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NO. COA09-1712

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

DANA Y. JOHNSON,  
Plaintiff,

v.

New Hanover County  
No. 08 CVS 2069

SIDNEY A. CAUSEY, in his Official Capacity as Sheriff of New Hanover County; NORMAN GATTISON, JR., (former deputy sheriff), Individually and In his *Official Capacity* as Deputy Sheriff of New Hanover County; FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a surety for Sheriff Sidney A. Causey; and NEW HANOVER COUNTY, NORTH CAROLINA a body politic,  
Defendants.

Appeal by defendant Norman Gattison and cross-appeal by plaintiff from order entered 11 August 2009 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 11 May 2010.

*Bell & Vincent-Pope, P.A., by Judith M. Vincent-Pope, for plaintiff.*

*Womble Carlyle Sandridge & Rice, PLLC, by Sarah L. Buthe, Julie B. Bradburn, and Christopher J. Geis, for defendants.*

STEELMAN, Judge.

Deputy Sheriff Gattison's sexual assault of a female inmate was outside of the scope of his employment and there was no coverage for plaintiff's claims under a law enforcement liability

policy. Where a sheriff's surety bond existed in the amount of \$25,000.00, the defense of sovereign immunity was waived to the extent of that bond as to Gattison and Sheriff Causey, in their official capacities. Plaintiff failed to forecast evidence to demonstrate that genuine issues of material fact existed as to the claims asserted against Gattison and Sheriff Causey, in their official capacities. Where Gattison is an employee of Sheriff Causey and not New Hanover County, the trial court properly granted summary judgment in favor of the county. Plaintiff's claims against Gattison, in his individual capacity, remain pending before the trial court. There exists an adequate state remedy for plaintiff's alleged injury and the trial court did not err in granting summary judgment as to plaintiff's State constitutional claims.

#### I. Factual and Procedural Background

On 28 December 2003, Dana Johnson (plaintiff) was arrested by the Wilmington Police Department on outstanding warrants for failing to appear in the Superior Court of New Hanover County. While she was in the booking area of the New Hanover County jail, plaintiff placed telephone calls to her mother and sister regarding her bond. Plaintiff was then dressed in jail clothes by a female officer and escorted to the elevator by Deputy Sheriff Norman Gattison, Jr. (Gattison). Plaintiff entered the elevator with Gattison and another officer. After one floor, the other officer exited the elevator. Plaintiff alleged that Gattison said that she was "cute" and asked whether she had a boyfriend. Gattison is

alleged to have then said that "he could take care of [her]" and made a motion as if to unzip his pants. Once they reached the fourth floor, Gattison released her to Deputy Kristy Cox (Cox) and plaintiff was escorted to her cell. Cox subsequently received a call directing her to return plaintiff to booking in order to place an additional telephone call. Gattison returned to escort plaintiff to booking. After plaintiff placed her call, Gattison escorted her back to the fourth floor. While on the elevator, Gattison allegedly asked to see her breasts and was "rubbing and touching" plaintiff. Plaintiff was returned to her cell.

A brief time later, Gattison informed Cox that he was trying to clear up confusion over plaintiff's identity<sup>1</sup> and that she needed to go to the magistrate's office. Gattison took plaintiff to the floor where the magistrate's office was located and placed plaintiff in an unoccupied room. During this time, Gattison allegedly put his hand down her jumpsuit and touched her breast. Gattison then spoke with the magistrate, and confirmed that plaintiff had no additional warrants. Gattison then took plaintiff to a nearby stairwell, and told plaintiff to face the wall and place her hands on the wall. Gattison unbuttoned plaintiff's jumpsuit and allegedly forced her to engage in vaginal intercourse. Plaintiff was then escorted back to her fourth floor cell.

Plaintiff did not report what transpired in the stairwell during her incarceration in the New Hanover County jail. On 2

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<sup>1</sup> Plaintiff has a twin sister named Dina, who also had outstanding criminal charges pending.

January 2004, plaintiff reported the incident to the Rape Crisis Center of Coastal Horizons Center, Inc., which contacted the New Hanover County Sheriff's Office. Gattison denied raping plaintiff, but admitted that he had engaged in consensual sex with plaintiff. Gattison was fired within twenty-four hours of his confession. Gattison pled guilty to the charge of sexual activity by a custodian pursuant to N.C. Gen. Stat. § 14-27.7(a) and served six months in prison.

