IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-446

Filed: 7 April 2015

Mecklenburg County, No. 12 CVS 1017

IVAN McLAUGHLIN and TIMOTHY STANLEY, Plaintiffs,

v.

DANIEL BAILEY, in his individual and official capacity as Sheriff of Mecklenburg County, and OHIO CASUALTY INSURANCE COMPANY, Defendants.

Appeal by plaintiffs from judgment entered 6 January 2014 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 November 2014.

Kennedy, Kennedy, Kennedy, and Kennedy, LLP, by Harold L. Kennedy, III, and Harvey L. Kennedy, for plaintiff-appellants.

Womble, Carlyle, Sandridge and Rice, LLP, by Sean F. Perrin, for defendant-appellee.

Edmond W. Caldwell, Jr., for amicus curiae North Carolina Sheriffs' Association.

STEELMAN, Judge.

The employees of a county sheriff, including deputies and others hired by the sheriff, are directly employed by the sheriff and not by the county or by a county department. Sheriff's employees are not "county employees" as defined in N.C. Gen. Stat. § 153A-99 and are not entitled to the protections of that statute. As a sworn deputy sheriff, plaintiff Stanley could be discharged based upon political conduct without violating free speech rights under the North Carolina Constitution. Where

defendant produced evidence that plaintiff McLaughlin was discharged for failure to comply with sheriff's department rules and policies, and McLaughlin failed to produce specific evidence that his discharge was politically motivated, the trial court properly dismissed his claim for violation of his rights to free speech under the North Carolina Constitution.

I. Factual and Procedural Background

Ivan McLaughlin and Timothy Stanley (plaintiffs) were employed by former Mecklenburg County Sheriff Daniel Bailey (defendant, with Ohio Casualty Insurance Company, collectively, defendants). Stanley was hired in 1998 as a detention officer at the Mecklenburg County jail, and as a deputy sheriff in 2008. He worked primarily as a courtroom bailiff. McLaughlin was hired as a juvenile counselor at the Gatling Juvenile Detention Center in 1998, and was not a sworn law enforcement officer. When the Mecklenburg County Sheriff's Department assumed responsibility for Gatling, McLaughlin became a detention counselor for youthful offenders housed in Mecklenburg County's Jail North.

In June 2009 defendant, a registered Democrat, sent a letter to approximately 1,350 of his employees, announcing his candidacy for reelection and stating that he would appreciate campaign contributions. Plaintiffs, who were Republicans, did not contribute to defendant's reelection campaign or attend a fund-raising barbeque sponsored by the campaign. Defendant was reelected in November 2010.

Stanley received favorable performance reviews between 2007 and 2010. However, shortly before the election, Stanley's supervisor reported to defendant that Stanley had been disruptive during the morning briefings by talking in the back of the room and making remarks expressing a preference for defendant's opponent in the election. On 30 November 2011 Stanley was terminated from his employment as a deputy sheriff. Defendant testified in his deposition that Stanley was terminated for being disruptive.

McLaughlin also received favorable performance reviews for several years prior to the election. However, in August 2010 the staff at Jail North, including McLaughlin, received a memo emphasizing the importance of "pod tours" to verify that inmates were present and were not in distress, and warning that failure to conduct pod tours would result in termination. McLaughlin's supervisor testified in his deposition that the "purpose of a pod tour . . . is to make sure that a pod officer can account for every inmate . . . being alive[.]" On 19 November 2010 McLaughlin's supervisors visited Jail North and observed a number of violations of the rules for supervision of the youthful offender population, including failure to conduct pod tours. The supervisors also reviewed a videotape that showed McLaughlin committing additional violations of Sheriff's Department rules. The supervisors documented McLaughlin's violations and submitted a report to the Office of Professional Compliance, which interviewed McLaughlin on 30 November 2010.

During the interview, McLaughlin conceded that he had failed to follow Sheriff's Department rules on a number of occasions. On 10 January 2011 McLaughlin received a memorandum setting forth his violations of the Sheriff's Department rules, and the resultant decision to terminate his employment. McLaughlin's termination was confirmed by the Sheriff's Department review board.

On 17 January 2012 plaintiffs filed a complaint, asserting claims against defendants for wrongful termination of employment in violation of public policy, and for violation of their rights under the Constitution of North Carolina, Article 1, § § 14 and 36. Plaintiffs asserted that they were terminated "for failing to make contributions to [Sheriff] Bailey's re-election campaign and for failing to volunteer to work in his campaign," and that McLaughlin was terminated based on "his Republican beliefs." Plaintiffs asserted that their termination was "in violation of [the] public policy" enunciated in N.C. Gen. Stat. § 153A-99. Defendants filed separate answers denying the material allegations of plaintiffs' complaint. On 13 June 2013 defendants filed a joint motion for summary judgment on all claims. On 6 January 2014 the trial court entered summary judgment in favor of defendants and dismissed plaintiffs' complaint.

Plaintiffs appealed. Although plaintiffs' complaint asserted claims against defendant in both his individual and official capacities, plaintiffs only appeal the entry of summary judgment on their claims against defendant in his official capacity.

II. Standard of Review

Under N.C. Gen. Stat. § 1A-1, Rule 56(a), summary judgment is properly entered "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." "'In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) [(2013)], and must be viewed in a light most favorable to the non-moving party.'" *Patmore v. Town of Chapel Hill N.C.*, __ N.C. App. __, __, 757 S.E.2d 302, 304 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (internal citation omitted)), *disc. review denied*, __ N.C. __, 758 S.E.2d 874 (2014).

In a trial court's ruling on a motion for summary judgment, "'[a] verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.' On the other hand, 'the trial court may not consider an unverified pleading when ruling on a motion for summary judgment.' Plaintiff[s'] complaint in this case was not verified, so it could not be considered in the course of the trial court's deliberations concerning Defendants' summary judgment motion." *Rankin v. Food Lion*, 210 N.C. App. 213, 220, 706 S.E.2d 310, 315-16 (2011) (quoting *Merritt, Flebotte, Wilson, Webb & Caruso,*

PLLC v. Hemmings, 196 N.C. App. 600, 605, 676 S.E.2d 79, 83-84 (2009) (internal quotation omitted), and *Tew v. Brown*, 135 N.C. App. 763, 767, 522 S.E.2d 127, 130 (1999)).

III. Termination in Violation of Public Policy

In plaintiffs' first argument, they contend that they were wrongfully terminated in violation of the public policy articulated in N.C. Gen. Stat. § 153A-99. Plaintiffs assert that they were "county employees" as defined in § 153A-99, and that their termination from employment violated this statute. We disagree.

A. Legal Principles

"In North Carolina, 'in the absence of an employment contract for a definite period, both employer and employee are generally free to terminate their association at any time and without any reason.'" *Elliott v. Enka-Candler Fire & Rescue Dep't, Inc.*, 213 N.C. App. 160, 163, 713 S.E.2d 132, 135 (2011) (quoting *Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 655, 412 S.E.2d 97, 99 (1991)). "However, the employee-at-will rule is subject to certain exceptions. . . . '[W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy.'" *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 446-47 (1989) (quoting *Sides v. Duke University*, 74 N.C. App.

331, 342, 328 S.E. 2d 818, 826 (1985), *overruled in part on other grounds as stated in Kurtzman v. Applied Analytical Industries, Inc.,* 347 N.C. 329, 493 S.E.2d 420 (1997)).

Plaintiffs argue that they were terminated in violation of the public policy set forth in N.C. Gen. Stat. § 153A-99:

> (a) The purpose of this section is to ensure that county employees are not subjected to political or partisan coercion while performing their job duties, [and] to ensure that employees are not restricted from political activities while off duty[.] . . . Employees shall not be restricted from affiliating with civic organizations of a partisan or political nature, nor shall employees, while off duty, be restricted from attending political meetings, or advocating and supporting the principles or policies of civic or political organizations, or supporting partisan or nonpartisan candidates of their choice in accordance with the Constitution and laws of the State and the Constitution and laws of the United States of America.
>
> (b) Definitions. For the purposes of this section: (1) "County employee" or "employee" means any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds[.] . . .

