IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-409

Filed: 2 January 2019

Mecklenburg County, No. 16-CVS-14300

VINCENT BORDINI, Plaintiff,

v.

DONALD J. TRUMP FOR PRESIDENT, INC., and EARL PHILLIP, Defendants.

Appeal by Plaintiff from order entered 22 November 2017 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 October 2017.

Spengler & Agans, PLLC, by Eric Spengler, and Van Kampen Law, P.C., by Sean F. Herrmann, for the Plaintiff.

Van Hoy, Reutlinger, Adams & Dunn, PLLC, by Phillip M. Van Hoy and G. Bryan Adams III, for the Defendant.

DILLON, Judge.

Plaintiff Vincent Bordini appeals from the trial court's order granting the motion of Defendant Donald J. Trump for President, Inc. (the "Campaign") for summary judgment. Plaintiff brought a number of claims against the Campaign for negligent retention of Earl Phillip, as well as vicarious liability for Phillip's actions.

Plaintiff argues that he presented sufficient evidence such that a jury could reasonably find in his favor. After careful review, we affirm the trial court's order.

I. Background

The evidence before the trial court at the summary judgment hearing tended to show as follows:

Beginning in November 2015, the Campaign hired Earl Phillip to serve as director over its North Carolina efforts. Phillip served under Stuart Jolly, Campaign National Field Director, and Corey Lewandowski, National Campaign Manager. Phillip later hired Plaintiff as a data director within the campaign's information technology staff.

Phillip possessed a concealed carry permit and frequently carried his pistol, nicknamed "Roscoe," including while on duty for the Campaign.

In February 2016, Phillip and Plaintiff rode together to a campaign event. While Phillip was driving his vehicle with Plaintiff in the passenger seat, Phillip allegedly held his pistol against Plaintiff's knee with his finger on the trigger.

In August 2016, Plaintiff filed a complaint against Phillip and the Campaign, alleging five causes of action stemming from the February 2016 incident: (1) assault; (2) battery; (3) intentional infliction of emotional distress ("IIED"); (4) negligent infliction of emotional distress ("NIED"); and (5) negligent retention and supervision. The Campaign filed a motion for summary judgment on all of Plaintiff's claims.

In November 2017, after a hearing on the matter, Judge Ervin granted the Campaign's motion for summary judgment.[1] Plaintiff appeals.

II. Analysis

Plaintiff appeals from Judge Ervin's order granting summary judgment in favor of the Campaign. "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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 re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Plaintiff contends that the evidence presented supported a denial of the Campaign's motion for summary judgment with respect to each of his claims. We address each claim in turn.

A. Jurisdiction

We briefly note the Campaign's contention that the subject matter of this case is rightfully under the jurisdiction of our Industrial Commission, and therefore not properly before this Court. We disagree.

The North Carolina Workers' Compensation Act preempts normal negligence actions against employers for injuries to employees "arising out of and in the course of the employment." *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 251, 293 S.E.2d 196, 198 (1982); N.C. Gen. Stat. § 97-2(6) (2017). Generally, "an injury arises out of

[1] Plaintiff and Phillip filed a mutual Dismissal of Claims Without Prejudice of all claims against one another following the trial court's order granting summary judgment to the Campaign.

the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks[.]" *Robbins v. Nicholson*, 281 N.C. 234, 239, 188 S.E.2d 350, 354 (1972) (internal citation omitted). "The injury must come from a risk which might have been contemplated by a reasonable person as incidental to the service when he entered the employment." *Lockey v. Cohen, Goldman & Co.*, 213 N.C. 356, 359, 196 S.E. 342, 344 (1938).

Further, intentional torts are generally not preempted by the Workers' Compensation Act, in an effort to deter the tortfeasor from future misconduct. *See Pleasant v. Johnson*, 312 N.C. 710, 717, 325 S.E.2d 244, 249 (1985). The risk of being intentionally assaulted at gunpoint by a coworker is not one which a reasonable person may have contemplated when accepting an information technology job on a presidential campaign.[2] Therefore, Plaintiff's appeal is rightfully before this Court.

B. Vicarious Tort Liability

Plaintiff contends that the Campaign is vicariously liable for his tort claims arising from the February 2016 incident. We conclude that, assuming Plaintiff can show the necessary elements of assault, battery, IIED, and NIED, he cannot show that the Campaign should be held vicariously liable for Phillip's behavior.