Plaintiff initially filed suit on 5 December 2006. This action was subsequently dismissed without prejudice. On 8 May 2008, plaintiff filed the instant action against Gattison, individually and in his official capacity; Sheriff Causey, in his official capacity; New Hanover County; and Fidelity and Deposit Company of Maryland (collectively, defendants) and alleged the following claims: (1) misconduct of Gattison; (2) negligence of unnamed defendants and Sheriff Causey; (3) negligent retention and negligent supervision of Gattison by Sheriff Causey; (4) negligent infliction of emotional distress by Gattison, Sheriff Causey, and New Hanover County; (5) North Carolina Constitutional claims; (6) liability of Sheriff Causey based upon *respondeat superior* and alter ego; (7) negligence of New Hanover County for failing to safely maintain the New Hanover County jail; and (8) liability of Fidelity and Deposit Company of Maryland based upon Gattison's conduct and Sheriff Causey's alleged negligence under the sheriff's bond. On 17 June 2008, defendants filed an answer denying the material allegations of plaintiff's complaint. On 13 March 2009,

defendants filed a motion for summary judgment alternatively arguing that sovereign immunity barred plaintiff's action and that plaintiff had failed to forecast evidence to support all of the elements of her claims against defendants. Gattison was a party to the motion for summary judgment in his official capacity only. Plaintiff's claims against Gattison in his individual capacity remain pending before the trial court and are not addressed in this appeal. On 11 August 2009, the trial court entered an order granting defendants' motion for summary judgment in part as to all claims except those for false imprisonment, detention, and assault and battery by Gattison, in his official capacity. The trial court held that "the language contained in the policy [was] ambiguous; that Defendant Gattison's acts are deemed covered by the provisions of the policy; that immunity as to those claims is waived; and that coverage applies only thereto." Gattison, in his official capacity, appeals and plaintiff cross-appeals.

## II. Interlocutory Nature of Appeal

Generally, a moving party may not appeal the denial of a motion for summary judgment because ordinarily such an order is interlocutory and does not affect a substantial right. *Bockweg v. Anderson*, 333 N.C. 486, 490, 428 S.E.2d 157, 160 (1993). "However, when the motion is made on the grounds of sovereign and qualified immunity, such a denial is immediately appealable, because to force a defendant to proceed with a trial from which he should be immune would vitiate the doctrine of sovereign immunity." *Smith v. Phillips*, 117 N.C. App. 378, 380, 451 S.E.2d 309, 311 (1994)

(citation omitted). The grant, rather than the denial of sovereign immunity, calls into question the same type of issues on appeal. *Greene v. Barrick*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 680 S.E.2d 727, 730 (2009). In the instant case, all defendants, in their official capacities, asserted the affirmative defense of sovereign immunity and, thus, Gattison's appeal and plaintiff's cross-appeal are properly before this Court.

### III. Standard of Review

The standard of review on a trial court's ruling on a motion for summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). The entry of summary judgment is appropriate where "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) (2009). "All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citation omitted). Summary judgment is proper when "an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense . . . ." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citation omitted).

### IV. Sovereign Immunity

"In North Carolina the law on governmental immunity is clear. In the absence of some statute that subjects them to liability, the state and its governmental subsidiaries are immune from tort liability when discharging a duty imposed for the public benefit." *McIver v. Smith*, 134 N.C. App. 583, 585, 518 S.E.2d 522, 524 (1999) (citations omitted), *disc. review improvidently allowed*, 351 N.C. 344, 525 S.E.2d 173 (2000). "The doctrine of sovereign immunity generally bars recovery in actions against deputy sheriffs sued in their official capacity." *Cunningham v. Riley*, 169 N.C. App. 600, 602, 611 S.E.2d 423, 424 (citation omitted), *disc. review denied and appeal dismissed*, 359 N.C. 850, 619 S.E.2d 405 (2005), *cert. denied*, 546 U.S. 1142, 163 L. Ed. 2d 1008 (2006). "Waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. State Ports Authority*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983).