"The express purpose of N.C. Gen. Stat. § 153A-99 is 'to ensure that county employees are not subjected to political or partisan coercion while performing their job duties[.]' N.C. Gen. Stat. § 153A-99 (2002). In *Vereen v. Holden*, this Court noted that if a county employee was fired due to his political affiliations and activities, 'this would contravene rights guaranteed by our State Constitution. . . . and the prohibition against political coercion in county employment stated in N.C. Gen. Stat. § 153A-99,' hence violating North Carolina public policy." *Venable v. Vernon*, 162 N.C.

App. 702, 705-06, 592 S.E.2d 256, 258 (2004) (quoting *Vereen v. Holden*, 121 N.C. App. 779, 784, 468 S.E.2d 471, 474 (1996) (internal citations omitted)).

B. Analysis

The threshold question is whether plaintiffs were county employees. N.C. Gen. Stat. § 153A-99 defines a county employee as an individual who is "employed by a county or any department or program thereof that is supported, in whole or in part, by county funds[.]" It is undisputed that a county sheriff's department is "supported, in whole or in part, by county funds" and that a county's administrators interact in various ways with the sheriff's department. The crucial question, however, is whether or not the persons hired by a sheriff are "employed by" a county department, in this case the "sheriff's department." We conclude that the plaintiffs are employees of the defendant sheriff individually, and are not employed by the county.

Preliminarily, we note that our common law unequivocally establishes that sheriff's deputies are employees of the sheriff, and are not county employees. In *Styers v. Forsyth County*, 212 N.C. 558, 194 S.E. 305, (1937), the widow of a deceased deputy sheriff was denied workers compensation benefits based on the trial court's determination that the deputy was an employee of the sheriff rather than of the county. On appeal, our Supreme Court held that a statute allowing Forsyth County to provide a fixed salary for certain deputies was not applicable to the facts of the

case, given that the deceased deputy had been hired directly by the sheriff. The Court also discussed the legal relationship between the sheriff and his deputies:

> "The deputy is not the agent or servant of the sheriff but is his representative, and the sheriff is liable for his acts as if they had been done by himself." . . . . The acts of the deputy are acts of the sheriff. For this reason the sheriff is held liable on his official bond for acts of his deputy. "A sheriff is liable for the acts or omissions of his deputy as he is for his own." In short, a deputy is a lieutenant, the sheriff's right-hand man, whose duties are coequal in importance with those of his chief. One who represents the high sheriff of the county in the capacity of deputy occupies no mean place. . . . He holds an appointment as distinguished from an employment.

Styers at 563, 563-64, 194 S.E. at 308-309 (quoting *Michel v. Smith*, 188 Cal. 199, 202, 205 P. 113, 114 (1922), citing *Horne v. Allen*, 27 N.C. 36 (1844), and *Spencer v. Moore*, 19 N.C. 264 (1837), and quoting *Sutton v. Williams*, 199 N.C. 546, 548, 155 S.E. 160, 162 (1930) (other citations omitted).

The holding of *Styers*, that a deputy is an employee of the sheriff and acts as his "alter ego," has been followed in subsequent cases. In *Clark v. Burke County*, 117 N.C. App. 85, 89, 450 S.E.2d 747, 749 (1994), we held that Burke County was not liable for the alleged negligence of a sheriff's deputy:

> A deputy is an employee of the sheriff, not the county. Therefore, any injury resulting from Deputy Smith's actions in this case cannot result in liability for Burke County and summary judgment is therefore affirmed for Burke County.

(citation omitted). Similarly, in *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 368 S.E.2d 892 (1988), we rejected the argument by the plaintiff, a dispatcher for the sheriff's department, that she was a county employee:

> Plaintiff argues that even though she was hired by the sheriff, she remained the employee of Watauga County and thus all the protections and privileges provided by the Board of Commissioners to other county employees should have been afforded her[.] . . . We cannot agree. Plaintiff's esoteric analysis of the issue is misplaced. It is clear to this Court that plaintiff was an employee of the sheriff and not Watauga County and its Board of Commissioners. . . . Furthermore, "under state law the sheriff has the exclusive right to fire any deputy [or employee] in his office." . . . [P]laintiff was not an 'employee' of Watauga County or its Board of Commissioners[.]

Peele, 90 N.C. App. at 449-50, 368 S.E.2d at 893-94 (quoting *Joyner v. Lancaster*, 553 F. Supp. 809, 816 (M.D.N.C. 1982)). *See also, e.g., Greene v. Barrick*, 198 N.C. App. 647, 653, 680 S.E.2d 727, 731 (2009) ("Our law is well-settled. 'A sheriff is liable for the acts or omissions of his deputy as he is for his own.'") (quoting *Prior v. Pruett*, 143 N.C. App. 612, 621, 550 S.E.2d 166, 172 (2001) (internal quotation omitted).

The fact that the county is the source of funding to pay deputies does not change their status as employees of the sheriff. In *Hubbard v. Cty. of Cumberland*, 143 N.C. App. 149, 152, 544 S.E.2d 587, 589-90 (2001), this Court acknowledged that deputies are paid from county funds, but held that:

> Plaintiffs in the instant case are law enforcement officers hired directly by the Sheriff of Cumberland County. The Sheriff is an independent constitutionally mandated

> officer, elected by the voters. N.C. Const. art. VII, § 2. Because it is the Sheriff, and not the County, who directly hires law enforcement officers, plaintiffs do not enjoy all of the protections of County employees.

(citing *Peele* at 450, 368 S.E.2d at 894, and N.C. Gen. Stat. § 153A-103). Although our common law uniformly holds that the sheriff's employees are not employed by the county, it does not articulate a general definition of a "county employee." Nor do the cases discussed above restrict their holdings by, for example, stating that a deputy is not a county employee "for purposes of *respondeat superior*."

Our common law is undergirded by certain statutory and constitutional provisions. N.C. Const. art. VII, § 2 states that "[i]n each county a Sheriff shall be elected by the qualified voters thereof at the same time and places as members of the General Assembly are elected and shall hold his office for a period of four years[.]" N.C. Gen. Stat. § 153A-103 provides that:

> (1) Each sheriff and register of deeds elected by the people has the exclusive right to hire, discharge, and supervise the employees in his office. . . .
>
> (2) Each sheriff and register of deeds elected by the people is entitled to at least two deputies who shall be reasonably compensated by the county[.] . . . Each deputy so appointed shall serve at the pleasure of the appointing officer. . . .

In sum:

> "Under North Carolina law, sheriffs have substantial independence from county government." Under the North Carolina Constitution, voters directly elect the sheriff. See N.C. Const. art. VII, § 2. County governments do not hire

> sheriffs. By statute, "the sheriff, not the county encompassing his jurisdiction, has final policymaking authority over hiring, supervising, and discharging personnel in the sheriff's office."

Jones v. Sheriff, 2013 U.S. Dist. LEXIS 51032 *5 (E.D.N.C. 2013) (quoting *Parker v. Bladen Cnty.*, 583 F. Supp. 2d 736, 739 (E.D.N.C. 2008), and citing *Little v. Smith*, 114 F. Supp. 2d 437, 446 (W.D.N.C. 2000), and *Clark*, 117 N.C. App. at 89, 450 S.E.2d at 749 (other citation omitted)), *dismissed by Jones v. Harrison*, 2014 U.S. Dist. LEXIS 99537 (E.D.N.C. 2014).

In the instant case, plaintiff's claim for wrongful discharge in violation of public policy is based on their argument that the strictures of N.C. Gen. Stat. § 153A-99 protect them, as "county employees," from being terminated for political reasons. As noted above, this statute states that "'County employee' or 'employee' means any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds[.]" We conclude that this statute does not apply to plaintiffs, who are employed by the sheriff and are not county employees.

