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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-429

No. COA21-799

Filed 21 June 2022

Henderson County, No. 19 CVS 375

RUPA VICKERS RUSSE and ARA L. VICKERS, Plaintiffs,

v.

WILLIAM ANTHONY YOUNGBLOOD, Individually and WILLIAM ANTHONY YOUNGBLOOD in his official capacity as a Sheriff for the Henderson County Sheriff Department and County of Henderson, Defendants.

Appeal by plaintiff from order entered 9 November 2020 by Judge Steve Warren in Henderson County Superior Court. Heard in the Court of Appeals 10 May 2022.

*Vickers Russe Law, PLLC, by Rupa Vickers Russe, pro se.*

*Teague Campbell Dennis & Gorham, L.L.P., by John L. Kubis and Megan N. Silver, for defendants-appellees.*

ARROWOOD, Judge.

¶ 1

Rupa Vickers Russe (“plaintiff”) appeals from the trial court’s order granting summary judgment in favor of William Anthony Youngblood, individually and in his official capacity as a Sheriff Deputy for the Henderson County Sheriff Department (“defendant Youngblood”), and Henderson County (“defendant County”) (collectively,

“defendants”). Plaintiff contends the trial court erred in granting summary judgment because genuine issues of material fact exist regarding defendants’ immunity defenses. Additionally, defendants have filed a motion to dismiss the appeal, and plaintiff has filed a petition for *writ of certiorari*. For the following reasons, we deny defendants’ motion to dismiss, grant plaintiff’s petition for *writ of certiorari*, and affirm the trial court.

### I. Background

¶ 2

On 5 March 2019, plaintiff filed a complaint in Henderson County Superior Court, asserting claims for negligence and gross negligence against defendants. Plaintiff alleged that on 5 March 2016, Youngblood drove his vehicle through an intersection and collided with plaintiff’s vehicle “in a careless, negligent and unlawful manner[.]” In plaintiff’s negligence claim against defendant County, plaintiff alleged that defendant Youngblood “was operating an automobile owned by [defendant County] and in the course and scope of his employment for his employer, . . . even though as described Defendant Youngblood acted negligently, wantonly negligent and recklessly.”

¶ 3

Defendants filed and served an answer to plaintiff’s complaint on 10 May 2019. Defendants denied that defendant Youngblood acted negligently and asserted several defenses, including public official immunity and “governmental and/or sovereign immunity[.]”

¶ 4

Defendants filed a motion for summary judgment on 27 July 2020. The basis of the motion was the defense on governmental and sovereign immunity, and the motion purported to show “that the allegations of the Complaint relate exclusively to the performance of governmental functions by and through Defendant Youngblood . . . in the course and scope of his employment.” Defendants argued that “no genuine issue of material fact exists on the issue of governmental/sovereign immunity and Defendants are entitled to judgment as a matter of law.”

¶ 5

In support of the motion, defendants filed a memorandum with a restatement of the facts. The memorandum noted plaintiff’s deposition testimony, where she acknowledged noticing that “a large black SUV in the lane to her left was stopped beyond the white line marking the beginning of the intersection[,]” prior to the collision with defendant Youngblood. The memorandum also asserted that prior to the collision, defendant Youngblood was “responding to a call . . . requesting backup on James Street in Hendersonville, North Carolina, a known gang area[,]” and that defendant Youngblood had his emergency lights and sirens activated and reduced his speed prior to entering the intersection.

¶ 6

The trial court conducted a hearing on the motion via WebEx on 26 October 2020. During the hearing, defendants’ counsel provided a factual background and described seven exhibits attached to the motion, which included a video of “dash cam footage from the deputy trailing [defendant] Youngblood that

absolutely demonstrate[s] that lights and sirens were operational . . . up until the point in time when [defendant Youngblood’s vehicle] collided with plaintiff’s vehicle.” The video, included in the record on appeal, shows a law enforcement vehicle with active emergency lights, operated by defendant Youngblood, approaching an intersection, reducing speed to allow approaching traffic to stop, and accelerating until colliding with plaintiff’s vehicle, which unlike other nearby vehicles did not stop. Plaintiff’s trial counsel argued that the circumstances surrounding the collision, namely, “driving a[n] emergency vehicle in a heavily traveled area in the middle of the day . . . and you don’t have the red . . . light,” presented a question for the jury as to whether defendant Youngblood’s actions were reasonable. At the conclusion of the hearing, the trial judge stated that because he had only read one of the parties’ briefs, he was “not going to rule today,” and would “get a decision” to the parties after completing his review.