[2] The Campaign cites *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E.2d 582 (1982), to show that the Workers' Compensation Act has jurisdiction over a supervisor's intentional assault of a coworker. However, in *Daniels*, the assault followed a heated discussion of the plaintiff coworker's job performance and therefore arose out of and in the course of employment. *Id.* at 558, 286 S.E.2d at 584. Here, Phillip exhibiting his skill with guns by grabbing Roscoe by the handle and pointing it at his coworkers was not in the course of Phillip nor Plaintiff's duties with the Campaign.

An employer may be held vicariously liable for an *employee's* tortious conduct where: "(1) the employer expressly authorizes the employee's act; (2) the tort is committed by the employee in the scope of employment and in furtherance of the employer's business; or (3) the employer ratifies the employee's tortious conduct." *Fox v. Sara Lee Corp.*, 237 N.C. App. 7, 13, 764 S.E.2d 624, 628-29 (2014); *see also Snow v. DeButts,* 212 N.C. 120, 122, 193 S.E. 224, 226 (1937). "Generally, one who employs an independent contractor is not liable for the independent contractor's negligence[.]" *Woodson v. Rowland,* 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991).

Essentially turning on the employer's "right of control" over the tortfeasor, our Supreme Court has described the following factors for determining whether an employer-employee relationship exists:

> [t]he person employed
> (a) is engaged in an independent business, calling, or occupation;
> (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work;
> (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis;
> (d) is not subject to discharge because he adopts one method of doing the work rather than another;
> (e) is not in the regular employ of the other contracting party;
> (f) is free to use such assistants as he may think proper;
> (g) has full control over such assistants; and
> (h) selects his own time.

Hayes v. Bd. of Trustees of Elon Coll., 224 N.C. 11, 16, 29 S.E.2d 137, 140 (1944). When the facts underlying the relationship between the tortfeasor and the employer

are established, whether vicarious liability attaches is a question of law. *Beach v. McLean*, 219 N.C. 521, 525, 14 S.E.2d 515, 518 (1941).

We conclude that the forecast of evidence demonstrates that Phillip served the Campaign as an independent contractor: The evidence shows that the Campaign contracted with a political consulting company who obtained Phillip's assistance with the Campaign's efforts in North Carolina. Though an admittedly vague and lofty goal, Phillip had the specific, designated task of "[w]inning North Carolina for Donald Trump." In achieving this goal, Phillip's employment agreement with the Campaign stated that "[Phillip] must direct what will be done and how it will be done. [The Campaign] will direct only the desired result." Each day, Phillip received instructions and a "to-do list" from Lewandowski, but typically these instructions consisted of target counties and outreach goals.

Further, the Campaign informed Phillip that "hiring employees for [North Carolina was] essentially up to [Phillip's] discretion" as the Campaign's State Director. Under this term, Phillip would determine when there was need for further assistance in the state. When Phillip determined that there was a need for additional personnel, he found applicants and referred them to Jolly, but only to ensure that the Campaign's budget would allow additional hires. Phillip did not pay his hires himself. Phillip was not paid hourly and had no set work hours; rather, he received $8,000 per month for all work performed. Phillip was not under regular employment

by the Campaign. His initial term of service was one month, to be renewed as long as the Campaign was satisfied with his performance. Phillip received no health benefits from the Campaign, and the Campaign withheld no taxes from Phillip's monthly fee.

Overall, Phillip was responsible to the Campaign only for "*the result* of his work[,]" not for the manner in which he performed it. *Cooper v. Asheville Citizen-Times Pub. Co.*, 258 N.C. 578, 588, 129 S.E.2d 107, 114 (1963). We conclude that the trial court properly granted the Campaign summary judgment because there was no issue of fact with respect to whether it was vicariously liable for Phillip's actions. The evidence showed that Phillip was an independent contractor for, not an employee of, the Campaign as a matter of law.[3]

C. Negligent Retention

Plaintiff's last claim alleges that the Campaign negligently retained and supervised Phillip despite prior notice of Phillip's erratic behavior. Specifically, Plaintiff contends that the evidence forecasted was sufficient to show that the Campaign had either actual or constructive notice of Phillip's prior incidents involving Roscoe, his pistol. We disagree, and affirm the trial court.

[3] We recognize that Plaintiff also expressly contends that the Campaign is liable for Phillip's assault and battery because it ratified Phillip's actions. However, while ratification of an employee's action does lead to vicarious liability, the tortfeasor must nonetheless be an employee. Because we hold that Phillip was not an employee, we decline to address whether his actions were ratified.