We first note that the statute's reference to "'county employee' or 'employee'" does not create two separate classes of employees, but simply clarifies that the statutory definition applies uniformly to all provisions of the statute, regardless of whether or not the word "employee" is modified by "county." There is no indication in the statute that the legislature intended to identify two separate classifications of employees. Secondly, we hold that employees of a county sheriff are not "employed by

a county or any department or program thereof." Our common law as well as the relevant statutory and state constitutional provisions clearly establish that plaintiffs, who were hired by the sheriff, are employees of the sheriff, and are not employed by the county in which the sheriff is elected.

In reaching this conclusion, we have considered, but ultimately reject, plaintiffs' arguments for a contrary result. Plaintiffs do not cite any binding authority holding that persons hired by a sheriff are county employees. Instead, plaintiffs contend that the enactment of N.C. Gen. Stat. § 153A-99 effectively abrogated the common law, and that the statute's scope encompasses employees of a sheriff. In support of this argument, plaintiffs primarily rely on a 1998 advisory opinion of the North Carolina Attorney General, which opined that the statute was "applicable to elected officials of counties[.]" "[W]hile opinions of the Attorney General are entitled to 'respectful consideration,' such opinions are not compelling authority." *Williams v. Alexander County Bd. of Educ.*, 128 N.C. App. 599, 602, 495 S.E.2d 406, 408 (1998) (quoting *Hannah v. Commissioners*, 176 N.C. 395, 396, 97 S.E. 160, 161 (1918)). In addition, we have considered the sources cited both in the Attorney General's 1998 opinion and by plaintiffs, and are not persuaded that N.C. Gen. Stat. § 153A-99 established a new definition of a county employee in abrogation of the common law.

Plaintiffs, as well as the Attorney General's opinion, cite *Carter v. Good*, 951 F. Supp. 1235 (W.D.N.C. 1996), *reversed and remanded*, 145 F.3d 1323 (4th Cir. N.C. 1998) (unpublished). The *Carter* opinion stated that:

> Plaintiff alleges a cause of action for a violation of N.C. Gen. Stat. § 153A-99 which prohibits counties from restricting county employees in any manner concerning their political affiliation and activities. Defendants seek judgment on the grounds that sheriffs are not county employees. This argument has been previously rejected.

Carter, 951 F. Supp at 1248-49. "'Although we are not bound by federal case law, we may find their analysis and holdings persuasive.'" *Ellison v. Alexander*, 207 N.C. App. 401, 405, 700 S.E.2d 102, 106 (2010) (quoting *Brown v. Centex Homes*, 171 N.C. App. 741, 744, 615 S.E.2d 86, 88 (2005)). However, *Carter* did not engage in any analysis of the issue, discuss authority pertaining to this issue, or even cite the basis for its assertion that the argument that the plaintiff was not a county employee under N.C. Gen. Stat. § 153A-99 had "been previously rejected." Moreover, *Carter* was reversed, further limiting its persuasive authority.

Plaintiffs also cite *Elkin Tribune, Inc. v. Yadkin County Bd. of Commissioners*, 331 N.C. 735, 417 S.E.2d 465 (1992), and *Durham Herald Co. v. County of Durham*, 334 N.C. 677, 435 S.E.2d 317 (1993), cases that addressed the applicability of N.C. Gen. Stat. § 153A-98 to applicants for county manager and sheriff respectively. N.C. Gen. Stat. § 153A-98(a) provides in relevant part that "[n]otwithstanding the provisions of G.S. 132-6 or any other general law or local act concerning access to

public records, personnel files of employees, former employees, or applicants for employment maintained by a county are subject to inspection and may be disclosed only as provided by this section." The statute thus regulates disclosure of information contained in the "personnel files of employees, former employees, or applicants for employment maintained by a county[.]" In *Durham Herald*, the plaintiff argued that the applications for the position of sheriff[1] were not protected by the statute because the sheriff is not a county employee. We acknowledged this distinction, but held that:

> While there are certainly differences between the office of sheriff and the position of county manager, which would be material in other contexts, the application of section 153A-98 does not turn on such distinctions. The clear purpose of this statute is to provide some confidentiality to those who apply to county boards or their agents for positions which those boards and their agents are authorized to fill. It is in this sense that the statute uses the terms "applicants for employment" and makes the personnel files of such applicants subject to its provisions. An "applicant" holds no position with the county whether as an "employee" in the strict sense of the term or as an elected public official such as the sheriff. He, or she, is merely an applicant for such positions. It is as applicants that the statute seeks to afford them and their applications some measure of confidentiality.

Durham Herald, 334 N.C. at 679, 435 S.E.2d at 319. *Durham Herald* did not hold that the sheriff or his deputies are county employees. In essence, the case held that

[1] Although the sheriff is an elected official, N.C. Gen. Stat. § 162-3 provides that a "sheriff may vacate his office by resigning the same to the board of county commissioners of his county; and thereupon the board may proceed to elect another sheriff." In *Durham Herald*, the sheriff had resigned and the county commissioners solicited applications for his replacement.

even though the sheriff and the applicants for sheriff were not county employees, the applications for the position were protected from disclosure.

Plaintiffs also argue that a close scrutiny of the word "thereof" in § 153A-99 reveals that the statute classifies them as county employees. However, we are unable to conclude that our legislature would abrogate longstanding and consistent common law by such an indirect method as the use of the modifier "thereof."

"In determining legislative intent, we may 'assume [that] the legislature is aware of any judicial construction of a statute.'" *Blackmon v. N.C. Dep't of Correction*, 343 N.C. 259, 265, 470 S.E.2d 8, 11 (1996) (quoting *Watson v. N.C. Real Estate Comm.*, 87 N.C. App. 637, 648, 362 S.E.2d 294, 301 (1987)). Therefore, we assume that when the legislature enacted N.C. Gen. Stat. § 153A-99, it was aware of the common law rule that sheriff's deputies are not county employees. In this regard, we find it significant that in a similar context our legislature amended a different statute to explicitly abrogate the common law rule. Earlier cases held that, as employees of the sheriff, deputies were not entitled to workers' compensation benefits. In response, in 1939, "the General Assembly amended [N.C. Gen. Stat. § 97-2] . . . so as (1) to include deputies sheriff and all persons acting in capacity of deputy sheriff within the meaning of the term 'employee' as used in the act[.]" *Towe v. Yancey County*, 224 N.C. 579, 580, 31 S.E.2d 754, 755 (1944). The amended statute provided in relevant part that:

> § 97-2(2) . . . The term 'employee' shall include deputy sheriffs and all persons acting in the capacity of deputy sheriffs, whether appointed by the sheriff or by the governing body of the county and whether serving on a fee basis or on a salary basis, or whether deputy sheriffs serving upon a full-time basis or a part-time basis[.] (emphasis added).

We believe that, had the legislature wished to abrogate the common law for purposes of N.C. Gen. Stat. § 153A-99, it would have been similarly direct, rather than requiring our appellate courts to engage in a strained analysis of the word "thereof" in order to ascertain their intent. "To determine whether N.C.G.S. § [153A-99] abrogated the [common law rule] at issue, we must examine its plain language." *Rosero v. Blake*, 357 N.C. 193, 206, 581 S.E.2d 41, 49 (2003) (citing *State v. Dellinger*, 343 N.C. 93, 95, 468 S.E.2d 218, 220 (1996)).

We also find it significant that other statutes addressing issues of county administration employ broader terms that would encompass a county sheriff and his or her employees. For example, N.C. Gen. Stat. § 153A-92(a) authorizes a county board of commissioners to "fix or approve the schedule of pay, expense allowances, and other compensation of all county officers and employees, whether elected or appointed, and may adopt position classification plans." (emphasis added). And, N.C. Gen. Stat. § 153A-435(a) authorizes a county to "contract to insure itself and any of its officers, agents, or employees against liability . . . caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope

of their authority and the course of their employment." (emphasis added). "It is a tenet of statutory construction that 'a change in phraseology when dealing with a subject raises a presumption of a change in meaning.' If the legislature had wanted to [include a sheriff's employees in N.C. Gen. Stat. § 153A-99] it could have expressly written § [153A-99] to include [persons employed by an agent or officer of a county.] . . . The fact that the legislature had the option to include this language, but chose not to, is presumptive evidence that it intended that the provision not encompass such options." *Brown v. Brown*, 112 N.C. App. 15, 20, 434 S.E.2d 873, 878 (1993) (quoting *Latham v. Latham*, 178 N.C. 12, 100 S.E. 131 (1919)).