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. Our General Statutes require all sheriffs to purchase a bond not to exceed \$25,000.

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. . . .

*Myers v. Bryant*, 188 N.C. App. 585, 588, 655 S.E.2d 882, 885 (internal citations omitted), *disc. review denied*, 362 N.C. 237, 659 S.E.2d 736 (2008).

V. Gattison's Appeal

In his only argument, Gattison contends that the trial court erred by denying summary judgment in favor of Gattison, in his official capacity, because the insurance policy did not provide coverage for his conduct.<sup>2</sup> We agree.

A. Terms of Insurance Policy In Effect

In the instant case, it is undisputed New Hanover County participated in a local government risk pool in December 2003, which contained provisions governing claims against Sheriff Causey and law enforcement employees. The provisions applicable to law enforcement employees are as follows:

1. Law Enforcement Employees Coverage.

The Fund will pay on behalf of the Participant or Covered Person, or both, all sums which the Participant or a Covered Person shall become legally obligated to pay as money damages because of an Occurrence which results in:

- a. Personal Injury; or
- b. Bodily Injury; or
- c. Property Damage; or
- d. Personal Injury, Bodily Injury, or Property Damage which results in emergency first aid treatment

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<sup>2</sup> Gattison's brief and plaintiff's brief only address whether sovereign immunity had been waived by the purchase of insurance. Whether sovereign immunity had been waived pursuant to the existence of the sheriff's surety bond is discussed *infra* in plaintiff's cross-appeal.



and arising out of the performance of a Covered Person's duties to provide law enforcement or other Fund approved law enforcement activities, or both, as declared in the application, and under the supervision of the Sheriff's office.

"Covered Person" is defined as, *inter alia*:

- h. each individual law enforcement or other employee of such department as are officially employed in the law enforcement duties or control, *but only in furtherance of the official pursuits of the law enforcement department or other Fund approved activities.*

(Emphasis added.)

#### B. Gattison's Conduct

At the outset, we note that this argument pertains to Gattison, in his official capacity only, and not Gattison in his individual capacity. As stated *supra*, plaintiff's claims against Gattison, in his individual capacity, remain pending before the trial court.

Gattison argues that he was not a "Covered Person" under the policy because his conduct was outside the scope of his employment and cites *Young v. Great Am. Ins. Co. of N.Y.*, 162 N.C. App. 87, 92, 590 S.E.2d 4, 7 (2004) (Hunter, J., dissenting), *per curiam rev'd based on the dissenting opinion*, 359 N.C. 58, 602 S.E.2d 673 (2004). In *Young*, a police officer sexually assaulted several different women while on duty performing routine traffic stops. *Id.* at 88, 590 S.E.2d at 5. The officer filed a declaratory judgment action requesting that the court determine whether there was coverage under the municipality's liability insurance policy. *Id.* The policy provided that the insurance company would pay

"those sums that the Insured becomes legally obligated to pay as damages because of 'wrongful act(s)' which result in [personal or bodily injury] caused by an 'occurrence' and arising out of the performance of the Insured's duties to provide law enforcement activities." *Id.* at 89, 590 S.E.2d at 6. The policy defined "wrongful acts" as having occurred "while performing law enforcement duties." *Id.*

The dissenting opinion, which was adopted by our Supreme Court, held that the intent of the policy was clear and unambiguous: "it is designed to cover those wrongful acts of police officers committed as the officer is carrying out duties related to law enforcement." *Id.* at 92, 590 S.E.2d at 8. In *Young*, the "plaintiff was not performing law enforcement duties at the same time as he was sexually assaulting the victims." *Id.* at 92, 590 S.E.2d at 8.

Although it is true that none of these assaults would have happened but for the fact plaintiff was a police officer, and thus had authority to stop or detain the victims, plaintiff's actions in forcing the women to commit sexual acts were not part of his law enforcement duties. Even though each case of assault began with a traffic stop or accident investigation, plaintiff at some point in each case stopped carrying out his duties in order to commit the assaults by performing acts so completely remote from law enforcement to constitute a cessation of his job duties, either by taking the women to a place unrelated to his law enforcement duties and by repeatedly physically and sexually assaulting a victim. Therefore, none of the assaults were committed as plaintiff actually carried out any duty of law enforcement. These assaults . . . were committed while he was serving his own personal and reprehensible purposes for

which he may be charged criminally and sued in his individual capacity.