¶ 7

The trial court entered an order on 9 November 2020 granting summary judgment in defendants’ favor. Based on email correspondence between the parties’ trial attorneys and the Henderson County Superior Court Trial Court Coordinator, it appears that this order was not served on either party until August 2021.<sup>1</sup>

¶ 8

On 25 August 2021, plaintiff’s trial attorney entered a motion to withdraw by

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<sup>1</sup> An email was sent to both parties’ attorneys on 17 August 2021 stating that the court coordinator would “get a copy of the order from the court file and email it to” the parties.

consent, which was subsequently granted. Plaintiff filed *pro se* notice of appeal on 8 September 2021. Plaintiff also filed a petition for *writ of certiorari* with this Court on 30 January 2022.

## II. Discussion

¶ 9 Plaintiff contends the trial court erred in granting summary judgment because genuine issues of material fact exist regarding defendants’ immunity defenses. Defendants argue that plaintiff failed to allege or show that any exceptions to governmental immunity applied. Defendants additionally filed a motion to dismiss plaintiff’s appeal as not timely noticed. We first address defendants’ motion to dismiss and plaintiff’s petition for *writ of certiorari*.

### A. Appellate Jurisdiction

¶ 10 A party must file and serve notice of appeal “within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 . . . .” N.C.R. App. P. 3(c)(1). If service is not made within the three-day period, the party must file and serve notice of appeal “within thirty days after service upon the party of a copy of the judgment . . . .” N.C.R. App. P. 3(c)(2). “The provisions of Rule 3 are jurisdictional, and failure to follow the rule’s prerequisites mandates dismissal of an appeal.” *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (citation omitted).

¶ 11 Generally, this Court lacks jurisdiction to hear an appeal that is untimely

noticed. N.C.R. App. P. 27(c). However, pursuant to Rule 21, “writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]” N.C.R. App. P. 21(a)(1).

¶ 12 Here, the trial court’s order was filed on 9 November 2020, but plaintiff did not file notice of appeal until 8 September 2021, approximately ten months after judgment was entered. It appears from the record, however, that neither party was timely served with a copy of the judgment, and service did not occur until after 17 August 2021 when the court coordinator emailed a copy of the order to the parties. Plaintiff then filed notice of appeal on 8 September 2021, within thirty days of receiving a copy of the order. Accordingly, it appears that plaintiff’s notice of appeal was timely served under Rule 3(c)(2). However, in light of the circumstances and out of an abundance of caution, we grant plaintiff’s petition for *writ of certiorari* and proceed to the merits of the appeal. By granting the petition, defendants’ motion to dismiss the appeal is moot.

#### B. Summary Judgment

¶ 13 Plaintiff contends the trial court erred in granting summary judgment to defendants on the grounds that genuine issues of material fact existed with respect to defendants’ immunity defenses. We disagree.

¶ 14 Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). “The standard of review for summary judgment is *de novo*.” *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). “Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court.” *Stevens v. Heller*, 268 N.C. App. 654, 658-59, 836 S.E.2d 675, 679 (2019) (citation and quotation marks omitted).

¶ 15 The movant “bears the initial burden of demonstrating the absence of a genuine issue of material fact.” *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted). This burden requires “(1) proving that an essential element of the opposing party’s claim is nonexistent, or by showing through discovery that the opposing party (2) cannot produce evidence to support an essential element of his or her claim, or (3) cannot surmount an affirmative defense which would bar the claim.” *Bernick v. Jurden*, 306 N.C. 435, 440-41, 293 S.E.2d 405, 409 (1982) (citation omitted).

¶ 16 In this case, the trial court granted summary judgment based on the defense of public official immunity. Public official immunity is “a derivative form” of governmental immunity. *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 203, 468

S.E.2d 846, 850 (1996). A public official has immunity from negligence claims unless it is “alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties.” *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (citation and quotation marks omitted). Significantly, plaintiff’s complaint alleged that defendant Youngblood “was operating an automobile owned by County of Henderson and in the course and scope of his employment”; accordingly, the only available exceptions to public official immunity are proven allegations that defendant Youngblood’s actions were corrupt or malicious. Because plaintiff has not alleged that defendant Youngblood acted corruptly, we consider whether defendant Youngblood acted with malice.