Moreover, the interpretation of N.C. Gen. Stat. § 153A-99 was recently addressed by this Court in *Sims-Campbell v. Welch*, __ N.C. App. __, __, __ S.E.2d __, __ (3 March 2015). In *Sims-Campbell*, the plaintiff, an assistant register of deeds, argued that her firing violated N.C. Gen. Stat. § 153A-99:

> Sims-Campbell also argues that [her firing] . . . violated Section 153A-99 of the General Statutes[.] . . . This argument fails because an assistant register of deeds is not a county employee. . . . We again find guidance in our cases dealing with the office of sheriff. In a series of cases, this court has held that sheriff's deputies . . . are not county employees, but rather employees of the sheriff. . . . In light of the statute's plain language and our analogous case law concerning deputy sheriffs, we conclude that an assistant register of deeds . . . is not a "county employee" within the meaning of N.C. Gen. Stat. § 153A-99(b)(1).

Sims-Campbell, __ N.C. App. at __, __ S.E.2d at __. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

We are not unsympathetic to the plaintiffs' circumstances. However, "this Court is not in the position to expand the law. Rather, such considerations must be presented to our Supreme Court or our Legislature, who have the power to rectify any inequities[.] . . . This Court is an error-correcting court, not a law-making court." *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 127, 723 S.E.2d 352, 358 (2012). We hold that the trial court did not err in its adherence to the common law principle that those hired by a sheriff are not county employees, and that N.C. Gen. Stat. § 153A-99 did not articulate a new definition of "county employee." As this statute was the basis of plaintiffs' claim for wrongful termination in violation of public policy, this argument is without merit.

IV. Violation of North Carolina Constitutional Rights

In their second argument, plaintiffs contend that their termination violated their rights to freedom of speech guaranteed by Art. 1, § 14 of the North Carolina Constitution. We disagree.

A. Legal Principles

"The First Amendment to the Federal Constitution provides: 'Congress shall make no law . . . abridging the freedom of speech, or of the press[.]' . . . Similarly, Article I, § 14 of the North Carolina Constitution states: 'Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.' N.C. Const. art. I, § 14." *State v. Peterslie*, 334 N.C. 169, 183, 432 S.E.2d 832, 840 (1993). "[W]e have recognized a cause of action against state officials for [the] violation [of art. I, § 14]. . . . We have also recognized that 'in construing provisions of the Constitution of North Carolina, this Court is not bound by opinions of the Supreme Court of the United States construing even identical provisions in the Constitution of the United States.'" *Peterslie*, 334 N.C. at 184, 432 S.E.2d at 841 (citing *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) (other citations omitted).

"To establish a cause of action for wrongful discharge or demotion in violation of his right to freedom of speech, plaintiff must forecast sufficient evidence 'that the speech complained of qualified as protected speech or activity' and 'that such protected speech or activity was the 'motivating' or 'but for' cause for his discharge or demotion.' 'The resolution of these two critical issues is a matter of law and not of fact.'" *Swain v. Elfland*, 145 N.C. App. 383, 386-87, 550 S.E.2d 530, 533 (2001) (quoting *Warren v. New Hanover County Bd. of Education*, 104 N.C. App. 522, 525-

26, 410 S.E.2d 232, 234 (1991) (internal quotation omitted), and citing *Evans v. Cowan*, 132 N.C. App. 1, 9, 510 S.E.2d 170, 175 (1999)). "[T]he causal nexus between protected activity and retaliatory discharge must be something more than speculation." *Lenzer v. Flaherty*, 106 N.C. App. 496, 510, 418 S.E.2d 276, 284 (1992) (citing *Brooks v. Stroh Brewery Co.*, 95 N.C. App. 226, 237, 382 S.E.2d 874, 882 (1989)). In addition, in *Corum*, our Supreme Court "adopt[ed] the reasoning applied in the majority of federal circuit courts of appeal[,]" and held that:

> "[W]here the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to *specific evidence* that the officials' actions were improperly motivated."

Corum, 330 N.C. at 774, 413 S.E.2d at 284-85 (quoting *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988) (emphasis in *Corum*).

B. Stanley's State Constitutional Claim

Plaintiffs' complaint alleges that Stanley was terminated "for refusing to make contributions to [defendant's] re-election campaign and for failing to volunteer to work in his campaign[,]" in "violat[ion] of the Constitution of North Carolina, Article I, § § 14 and 36." Assuming, without deciding, that Stanley produced evidence that he was terminated for expressing his political views, we hold that his termination did not violate his rights under the North Carolina Constitution.

"[T]he First Amendment generally bars the firing of public employees 'solely for the reason that they were not affiliated with a particular political party or candidate,' as such firings can impose restraints 'on freedoms of belief and association[.]'" *Bland v. Roberts*, 730 F.3d 368, 374 (4th Cir. 2013) (quoting *Knight v. Vernon*, 214 F.3d 544, 548 (4th Cir. 2000) (internal quotation marks omitted), and *Elrod v. Burns*, 427 U.S. 347, 355, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality opinion)). However, "the Supreme Court in *Elrod* created a narrow exception 'to give effect to the democratic process' by allowing patronage dismissals of those public employees occupying policymaking positions." *Id.* (quoting *Jenkins v. Medford*, 119 F.3d 1156, 1161 (4th Cir. 1997) (*en banc*).

> In *Jenkins* we analyzed the First Amendment claims of several North Carolina sheriff's deputies who alleged that the sheriff fired them for failing to support his election bid and for supporting other candidates. In so doing, we considered the political role of a sheriff, the specific duties performed by sheriff's deputies, and the relationship between a sheriff and his deputies as it affects the execution of the sheriff's policies. . . . [We] concluded "that in North Carolina, the office of deputy sheriff is that of a policymaker, and that deputy sheriffs are the alter ego of the sheriff generally[,]" . . . [and] determined "that such North Carolina deputy sheriffs may be lawfully terminated for political reasons under the *Elrod-Branti* exception to prohibited political terminations."

Bland, 730 F.3d at 376 (quoting *Jenkins*, 119 F.3d at 1164). "In [*Jenkins*] the majority explained that it was the deputies' role as sworn law enforcement officers that was dispositive[.]" *Bland* at 377.

The reasoning of *Jenkins* and *Bland* was adopted by this Court in *Carter v. Marion*, 183 N.C. App. 449, 645 S.E.2d 129 (2007), *review denied, appeal dismissed*, 362 N.C. 175, 658 S.E.2d 271 (2008). The plaintiffs in *Carter* were former deputy clerks of court who claimed that they had been terminated from their employment for political reasons, in violation of their rights to free speech under the North Carolina Constitution. On appeal, we discussed the holdings of the United States Supreme Court in *Elrod,* and in *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980), which held that public employees could be discharged "for not being supporters of the political party in power" if "party affiliation is an appropriate requirement for the position involved." *Carter*, 183 N.C. App. at 453, 645 S.E.2d at 131. The *Carter* opinion also discussed the holding of *Jenkins* that "deputies actually sworn to engage in law enforcement activities on behalf of the sheriff" could be lawfully terminated for political reasons, and noted that *Jenkins* based its holding on the facts that:

> [D]eputy sheriffs (1) implement the sheriff's policies; (2) are likely part of the sheriff's core group of advisors; (3) exercise significant discretion; (4) foster public confidence in law enforcement; (5) are expected to provide the sheriff with truthful and accurate information; and (6) are general agents of the sheriff, and the sheriff is civilly liable for the acts of his deputy.