*Id.* at 93, 590 S.E.2d at 8 (footnote omitted).

The facts and the provisions in the insurance policy in the instant case are materially indistinguishable from *Young*. While the provisions in the insurance policies are not identical, their import is the same. Here, "Covered Person" is defined as each individual law enforcement officer, "but only in furtherance of the official pursuits of the law enforcement department . . . ." It is clear and unambiguous that the policy was intended to provide coverage for officers performing law enforcement duties in furtherance of the official pursuits of the law enforcement department. See *Dawes v. Nash Cty.*, 357 N.C. 442, 449, 584 S.E.2d 760, 764 (2003) ("[I]f the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein." (quotation omitted)).

In the instant case, Gattison's conduct was not in furtherance of the official pursuits of the law enforcement department. Gattison removed plaintiff from her cell in order for her to make an additional phone call that she had requested. On the way back to her fourth floor cell, while in the elevator, Gattison asked to see plaintiff's breasts and was "rubbing and touching" her. Gattison subsequently returned and removed plaintiff from her cell a second time to take her to the magistrate's office. Once they reached the second floor, Gattison placed defendant in an

unoccupied room. Plaintiff put his hand down her jumpsuit and touched her breast. After Gattison spoke with the magistrate, Gattison and plaintiff entered a nearby stairwell, where Gattison and plaintiff engaged in vaginal intercourse.

During each of the alleged sexual assaults on plaintiff, Gattison was not acting in furtherance of the official pursuits of the Sheriff of New Hanover County, but rather was acting to further his own "personal and reprehensible purposes[.]" *Young*, 162 N.C. App. at 93, 590 S.E.2d at 8. Based upon the rationale in *Young*, Gattison's conduct was outside of the scope of his employment. There was no coverage for Gattison's sexual assaults upon plaintiff under the insurance policy.

The trial court erred in holding that the language of the policy was ambiguous and that sovereign immunity had been waived as to the actions of Gattison, in his official capacity, based upon the County's purchase of insurance. This portion of the trial court's order is reversed.

## VI. Plaintiff's Cross-Appeal

### A. Claims Against Sheriff Causey

#### 1. Sheriff's Surety Bond

In her first argument, plaintiff contends that the trial court erred in granting summary judgment in favor of Sheriff Causey, in his official capacity, and Fidelity and Deposit Company of Maryland, on the ground that Sheriff Causey waived sovereign immunity to the extent of the sheriff's surety bond.

N.C. Gen. Stat. § 58-76-5 (2003) provides:

Every person injured by the neglect, misconduct, or misbehavior in office of any clerk of the superior court, register, surveyor, sheriff, coroner, county treasurer, or other officer, may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds *for the due performance of their duties in office* in the name of the State, without any assignment thereof; and no such bond shall become void upon the first recovery, or if judgment is given for the defendant, but may be put in suit and prosecuted from time to time until the whole penalty is recovered; and every such officer and the sureties on his official bond shall be liable to the person injured for all acts done by said officer by virtue or under color of his office.

(Emphasis added.) It is well-established that waiver of a sheriff's sovereign immunity may be shown by the existence of an official bond pursuant to N.C. Gen. Stat. § 58-76-5. *Phillips*, 117 N.C. App. at 383, 451 S.E.2d at 313. This Court has stated "[t]he statutory mandate that the sheriff furnish a bond works to remove the sheriff from the protective embrace of governmental immunity . . . ." *Messick v. Catawba County*, 110 N.C. App. 707, 715, 431 S.E.2d 489, 494 (citation omitted), *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993). However, immunity is only waived to the extent of the amount of that bond. *Hill v. Medford*, 158 N.C. App. 618, 623, 582 S.E.2d 325, 329 (2003) (Martin, J. dissenting), *per curiam rev'd based on the dissenting opinion*, 357 N.C. 650, 588 S.E.2d 467 (2003).