An employer may be held liable for negligently retaining an employee or independent contractor where that employee commits a tortious act and, prior to the act, the employer knew or had reason to know that it may reasonably occur. *Pleasants v. Barnes*, 221 N.C. 173, 173, 19 S.E.2d 627, 629 (1942). To show negligent retention, a plaintiff must prove:

> (1) the specific negligent act on which the action is founded[,]
> (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and
> (3) *either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in oversight and supervision*[,] and
> (4) that the injury complained of resulted from the incompetency proved.

Medlin v. Bass, 327 N.C. 587, 590-91, 398 S.E.2d 460, 462 (1990) (emphasis in original) (internal citation omitted). Again, assuming that Plaintiff can show sufficient evidence of the specific underlying torts committed by Phillip, we hold that his argument nonetheless fails because he cannot show that the Campaign had notice of Phillip's prior acts.

In comparison to the February 2016 incident, Plaintiff references three incidents in which Phillip used Roscoe in a reckless manner while on official business: First, while working for the North Carolina Grand Old Party ("NCGOP") in 2013, Phillip angrily demanded a coworker get into his vehicle while brandishing Roscoe.

Next, while working an event for the Campaign in 2015, Cory Bryson, a coworker, witnessed Phillip unholster Roscoe, cock it, waive it around, and point it towards the feet of Taylor Playforth, another coworker. Lastly, on another trip for the Campaign in early 2016, Phillip unholstered Roscoe while sitting in a vehicle with Playforth. Plaintiff states the Campaign was aware of each of these incidents, and that retaining Phillip with such notice was negligent.

In support of Phillip's history of erratic behavior, Plaintiff offers two affidavits by officials who worked with or oversaw Phillip while he worked with the NCGOP. However, there is no evidence that anyone within the Campaign knew or should have known of the event that occurred while Phillip worked for the NCGOP. Evidence suggests that an NCGOP official may have spoken with Jolly and/or Lewandowski, but only insofar as letting them know that Phillip carried a gun – not that he had a history of erratic behavior. *See Bass*, 327 N.C. at 592, 398 S.E.2d at 463 (stating that summary judgment is proper where plaintiff fails to show notice of prior acts by the employee similar to the wrongful conduct giving rise to his or her claim).

Further, Plaintiff claims that the Campaign had actual notice of the events involving Bryson and Playforth because they were "managers." Specifically, Plaintiff states that Playforth had knowledge of the incidents against him, and Bryson witnessed an incident, therefore individuals in managerial capacities had actual knowledge of Phillip's conduct. However, the rule is not simply that a manager has

actual knowledge, but that a manager who is "vested with the general conduct and control of defendant's business[]" has knowledge. *Brown v. Burlington Indus., Inc.*, 93 N.C. App. 431, 437, 378 S.E.2d 232, 236 (1989). Bryson and Playforth served as "Directors" within the Campaign, but their positions did not hold the power and responsibility contemplated in the definition of "manager." Each reported to Jolly and Lewandowski. In his deposition Jolly stated that, though he worked in the same building as and spoke with Bryson and Playforth on many occasions, neither ever mentioned Phillip's erratic behavior.

Likewise, we cannot say that there was evidence to show that the Campaign had constructive notice of Phillip's potential behaviors. It is true that Lewandowski admitted that, if Phillip's behaviors were occurring, he "should have known if that stuff was occurring." But the evidence does not show that the incidents referenced above were ever reported to Lewandowski or Jolly. Rather, Plaintiff contends that Playforth, Bryson, and other employees of the Campaign never received proper information and/or training regarding the Campaign's weapons policy, which would have instructed them to report the incidents. However, Plaintiff cites no authority, and our research finds no authority, for the proposition that a lack of appropriate training by an employer means that the employer should have known about an otherwise reportable incident.

We conclude that there was no issue of material fact as to whether the Campaign had either actual or constructive notice of any events which would alert them as to Phillip's potential for erratic behavior with a firearm. Indeed, Plaintiff himself admitted in a deposition that he "[didn't] see why [the Campaign] would have a reason[]" to know about Phillip's behavior.

III. Conclusion

We hold that the forecast of evidence raised no issues of material fact with respect to Plaintiff's claims for the vicarious liability of and negligent retention by the Campaign. Phillip was an independent contractor for the Campaign, working under minimal direction, and his tortious conduct may not be transferred to the Campaign. Further, the Campaign had neither actual nor constructive notice of Phillip's past erratic behavior with firearms, and therefore was not negligent in its retention of Phillip. Therefore, we affirm Judge Ervin's decision granting summary judgment to the Campaign.

AFFIRMED.

Judges ELMORE and STROUD concur.

Judge Elmore concurred in this opinion prior to 31 December 2018.

Report per Rule 30(e).