Carter at 454, 654 S.E.2d at 131 (citing *Jenkins* at 1162-63). Utilizing the analysis of *Jenkins* and *Knight*, *Carter* held that "political affiliation is an appropriate requirement for deputy clerks of superior court." *Id.* In sum:

> Government employees generally are protected from termination because of their political viewpoints. But this Court and various federal appeals courts repeatedly have held that deputy sheriffs and deputy clerks of court may be fired for political reasons such as supporting their elected boss's opponents during an election.

Sims-Campbell, __ N.C. App. at __, __ S.E.2d at __ (citing *Carter*, *Jenkins*, *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), and *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989)).

In the instant case, it is undisputed that Stanley, as a deputy sheriff, was a sworn law enforcement officer. Plaintiffs argue that, to determine whether Stanley could be terminated for political reasons, we must analyze his customary duties as an individual to assess whether he enjoyed a "policymaking" position. However, the holdings in both *Jenkins* and *Carter* were based on the nature of the plaintiff's position, rather than on an analysis of the degree to which the individual's employer consulted him or her on policy matters. *Carter* is controlling on the issue of whether Stanley could lawfully be fired based on political considerations, and we hold that his termination did not violate his free speech rights under the North Carolina Constitution.

C. McLaughlin's State Constitutional Claim

Plaintiffs' complaint alleges that McLaughlin was terminated "for refusing to make contributions to [defendant's] re-election campaign and for failing to volunteer to work in his campaign[,]" and "because of his Republican beliefs." Unlike Stanley, McLaughlin was not a sworn law enforcement officer. Given that *Carter* held that deputy clerks of court might lawfully be fired based on political considerations, this is not necessarily dispositive. However, defendants' appellee brief takes the position that, "[a]s McLaughlin was a detention officer, his wrongful discharge claim does not fail as a matter of law." In light of defendants' concession on this issue, we assume, without deciding, that McLaughlin could not lawfully be terminated for his exercise of his right to free speech. We conclude, however, that even assuming, *arguendo*, that McLaughlin produced evidence to support his claim that his termination was based on his political preferences, he failed to offer evidence that he would not have been fired for violations of sheriff's department rules, regardless of his political affiliation.

McLaughlin's argument that he was fired in violation of his right to free speech is based on the following circumstances: (1) McLaughlin received favorable performance reviews for several years before he was terminated; (2) over a year before the election, McLaughlin received the letter sent to over 1000 sheriff's department employees, in which defendant announced his candidacy and solicited donations; (3) McLaughlin was a supporter of defendant's opponent and did not contribute to

defendant's campaign; and (4) McLaughlin was told by Sergeant Nesbitt prior to the election that he would be fired if defendant won reelection.[2]

On the other hand, defendants note that McLaughlin admitted in his deposition that his belief that defendant knew he was a Republican was "speculation," and that defendant testified that he did not know the identities of the contributors to his campaign and did not know what McLaughlin's political affiliation was. We agree with defendants that McLaughlin produced little evidence that "protected activity was a substantial or motivating factor" in defendant's decision to terminate him. However, we do not need to reach a definitive conclusion on this issue, given McLaughlin's failure to produce evidence to rebut defendant's showing that McLaughlin was fired for failure to comply with Sheriff's Department rules and policies.

"'[W]here the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the officials' actions were improperly motivated.' Mere conclusory assertions of discriminatory intent embodied in

[2] In response to defendant's challenge to our consideration of the statement by Sergeant Nesbitt as hearsay, McLaughlin argues that "[c]learly [defendant] cannot raise this for the first time on appeal." We agree. *See Gilreath v. N.C. Dept. of Health & Human Servs.*, 177 N.C. App. 499, 629 S.E.2d 293, (2006) (on appeal from entry of summary judgment, plaintiff could not challenge the trial court's refusal to strike paragraphs from an affidavit where she failed to obtain a ruling on the issue from the trial court).

affidavits or deposition testimony are not sufficient to avert summary judgment." *Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 501 451 S.E.2d 650, 655-56 (1995) (quoting *Pueblo Neighborhood*, 847 F.2d at 649. We conclude that McLaughlin has failed to produce any evidence to rebut defendants' substantial showing that he was fired for failure to comply with Sheriff's Department rules.

Defendants' Exhibit 2, a memorandum detailing the basis of McLaughlin's termination, states that McLaughlin had been fired for unsatisfactory performance, described as follows:

> [1.] On November 19th and 20th [2009], D/O McLaughlin failed to follow policy and procedures while assigned to the youthful offender pod. Several things were observed by his supervisors and captured on [v]ideo while conducting their wellness checks.
>
> [2.] No crossover roll call conducted during feeding time.
>
> [3.] Youthful offender distributing food trays to the entire pod with no supervision.
>
> [4.] Video clips displayed D/O McLaughlin not conducting his pod tours, falsely entered Pod tours in OMS.
>
> [5.] No shakedowns were conducted.
>
> [6.] Allowed a youthful offender to push his pod tour buttons as he remained at the podium.
>
> [7.] Allowed youthful offenders to come out of their cells to watch TV when they should have been locked down.
>
> [8.] No pre-pod inspection or orientation conducted [and] seen beating on the podium.

> [9.] He is seen throwing the Pod Orientation paperwork on the floor, and pushes the youthful offender's white cards off the podium then allows one of them to retrieve them off the floor.
>
> [10.] D/O McLaughlin had a discussion with his Sergeant on October 14th where policy and procedures were discussed.
>
> [11.] On November 30th, during McLaughlin's interview with OPC he admitted to not following policy and procedures, allowing a youthful offender to feed the Pod, push his tour buttons, failing to conduct pod tours, shakedowns, and falsifying his log entries in OMS.
>
> [12.] Detention Officer Ivan McLaughlin's actions were not in keeping with the highest standards of conduct as required by employees of the Mecklenburg County Sheriff's Office.

On appeal, McLaughlin asserts that some of these violations occurred during a 30 minute visit from his supervisors and that they "cornered" him so that he "would have to answer their questions," and then based his termination upon his failure to follow procedures during their visit. However, he does not dispute the factual accuracy of defendants' Exhibit 2, which specifies that violations occurred on both 19 and 20 November, that violations were observed on videotape, and that he admitted in his pre-termination interview that he had violated required rules and policies.[3] In

[3] Plaintiffs argue on appeal that we should not consider the contents of McLaughlin's interview because it was "not certified" or transcribed by a court reporter, and because McLaughlin was not under oath during the interview. As discussed in regards to Sergeant Nesbitt's statement, plaintiffs failed to challenge the interview at the trial level and cannot raise the issue for the first time on appeal.

addition, McLaughlin admitted in his sworn deposition that he had violated Sheriff's Department rules, including falsifying a record. McLaughlin also admitted in his deposition that he had no information that Sheriff Bailey knew that he supported Bailey's opponent, and that his opinions on this issue were "speculation." As discussed above, where the "defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to *specific evidence* that the officials' actions were improperly motivated." *Corum* at 774, 413 S.E.2d at 284-85 (citation omitted). We hold that McLaughlin has failed to produce such evidence or to demonstrate that he would not have been fired "but for" his political beliefs.

V. Conclusion

For the reasons discussed above, we conclude that the trial court did not err by granting summary judgment in favor of defendants. Having reached this conclusion, we do not reach the parties' arguments on sovereign immunity. The trial court's order is

AFFIRMED.

Judge STEPHENS concurs.

Judge GEER concurring in part and dissenting in part.

Moreover, plaintiff does not challenge defendants' Exhibit 2, which states that McLaughlin admitted to rules violations during his interview.

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GEER Judge, concurring in part and dissenting in part.

I respectfully dissent in part from the majority opinion's conclusion that N.C. Gen. Stat. § 153A-99 (2013) does not cover employees of a county sheriff's office and, therefore, plaintiffs are not entitled to pursue a claim for wrongful discharge in violation of public policy based on that statute. I would hold that since the Mecklenburg County Sheriff's Office is funded by Mecklenburg County, both plaintiffs have properly asserted claims for wrongful discharge in violation of public policy based on N.C. Gen. Stat. § 153A-99. Because a wrongful discharge claim is an adequate alternative remedy, I would not address the state constitutional claim. I do, however, concur in the majority opinion's analysis of both plaintiffs' constitutional claims.

