567-68, 559 S.E.2d [230] at 232 [(2001)]; Sanitary District v. Canoy, 252 N.C. 749, 752, 114 S.E.2d 577, 580 (1960) ('[R]espondents retained the fee and have a right to use the property so long as such use does not interfere with the proper use by the petitioner for the maintenance and operation of its sewer lines.'). So, even in the absence of a recorded deed, as a matter of law the County holds title to the utility mains under the Property, which includes title to the easement for their maintenance and repair." As to the trial court's entry of summary judgment for defendants (dismissing plaintiff-County's complaint on the ground that it had not shown it held title to the water and sewer pipes or a utility easement), the Court of Appeals reversed and remanded the matter for: (1) entry of a partial summary judgment order declaring that plaintiff-County owned title to the lines and easement extending along defendants' property; and (2) a proceeding on the size and scope of the easement and any remaining issues raised by the pleadings. (Appeal by plaintiff from May 2021 order. Reversed and remanded. Opinion written by Judge Inman, with Judge Arrowood and Judge Jackson concurring.))

Land Use; Notice of Violation; Street Side Yard Setbacks Thompson v. Union County, 2022-NCCOA-382 (No. COA21-220, Union— 6/7/22) (Appellants (purchasers of a residence with two detached garages in 2018) appealed from a Superior Court order affirming a decision by the County's Board of Adjustment (BOA), which upheld zoning Notices of Violation and a fine issued to appellants by respondent-County. Appellants argued *inter alia* that the Superior Court erred: (1) by retroactively applying the 2014 County Unified Development Ordinance ("2014 UDO") to a property constructed prior to its enactment (residence 2004; garage 2009); and (2) by affirming the Board of Adjustment's decision without sufficient findings of fact and conclusions of law. The Court held, "Because Appellants' residence

is presumed lawful if it was in compliance with the ordinance in effect at the time of construction and any applicable issued permits, and because the prior ordinance applicable to the residence and garage was not in evidence, Union County failed to show the structures are in violation of the 2014 UDO. The BOA and Superior Court therefore erred in holding Appellants' property in violation of the 2014 UDO." The Court observed, "Appellants argue the plain language of the 2014 UDO exempts their property from enforcement under Section 1.120-A(1), but this Section is also not in the record and we cannot take notice of municipal ordinances not in the record. High Point Surplus Co. v. Pleasants, 263 N.C. 587, 591, 139 S.E.2d 892, 895 (1965); Fulghum v. Town of Selma, 238 N.C. 100, 105, 76 S.E.2d 368, 371 (1953) (We cannot take judicial notice of municipal ordinances.)…. For purposes of appellate review, we must consider only the evidence and ordinances in the record. High Point Surplus Co., 263 N.C. at 591, 139 S.E.2d at 895; Fulghum, 238 N.C. at 105, 76 S.E.2d at 371. The burden of proof to show the existence of a violation of the ordinance is upon the Appellee. *See* Shearl v. Town of Highlands, 236 N.C. App. 113, 116–17, 762 S.E.2d 877, 881 (2014) ('As to the first question, the burden of proving the existence of an operation in violation of the local zoning ordinance is on Respondent. Thus, it was Respondent's responsibility to present evidence that Petitioner's commercial use of his storage building was in violation of Respondent's zoning ordinance when the notice of violation was issued on 19 August 2009.' (Citation omitted))." (As to the garage, the Court noted that appellants acknowledged that it was constructed without a permit, so it could potentially be in violation under Section 1.120-B.) As to Appellants' arguments that the County's enforcement actions were barred by statutes of limitations under G.S. 1-49(3) & 1-51(5), the Court concluded that appellants waived the statutes of limitations defense as to the civil penalty and Notices of Violation by failure to raise this defense before the Board of Adjustment. In closing its opinion, the Court stated, "We conclude the Superior Court erred by affirming the BOA's decision because [defendant-Board of Adjustment] failed to carry its burden of proving the residence and garage were in violation of the 2014 UDO. As to Appellants' residence, the trial court's order is reversed. As to Appellants' garage, the trial court's order is vacated and remanded with instructions to remand to the BOA for further proceedings consistent with this opinion, with the burden upon [defendant-Board of Adjustment] to prove a zoning violation based upon the applicable ordinances." (Appeal by petitioners from November 2020 orders. Reversed in part; Vacated and remanded in part. Chief Judge Stroud wrote the opinion, with Judge Arrowood and Judge Jackson concurring.))