¶ 17 Malice exists “when [a defendant] wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another.” *Bartley v. City of High Point*, 272 N.C. App. 224, 228, 846 S.E.2d 750, 754 (2020) (citation and quotation marks omitted), *disc. review denied*, 379 N.C. 160, 860 S.E.2d 918 (2021). “Thus, a malicious act is an act (1) done wantonly, (2) contrary to the actor’s duty, and (3) intended to be injurious to another.” *Id.* (citation and quotation marks omitted). “An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.” *Brown v. Town of Chapel Hill*, 233 N.C. App. 257, 269, 756 S.E.2d 749, 758 (2014) (citation and quotation marks omitted).



¶ 18 Here, the evidence reflected that, prior to the collision with defendant Youngblood, when plaintiff approached the intersection, she noticed that “a large black SUV in the lane to her left was stopped beyond the white line marking the beginning of the intersection.” Defendant Youngblood was “responding to a call . . . requesting backup on James Street in Hendersonville, . . . a known gang area[.]” had his emergency lights and sirens activated, and reduced his speed prior to entering the intersection; the dashboard camera video showing defendant Youngblood’s vehicle indicates the same.

¶ 19 Plaintiff argues that constructive malice can be found by determining that defendant Youngblood “recklessly, intentionally accelerated prior to verifying that all vehicles impacted by his decision were on notice of his intent to . . . overtake their right-of-way[.]” Such a finding would be contrary to the facts established at the hearing. Defendant Youngblood was on route to provide backup, and, as shown in the dashboard camera video, he had properly activated his emergency signals and slowed down prior to entering the intersection. Other vehicles near plaintiff stopped to allow defendant Youngblood and other law enforcement vehicles through the intersection, but plaintiff failed to do so.

¶ 20 Based on the facts established at the hearing, plaintiff has failed to offer any evidence that would create genuine issues of material fact as to whether defendant

Youngblood acted with malice. Accordingly, we hold the trial court did not err in granting defendants summary judgment pursuant to public official immunity.

¶ 21 Plaintiff additionally argues that defendant Youngblood was grossly negligent in causing a collision while speeding and not in active pursuit of a law violator. Plaintiff cites *Allmond v. Goodnight*, 230 N.C. App. 413, 753 S.E.2d 400 (2013) (unpublished) in support of this argument. In *Allmond*, the plaintiff alleged that the police officer “was not acting in response to any official duty of any form, or kind whatsoever nor was he involved in any pursuit, or emergency activity that required, mandated, or permitted the excessive speed at which he was traveling, as he was accelerating up to approximately 120 miles per hour.” *Id.* (slip op. at \*5). This Court determined that, because the defendant was acting outside the scope of his official duties, he was not entitled to public official immunity based on the allegations. *Id.* (slip op. at \*6).

¶ 22 In this case, however, plaintiff did allege that defendant Youngblood was acting within the scope of his employment. Perhaps more importantly, the law enforcement actions in each case stand in stark contrast; defendant Youngblood was responding to a call for backup and reduced his speed, with emergency signals active, prior to entering the intersection, unlike the excessive speed noted in *Allmond*. Plaintiff has failed to produce evidence that could support a reasonable juror finding

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that defendant Youngblood was grossly negligent, and the trial court properly granted summary judgment in defendants' favor.

¶ 23 Plaintiff has also presented arguments regarding county and statutory liability, asserting that defendant County waived governmental immunity by purchasing liability insurance. The only exceptions to public official immunity, however, are where the challenged actions were outside the scope of official authority, done with malice, or corrupt. *Wilcox v. City of Asheville*, 222 N.C. App. 285, 288, 730 S.E.2d 226, 230 (2012) (citation omitted). As we have already concluded that plaintiff has failed to establish an exception to the public immunity doctrine, it is unnecessary to consider plaintiff's additional arguments.

III. Conclusion

¶ 24 For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judges INMAN and WOOD concur.

Report per Rule 30(e).