With respect to the issue whether plaintiffs submitted sufficient evidence of wrongful discharge in violation of public policy, I would hold consistent with the majority opinion's analysis of plaintiff McLaughlin's constitutional claim, that McLaughlin has failed to present sufficient evidence to give rise to a genuine issue of material fact with respect to the wrongful discharge claim. The majority was not, however, required to address the sufficiency of plaintiff Stanley's evidence of political discrimination. I would hold that Stanley's evidence is sufficient to warrant reversal of the trial court's order granting summary judgment.

As the majority notes, the pivotal question is whether a sheriff's deputy is considered a "county employee" for purposes of N.C. Gen. Stat. § 153A-99. N.C. Gen.

Stat. § 153A-99(b)(1) specifically defines "county employee" and "employee" for purposes of the statute: " 'County employee' or 'employee' means any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds[.]" The majority opinion, in construing the phrase "county employee" in accordance with the common law, overlooks established principles of statutory construction.

As our Supreme Court has explained:

> Where, however, the statute, itself, contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be. The courts must construe the statute as if that definition had been used in lieu of the word in question. If the words of the definition, itself, are ambiguous, they must be construed pursuant to the general rules of statutory construction . . . .

In re Clayton-Marcus Co., 286 N.C. 215, 219-20, 210 S.E.2d 199, 203 (1974) (internal citation omitted). *See also Institutional Food House, Inc. v. Coble*, 289 N.C. 123, 135-36, 221 S.E.2d 297, 305 (1976) (accord).

In accordance with statutory construction principles, this Court has previously refused to incorporate common law definitions when the statute itself contains a definition. *See, e.g., Campos-Brizuela v. Rocha Masonry, L.L.C.*, 216 N.C. App. 208, 219-20, 716 S.E.2d 427, 436 (2011) ("[W]e conclude that the broad statutory definition of 'employee' contained in N.C. Gen. Stat. § 97-2(2) renders it unnecessary for us to finely parse the common law distinctions between disclosed, unidentified, and

undisclosed principals as applied to this case."); *Baker v. Rushing*, 104 N.C. App. 240, 248, 409 S.E.2d 108, 113 (1991) ("This broad, statutory definition of landlord makes irrelevant in determining the liability of an agent the common law distinction between disclosed and undisclosed principals.").

Here, N.C. Gen. Stat. § 153A-99(b)(1) contains a specific definition of "county employee" and "employee." Under controlling Supreme Court authority, the role of this Court is to apply the General Assembly's actual definition. In the event that definition is deemed ambiguous, this Court is required to apply statutory construction principles in determining the General Assembly's intent in adopting that definition. I have found no authority supporting the majority's approach of essentially assuming that the General Assembly, although including a specific definition, actually intended simply to adopt the common law definition.

Indeed, the majority's incorporation of the common law definition overlooks an obvious question: Why would the General Assembly need to include a definition of "county employee" if it intended that phrase to refer only to county employees as defined by the common law or employees undisputedly employed by the county under current law? In construing statutes, "we presume that the legislature acted with full knowledge of prior and existing law and its construction by the courts." *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763 (1992). Consequently, in the absence of a specific statutory definition of "county employee," we would have

construed that phrase in accordance with prior opinions of our courts. Yet, here, because there is a statutory definition, the question before this Court is not whether sheriff's department employees are "county employees" under prior case law, but rather what did the General Assembly intend when it enacted N.C. Gen. Stat. § 153A-99(b)(1)?

N.C. Gen. Stat. § 153A-99(b)(1) defines a "county employee" as an individual either (1) "employed by a county" or (2) employed by "any department or program thereof that is supported, in whole or in part, by county funds." The majority opinion does not seriously address what the General Assembly intended when it referred to employees of "any department or program thereof that is supported, in whole or in part, by county funds." *Id.*

As North Carolina's constitution establishes, a sheriff's department is a county sheriff's department. *See* N.C. Const. art. VII, § 2 ("In each county a Sheriff shall be elected by the qualified voters thereof . . . ."). Because a county sheriff's department is also funded in whole or in part by county funds, it arguably is a department of the county supported by county funds. *See* N.C. Gen. Stat. § 153A-149(c)(18) (2013) (authorizing property taxes levied by counties to be used to "provide for the operation of the office of the sheriff of the county"); N.C. Gen. Stat. § 153A-103(2) (2013) (providing that "at least two deputies . . . shall be reasonably compensated by the

county"). Thus, N.C. Gen. Stat. § 153A-99(b)(1) can reasonably be construed as encompassing employees of a sheriff's department.

"Statutory language is ambiguous if it is fairly susceptible of two or more meanings." *Purcell v. Friday Staffing*, ___ N.C. App. ___, ___, 761 S.E.2d 694, 698 (2014) (internal quotation marks omitted). When, as here, " 'a statute is ambiguous, judicial construction *must* be used to ascertain the legislative will.' " *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (emphasis added) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990)). Therefore, in deciding what the General Assembly in fact intended when it included within the definition of "county employee" employees of "any department or program thereof that is supported, in whole or in part, by county funds," N.C. Gen. Stat. § 153A-99(b)(1), the majority should have applied statutory construction principles rather than just invoking the common law and holding that the statutory definition is synonymous with the common law at least with respect to sheriff's department employees.

In my view, the majority opinion fails to give any separate meaning to the clause "any department or program thereof that is supported, in whole or in part, by county funds." *Id.* Yet, it is a basic principle of statutory construction that

> "[i]f possible, a statute must be interpreted so as to give meaning to all its provisions." *State v. Buckner*, 351 N.C. 401, 408, 527 S.E.2d 307, 311 (2000) (citing *State v. Bates*, 348 N.C. 29, 35, 497 S.E.2d 276, 279 (1998)).

> " '[S]ignificance and effect should, if possible, . . . be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word.' " *Hall v. Simmons*, 329 N.C. 779, 784, 407 S.E.2d 816, 818 (1991) (quoting *State v. Williams*, 286 N.C. 422, 432, 212 S.E.2d 113, 120 (1975)).

Brown v. N.C. Dep't of Env't & Natural Res., 212 N.C. App. 337, 346-47, 714 S.E.2d 154, 161 (2011). *See also In re K.L.*, 196 N.C. App. 272, 280, 674 S.E.2d 789, 794 (2009) ("It is, however, well established that [w]hen interpreting a statutory provision, [t]he legislature is presumed to have intended a purpose for each sentence and word in a particular statute, and a statute is not to be construed in a way which makes any portion of it ineffective or redundant." (internal quotation marks omitted)).

In other words, because N.C. Gen. Stat. § 153A-99(b)(1) refers to both individuals "employed by a county" and individuals employed by "any department or program thereof that is supported, in whole or in part, by county funds," the General Assembly must have intended that the second clause cover people who do not otherwise fall within the clause "employed by a county." If the statute is construed, as the majority opinion does, to cover only individuals actually "employed by a county," *id.*, then the second clause is rendered meaningless -- a construction that is impermissible.

The question becomes: what departments or programs exist that are in some fashion part of the county and are supported at least partially by county funds, but

whose employees are not otherwise considered as being employed by the county? I believe that Chapter 153A itself answers that question. Article 5 of Chapter 153A covers the "Administration" of Counties. N.C. Gen. Stat. § 153A-99 appears in Part 4 (entitled "Personnel") of Article 5. Part 5 of Article 5 addresses "Board of Commissioners and *Other Officers, Boards, Departments, and Agencies of the County*." (Emphasis added.) The titles of Part 4 and Part 5 were included in the original session law enacting Chapter 153A. *See* 1973 N.C. Sess. Laws ch. 822, pp. 1246, 1248. These titles, therefore, are evidence of the General Assembly's intent. *See State v. Fowler*, 197 N.C. App. 1, 6, 676 S.E.2d 523, 532 (2009) ("[W]hile 'the caption [of a statute] will not be permitted to control when the meaning of the text is clear,' '[w]here the meaning of a statute is doubtful, its title may be called in aid of construction.' " (quoting *Dunn v. Dunn*, 199 N.C. 535, 536, 155 S.E. 165, 166 (1930))).