It is undisputed that a sheriff's bond existed in the amount of \$25,000.00 in the instant case. Sheriff Causey waived immunity to the extent of that bond. Summary judgment in favor of Sheriff Causey, in his official capacity, on the basis of sovereign

immunity would be improper. We note that the trial court did not include the basis of his ruling as to Sheriff Causey in its order. Sheriff Causey also argued in his motion for summary judgment, in addition to the defense of sovereign immunity, that plaintiff had "failed to forecast evidence to support all elements of her claims . . . ." We must determine whether genuine issues of material fact existed as to Sheriff Causey, in his official capacity, on any legal theory set forth in plaintiff's complaint. See *Thomas v. Sellers*, 142 N.C. App. 310, 314, 542 S.E.2d 283, 286-87 (2001).

## 2. Respondeat Superior or Alter Ego

In her second argument, plaintiff argues that the trial court erred in granting Sheriff Causey summary judgment because he was liable for Gattison's conduct under the doctrine of *respondeat superior* or alter ego. We disagree.

"Under our law a deputy sheriff is authorized to act only in ministerial matters, and in respect to these matters he acts as vice-principal or *alter ego* of the sheriff, for the sheriff and his deputy are, in contemplation of law, one person' . . . The acts of the deputy are the acts of the sheriff[.]" *Cain v. Corbett*, 235 N.C. 33, 38, 69 S.E.2d 20, 23 (1952) (quotation omitted). However, where the doctrine of *respondeat superior* is relied upon as a basis for recovery by a third person, the tortious act of the servant must be committed in the scope of his employment. *Van Landingham v. Sewing Machine Co.*, 207 N.C. 355, 357, 177 S.E. 126, 127 (1934); see also *Estes v. Comstock Homebuilding Cos.*, 195 N.C. App. 536, 540, 673 S.E.2d 399, 402 (2009) ("[T]he master is not responsible

if the negligence of the servant which caused the injury occurred while the servant was engaged in some private matter of his own or outside the legitimate scope of his employment." (quotation omitted)).

If an assault is committed by the servant, not as a means or for the purpose of performing the work he was employed to do, but in a spirit of vindictiveness or to gratify his personal animosity or to carry out an independent purpose of his own, then the master is not liable.

*Robinson v. McAlhaney*, 214 N.C. 180, 183, 198 S.E. 647, 650 (1938) (citations omitted).

As discussed in Section V.B. of this opinion, Gattison was not acting within the scope of his employment when he sexually assaulted plaintiff. This argument is without merit.

### 3. Negligent Hiring, Training, Retention, and Supervision

In her third argument, plaintiff argues that the trial court erred in granting summary judgment in favor of Sheriff Causey because genuine issues of material fact existed as to whether he negligently hired, trained, retained, and supervised Gattison. We disagree.

#### Negligent Hiring or Retention

In order to establish a claim for negligent hiring or retention, a plaintiff must show (1) a tortious act by the employee; (2) the employee's incompetence or unfitness; (3) the employer's actual or constructive notice of the employee's incompetency or unfitness; and (4) injury resulting from the employee's incompetency or unfitness. *Medlin v. Bass*, 327 N.C.

587, 591, 398 S.E.2d 460, 462 (1990). The only element at issue in the instant case is whether Sheriff Causey had actual or constructive knowledge of Gattison's unfitness. Plaintiff argues Sheriff Causey knew or should have known prior to the hiring of Gattison that he had been a defendant in a lawsuit in New York in 1997 filed *pro se* by an inmate that alleged he was beaten and kicked by several officers, including Gattison.<sup>3</sup> Plaintiff also cites an incident that occurred five days prior to the sexual assault on plaintiff where Gattison was involved in an altercation with an inmate and allegedly punched the inmate after a verbal altercation. The alleged incident five days prior to Gattison's assault on plaintiff was never substantiated. Neither of these incidents involved sexual misconduct with an inmate. Thus, these incidents are not sufficient to establish that Gattison was likely to sexually assault a female inmate. See *Moricle v. Pilkington*, 120 N.C. App. 383, 387, 462 S.E.2d 531, 533 (1995) (holding that prior convictions for assault and battery, harassing telephone calls, possession of an unsealed container of alcohol, and traffic offenses were not indicative of the likelihood of the employees to engage in larceny). Plaintiff points to nothing in Gattison's background, which should have put Sheriff Causey on actual or constructive notice to alert him to Gattison's unfitness. Unsubstantiated claims of prior physical assaults on male inmates

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<sup>3</sup> The record does not indicate the outcome of the 1997 lawsuit.



were not indicative that Gattison would engage in sexual misconduct with a female inmate.