Within Part 5 appears N.C. Gen. Stat. § 153A-103, which was also included in the 1973 Session Law and is titled: "Number of employees in offices of sheriff and register of deeds." The statute specifies that the Board of County Commissioners may fix the number of salaried employees in the offices of the sheriff and the register of deeds subject to certain limitations. *Id.* Since Part 5 addresses not only the Board of County Commissioners, but also "Other Officers, Boards, Departments, and Agencies of the County," I believe that § 153A-103 indicates the General Assembly's

intent that sheriff's departments be considered, for purposes of Chapter 153A, as "Other . . . Departments[] and Agencies of the County."

Moreover, while N.C. Gen. Stat. § 153A-103(1) specifies that the sheriff has "the exclusive right to hire, discharge, and supervise the employees in his office," the statute also specifies that the county fixes the number of sheriff's department salaried employees and pays their compensation. Given that the General Assembly has, in N.C. Gen. Stat. § 153A-99(b)(1), chosen to define a "county employee" in terms of who pays for the employee's department or program -- rather than who hires, fires, or supervises the employee -- I believe, contrary to the majority opinion, that N.C. Gen. Stat. § 153A-103 in fact supports the conclusion that the General Assembly intended that sheriff's departments fall within the scope of N.C. Gen. Stat. § 153A-99(b)(1). For that reason, I also find cases relied upon by the majority -- deciding whether a sheriff's department employee is a county employee for purposes of respondeat superior -- unhelpful in addressing the General Assembly's intent in N.C. Gen. Stat. § 153A-99. Those cases focus entirely on identifying who has the authority to control the actions of the deputy sheriffs -- a different test than the one specified in N.C. Gen. Stat. § 153A-99(b)(1).

Moreover, the view that a sheriff's department is an office or department of the county is, contrary to the majority opinion's assumption, consistent with well-established and controlling law of the Supreme Court. In *Southern Ry. Co. v.*

Mecklenburg Cnty., 231 N.C. 148, 151, 56 S.E.2d 438, 440 (1949), the Supreme Court explained:

> *One of the primary duties of the county, acting through its public officers*, is to secure the public safety by enforcing the law, maintaining order, preventing crime, apprehending criminals, and protecting its citizens in their person and property. This is an indispensable function of county government which the county officials have no right to disregard and no authority to abandon.
>
> *The sheriff is the chief law enforcement officer of the county.*

(Emphasis added.) This portion of *Southern Railway* has more recently been relied upon by the Supreme Court in emphasizing the importance of county lines for redistricting purposes. *Stephenson v. Bartlett*, 355 N.C. 354, 365, 562 S.E.2d 377, 386 (2002). This Court has also held that this holding of *Southern Railway* is controlling authority. *See Boyd v. Robeson Cnty.*, 169 N.C. App. 460, 477, 621 S.E.2d 1, 12 (2005) (holding that "[w]e are bound by *Southern Railway*" when concluding that office of North Carolina sheriff is a "person" under § 1983).

When N.C. Gen. Stat. § 153A-99(b)(1) (emphasis added) refers to a "department or program *thereof* that is supported, in whole or in part, by county funds," I can conceive of no other interpretation of "thereof" than "of the county." Further, our legislature has chosen in Chapter 153A to require that the county fully fund the county sheriff's department, which is the county's means, consistent with its duties under *Southern Railway*, to provide for the public safety of its citizens. Under

Chapter 153A and controlling Supreme Court authority, a sheriff is an officer *of the county*, his department is a department *of the county*, and, I would hold, it is encompassed within N.C. Gen. Stat. § 153A-99(b)(1).

A review of other statutes addressing the office of the sheriff further indicates that, as a matter of legislation, the General Assembly has chosen to given counties significant control over the office of the sheriff even though the sheriff remains a constitutionally-established, separate local government officer. The Fourth Circuit Court of Appeals has succinctly explained:

> [The defendant sheriff] ignores, however, a series of indicia suggesting substantial county control of sheriffs. Residents of a county elect their sheriff. N.C. Const. art. VII, § 2; N.C. Gen. Stat. § 162-1. The Board of County Commissioners determines the number of salaried employees in the sheriff's office. § 153A-103. The county sets and pays the salaries of a sheriff and his deputies and the county determines and pays the overall budget. §§ 153A-103, 153A-149. If a vacancy arises in the position of sheriff, either by resignation or removal, the Board of County Commissioners appoints a new sheriff for the remainder of the sheriff's term. § 162-5. A petition for removal of a sheriff is prosecuted by the county attorney, § 128-17, before a judge of the Superior Court in the county where the sheriff resides. § 128-16. If a sheriff resigns, he forwards his resignation to the county commissioners. § 162-3. Sheriffs must also furnish a bond to the county commissioners, with the amount of the bond set by the commissioners. § 162-8.
>
> Therefore, county government controls many significant aspects of North Carolina sheriffs' employment. County residents hire the sheriff (through election), the county government sets their pay, the county provides for

> the number of deputies, and the county attorney is the official with the power to move to dismiss the sheriff.

Harter v. Vernon, 101 F.3d 334, 340-41 (4th Cir. 1996) (internal footnote omitted). *See also id.* at 341 ("Sheriffs have been considered county officers from the creation of that office in England.").

Moreover, the majority opinion's analysis cannot be reconciled with the " 'fundamental rule of statutory construction that statutes in pari materia, and all parts thereof, should be construed together and compared with each other.' " *Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009) (quoting *Redevelopment Comm'n v. Sec. Nat'l Bank*, 252 N.C. 595, 610, 114 S.E.2d 688, 698 (1960)). "Statutory provisions must be read in context: Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole. Statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each." *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003) (internal citation and quotation marks omitted). Further, " '[i]nterpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible.' " *Barnes v. Erie Ins. Exch.*, 156 N.C. App. 270, 278, 576 S.E.2d 681, 686 (2003) (quoting *Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 144 N.C. App. 589, 593, 551 S.E.2d 873, 876 (2001)).

The majority opinion's holding means that no portion of N.C. Gen. Stat. § 153A-99 applies to employees of sheriff's departments. However, N.C. Gen. Stat. § 153A-99(e) provides that "[n]o employee may use county funds, supplies, or equipment for partisan purposes, or for political purposes except where such political uses are otherwise permitted by law." Consequently, the majority opinion leads to the result that this provision does not apply to sheriffs and their employees even though the sheriff's department's funding, supplies, and equipment come from the county.

Perhaps even more significantly, the majority's holding also places N.C. Gen. Stat. § 153A-99 in conflict with other provisions of Chapter 153A in which "county employee" and "employee" have been determined to include employees of the sheriff's department. N.C. Gen. Stat. § 153A-92(a) (2013) specifies that "the board of commissioners shall fix or approve the schedule of pay, expense allowances, and other compensation of *all county officers and employees, whether elected or appointed*, and may adopt position classification plans." (Emphasis added.) N.C. Gen. Stat. § 153A-92(d) authorizes a county to "purchase life insurance or health insurance or both for the benefit of all or any class of county officers and employees as a part of their compensation. A county may provide other fringe benefits for county officers and employees." These provisions -- although addressing "county officers and employees" -- cover employees of the sheriff's department. *See Hubbard v. Cnty. of Cumberland*, 143 N.C. App. 149, 154, 544 S.E.2d 587, 591 (2001) (upholding denial of county's

motion for summary judgment). Indeed, in *Hubbard*, this Court upheld the trial court's dismissal of the plaintiff's compensation-based claims against the sheriff on the grounds that it is not the sheriff's responsibility to fund the sheriff's department but that of the county, and "[n]or does the Sheriff administer the funds." *Id.*

Further, N.C. Gen. Stat. § 153A-97 (2013) provides that "[a] county may, pursuant to G.S. 160A-167, provide for the defense of: (1) Any county officer or employee, including the county board of elections or any county election official." N.C. Gen. Stat. § 160A-167(a) (2013) provides that the defense may be provided "by purchasing insurance which requires that the insurer provide the defense."