#### Training

Plaintiff also argues that Sheriff Causey was negligent in training Gattison in the jail's policies and procedures, in particular those policies relating to the transfer and movement of female inmates. Plaintiff's brief implies that there was a formal procedure in place that controlled when male officers were permitted to transport or move female inmates. However, the evidence presented at the summary judgment hearing indicates that no such formal policy was in place. Sheriff Causey testified that there was no written policy in place at the time the incident took place. Sheriff Causey was under the impression that North Carolina's Detention Officer Certification Course and basic law enforcement training taught officers that when a female officer is available, the female officer should transport the female inmate. While implementing such a rule may be the better practice, neither national nor North Carolina standards make this a requirement. In fact, plaintiff's own expert witness in proper jail policies and procedures, stated that "cross-gender supervision is a recognized supervisory style in corrections." Plaintiff's expert also testified that he could not say that supervisory training would have prevented Gattison from sexually assaulting plaintiff. Plaintiff failed to forecast evidence that Sheriff Causey was negligent in training Gattison or any other sheriff deputy.

#### Supervision

Plaintiff also argues that Sheriff Causey was negligent in failing to maintain a jail inmate log and failing to maintain the surveillance cameras located in the jail in proper working order.

Plaintiff argues that the deputy responsible for her cell block negligently failed to make an entry into a jail inmate log each time Gattison removed plaintiff from her cell and escorted her off of that floor. Deputy Cox, the officer responsible for plaintiff's cell block at the time of the incident, testified that she could not specifically recall if she made entries into the log when Gattison removed plaintiff from her cell. However, she stated that making an entry into the log is something that she generally did when inmates were taken from the cell block and that there was no reason why she would not have made an entry each time she released plaintiff to Gattison's custody.<sup>4</sup> Even assuming *arguendo* the log was not properly maintained, plaintiff has failed to demonstrate how this would have prevented Gattison's sexual assault on plaintiff. Plaintiff's expert testified that the inmate logs are relevant to reconstruct time lines for investigative purposes after an alleged incident occurred.

Plaintiff also argues Sheriff Causey negligently failed to maintain the surveillance cameras located in the jail in proper working order. Sheriff Causey testified that there were surveillance cameras in the jail and that "[s]ome worked and a lot did not." Sheriff Causey could not identify the percentage of

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<sup>4</sup> During discovery, defendants were unable to locate the 2003 inmate log book.

cameras that were inoperable. Surveillance cameras were located in the intake area and in certain hallways. There was evidence that the camera located in the elevator was not working at the time of the incident. However, there was no evidence in the record that a surveillance camera was located in the unoccupied room on the second floor near the magistrate's office where plaintiff was placed prior to the alleged rape and it is undisputed that a camera was not located in the stairwell outside of the magistrate's office where the alleged rape occurred. Plaintiff has failed to demonstrate or even address how this alleged breach of duty proximately caused plaintiff's injury. See *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 68, 414 S.E.2d 339, 345 (1992) (holding that the plaintiff "is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence . . . ." (citation omitted)).

This argument is without merit.

#### 4. Safe Control and Management of the Jail

In her fourth argument, plaintiff contends that the trial court erred by granting summary judgment in favor of Sheriff Causey based upon the fact that he failed to provide for the safe control and management of the jail.

In support of this argument, plaintiff cites N.C. Gen. Stat. § 162-22 (2003), which provides: "[t]he sheriff shall have the care and custody of the jail in his county; and shall be, or appoint, the keeper thereof." Plaintiff makes the broad, sweeping assertion that Sheriff Causey "failed to provide for the safe control and

management of the jail and ensure the security and well-being of its inmates, including [plaintiff], in numerous respects, which were the proximate cause of [plaintiff's] injuries." Plaintiff does not articulate any evidence or case law to support this broad assertion. Plaintiff simply lists 8 lines of record citations without further explanation. It is not the duty of this Court to comb through the record to find support for an appellant's argument. This argument is dismissed. N.C.R. App. P. 28(b)(6).

5. Negligent Infliction of Emotional Distress

In her fifth argument, plaintiff contends that the trial court erred by granting summary judgment in favor of Sheriff Causey because genuine issues of material fact exist as to her claim of negligent infliction of emotional distress.

In order to establish a claim for negligent infliction of emotional distress, a plaintiff must show: "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . . , and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990). Gattison intentionally engaged in a sexual assault against plaintiff. As we have held *supra*, plaintiff failed to forecast any evidence that Sheriff Causey was negligent. This claim necessarily fails.

Plaintiff has failed to show that genuine issues of material fact exist as to any claims against Sheriff Causey, in his official

capacity. We note that plaintiff argues that the insurance policy provides coverage for many of the above causes of action. However, because we have held that Sheriff Causey is entitled to judgment as a matter of law as to these claims, that analysis is duplicative and unnecessary. The trial court did not err by granting summary judgment in favor of Sheriff Causey, in his official capacity.

B. Claims Against New Hanover County

In her sixth argument, plaintiff contends that the trial court erred by granting summary judgment in favor of New Hanover County. We disagree.

Plaintiff contends New Hanover County is liable for the conduct of Gattison and for the failure to adequately maintain jail surveillance and supervision. However, N.C. Gen. Stat. § 153A-103(1) (2003) provides, in part, that "[e]ach sheriff and register of deeds elected by the people has the exclusive right to hire, discharge, and supervise the employees in his office." This Court has stated that "[t]his statute gives every indication that the control of the employees hired by the sheriff is vested exclusively in the sheriff." *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 450, 368 S.E.2d 892, 894, *disc. review denied and appeal dismissed*, 323 N.C. 366, 373 S.E.2d 547 (1988). In *Clark v. Burke County*, the plaintiff sued members of the Burke County Sheriff's Department and Burke County to recover damages for wrongful death, which resulted from a high speed chase. 117 N.C. App. 85, 87, 450 S.E.2d 747, 747 (1994). The defendants contended that Burke County could not be held liable for the alleged negligent acts of the

Sheriff or his deputies because they were not employees of the county. *Id.* at 89, 450 S.E.2d at 748. We agreed based upon the language of the above-referenced statute. *Id.* at 89, 450 S.E.2d at 749. "A deputy is an employee of the sheriff, not the county. Therefore, any injury resulting from [the deputy's] actions in this case cannot result in liability for Burke County and summary judgment is therefore affirmed for Burke County." *Id.* Based upon the holding in *Clark*, the trial court did not err in granting summary judgment in favor of New Hanover County.

#### C. Constitutional Claims

In her seventh argument, plaintiff contends that the trial court erred by granting summary judgment on plaintiff's constitutional claims because no other adequate state law remedy exists. We disagree.

"In the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009) (quotation and alteration omitted). In *Craig*, our Supreme Court held that where sovereign immunity barred a common law negligence claim against the New Hanover Board of Education, the negligence claim did not provide an adequate state remedy. *Id.* at 340, 678 S.E.2d at 355. In the instant case, sovereign immunity did not bar all of plaintiff's claims against defendants. Sheriff Causey waived sovereign immunity to the extent of the surety bond, or \$25,000.00. However, we have held that Sheriff Causey was entitled to a

judgment as a matter of law on the merits of those claims. In addition, plaintiff's claims against Gattison, in his individual capacity, remain pending before the trial court. There is an adequate state remedy for plaintiff's alleged injury resulting from Gattison's conduct. *See Glenn-Robinson v. Acker*, 140 N.C. App. 606, 632, 538 S.E.2d 601, 619 (2000) (holding that the plaintiff had an adequate state remedy for her alleged injury where claims survived against the defendant in his individual capacity), *disc. review denied and appeal dismissed*, 353 N.C. 372, 547 S.E.2d 811 (2001).

This argument is without merit.

REVERSED IN PART and AFFIRMED IN PART.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).