N.C. Gen. Stat. § 153A-435(a) (2013) also specifies:

> *A county may contract to insure itself and any of its officers, agents, or employees* against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county *or of any of its officers, agents, or employees* when acting within the scope of their authority and the course of their employment. The board of commissioners shall determine what liabilities and what officers, agents, and employees shall be covered by any insurance purchased pursuant to this subsection.
>
> *Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function.* . . . By entering into an insurance contract with the county, an insurer waives any defense based upon the governmental immunity of the county.

(Emphasis added.)

It is well established that sheriffs and their employees fall within these provisions:

> Our Legislature has prescribed two ways for a sheriff to be sued in his official capacity, thus waiving sovereign immunity. First, under section 58-76-5, a plaintiff may sue a sheriff and the surety on his official bond for acts of negligence in the performance of official duties. . . .
>
> Second, a sheriff may be sued in his official capacity under section 153A-435. Section 153A-435 permits a county to purchase liability insurance, which includes participating in a local government risk pool, for negligence caused by an act or omission of the county or any of its officers, agents, or employees when performing government functions. The [p]urchase of insurance under this subsection waives the county's sovereign immunity, to the extent of insurance coverage . . . .

Myers v. Bryant, 188 N.C. App. 585, 588, 655 S.E.2d 882, 885 (2008) (internal citations and quotation marks omitted).

In *Cunningham v. Riley*, 169 N.C. App. 600, 602, 611 S.E.2d 423, 424 (2005), this Court further recognized that when the county "purchased insurance covering the acts of the employees of the Mecklenburg County Sheriff's Department[,]" then "[a] suit against a sheriff's deputy in his official capacity constituted a suit against the county, thus triggering this insurance coverage." Moreover, while "[t]he doctrine of sovereign immunity generally bars recovery in actions against deputy sheriffs sued in their official capacity[,]" "[a] county may waive sovereign immunity by purchasing

liability insurance, but only to the extent of coverage provided." *Id.* (citing N.C. Gen. Stat. § 153A-435(a) (2004)).

Finally, N.C. Gen. Stat. § 153A-98 (2013), which addresses the application of the Public Records Act to personnel files of county employees and applicants for county employment has also been held to apply to sheriffs and their employees. Our Supreme Court has held: "While there are certainly differences between the office of sheriff and the position of county manager, which would be material in other contexts, the application of section 153A-98 does not turn on such distinctions. The clear purpose of this statute is to provide some confidentiality to those who apply to county boards or their agents for positions which those boards and their agents are authorized to fill. It is in this sense that the statute uses the terms 'applicants for employment' and makes the personnel files of such applicants subject to its provisions." *Durham Herald Co. v. Cnty. of Durham*, 334 N.C. 677, 679, 435 S.E.2d 317, 319 (1993).

In short, without a specific definition such as that contained in N.C. Gen. Stat. § 153A-99(b)(1) -- a definition that by its terms encompasses a sheriff's department -- other provisions of Chapter 153A, including provisions within the same Article and Part as N.C. Gen. Stat. § 153A-99, have been deemed to cover employees of a sheriff's department even though referencing only "county officers" or "county employees." The majority opinion provides no rationale for concluding that the General Assembly

intended in these provisions to include sheriffs as county officers and to bring sheriff's department employees within the scope of those provisions, but had a different intent in N.C. Gen. Stat. § 153A-99.

I can conceive of no basis for reaching that conclusion given the definition actually contained in N.C. Gen. Stat. § 153A-99(b)(1) and its focus on funding of departments as opposed to control over personnel decisions when defining "county employee." I would, therefore, hold under longstanding principles of statutory construction that employees of sheriff's departments fall within the definition of "county employee" and "employee" set out in N.C. Gen. Stat. § 153A-99(b)(1).

Based on this conclusion, I would further hold that plaintiff Stanley may assert a wrongful discharge claim in violation of the public policy set out in N.C. Gen. Stat. § 153A-99. *See Vereen v. Holden*, 121 N.C. App. 779, 784, 468 S.E.2d 471, 474 (1996) (holding that N.C. Gen. Stat. § 153A-99 supported claim for wrongful discharge in violation of public policy when county employee alleged defendants fired him due to his political affiliation and activities).

Because the majority opinion does not address the sufficiency of plaintiff Stanley's evidence to support this claim, I do so briefly. When the evidence is viewed in the light most favorable to Stanley, as required on a motion for summary judgment, the evidence shows that Stanley had, prior to being terminated, an exemplary employment record. Stanley, a Republican, has also presented evidence from which

a jury could find that Sheriff Bailey, a Democrat, and Stanley's superior officers knew of Stanley's opposition to Sheriff Bailey's reelection. According to Stanley's evidence, Sheriff Bailey sent a letter to employees of the sheriff's department, including Stanley, soliciting contributions for his campaign. Stanley was also approached by superior officers and asked to purchase tickets to fundraisers. When Stanley refused, one of the officers commented: "You know who signs your checks."

Stanley presented further evidence that on 30 November 2010, shortly after Sheriff Bailey won reelection, Stanley was handed a letter of termination by Captain/Major Pummell. When Stanley asked him what the reason was for the termination, Pummell simply turned around and walked away. Subsequent to Stanley's termination, two incident reports were submitted accusing Stanley of having been responsible for a roll call disruption by loudly making a comment complaining about the lack of raises and talking about Sheriff Bailey's opponent being elected. One report stated that the incident occurred between 25 and 29 October 2010 while the other report did not indicate the date of the incident. The first report was signed off on by a sergeant on the day of Stanley's termination, while the second report was not signed off on until 6 December 2010. Stanley asserted in an affidavit that both reports were false.

Sheriff Bailey submitted evidence indicating that he fired Stanley for being disruptive -- he claimed that Stanley had disrupted the workplace by campaigning

for Sheriff Bailey's opponent. The Sheriff submitted testimony from another employee about Stanley being disruptive one morning during roll call and that other employees had indicated that Stanley talked about how much better the Sheriff's Office would be once Sheriff Bailey's opponent got elected.

Stanley presented evidence that he had heard from two sergeants that someone else had, shortly before the election, made a comment about things changing when Sheriff Bailey's opponent was elected. One of the sergeants asked Stanley whether he had made the comment. When Stanley explained that he was out sick the day the comment was made, the other sergeant confirmed that Stanley had in fact been out on the day of the comment.

Given Stanley's evidence of his employment record, the sheriff's soliciting contributions from sheriff's department employees, the sheriff's having knowledge of Stanley's political support for the sheriff's opponent, and the sheriff's claim that Stanley was fired for a politically-motivated disruptive comment, together with Stanley's evidence that he did not make the disruptive comment, I would hold that Stanley has presented sufficient evidence to give rise to a genuine issue of material fact regarding whether Stanley's employment was terminated for a reason in violation of public policy. *See, e.g., Knight v. Vernon*, 214 F.3d 544, 552 (4th Cir. 2000) (holding that plaintiff submitted sufficient evidence that her firing was politically motivated when sheriff asked plaintiff for political loyalty, sheriff's top officers

solicited employees for campaign contributions, sheriff accused plaintiff of supporting his opponent, and reason given for termination could be found by jury to be pretext); *Jenks v. City of Greensboro*, 495 F. Supp. 2d 524, 529 (M.D.N.C. 2007) (explaining that plaintiff may establish pretext by showing employer's reliance on false or biased report caused adverse employment action); *Jones v. Cargill, Inc.*, 490 F. Supp. 2d 994, 1006 (N.D. Iowa 2007) ("When the facts are viewed in the light most favorable to Plaintiff, a jury could find that this prior 'record' was a sham, insofar as Plaintiff was falsely accused of staging the incident because he had repeatedly complained about racial discrimination and harassment.")

I would, therefore, reverse the trial court's grant of summary judgment as to Stanley's wrongful discharge claim. I agree, however, that we should affirm the entry of judgment on plaintiff McLaughlin's claims.