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Immunity from Personal Liability under State Law for Public Officials and Employees: An Update

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Immunities reflect a judgment that despite actionable conduct, public policy is better served by protecting certain defendants from liability. As such, some North Carolina state and local public servants enjoy immunity from personal liability for torts committed in the course of fulfilling their public duties. The public policy justifications for that immunity include the need to protect against (1) the danger that the threat of personal liability would deter good, but risk-adverse, persons from becoming public servants;[1] (2) the risk that the threat of liability would prevent public servants from making the difficult decisions necessary for the public's business to be effectively administered;[2] (3) time-consuming and costly lawsuits that threaten the effective functioning of government;[3] and (4) the apparent injustice of subjecting a public servant to liability when the legal obligations of the servant's position require exercising discretion, and he or she does so in the absence of bad faith.[4]

The above reasons for protecting public servants in the performance of their duties are necessarily at tension with the public policy underlying other rules. For example, the desire to protect the decision making of public servants is always at odds with the notion of individual accountability and the belief that an injured plaintiff ought to have recourse against the offending party. As demonstrated by the recent North Carolina Court of Appeals decisions analyzed below, these tensions have led to the fusion of separate and distinct rules of immunity for public servants with those available to their employers.

A legal action brought against a public servant in her "official capacity" is in effect an action against the entity for which she works, irrespective of whether she is considered to be an official or employee.[5] The same defenses and immunities available to the entity are available to her. Hence, to the extent sovereign or governmental immunity is available to the entity, it is available to her.[6] On the other hand, an action against a public servant in her "individual capacity" represents an allegation by the plaintiff that the public servant has personal liability to the plaintiff. The public servant should not look to the entity's sovereign or governmental immunity for protection. But other immunities, separate and distinct from that available to the entity, may insulate the public servant from liability for acts committed within the scope of her duties. Such was the settled law.

However, recent cases have merged the immunities available to the entity and the individual personally. As a result, a new rule of individual governmental or individual sovereign immunity has emerged. This bulletin will examine the traditional rules of liability for public servants, trace the evolution of the new rule of individual governmental/sovereign immunity, and propose a legal framework for approaching public servant immunities.

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1. Wood v. Strickland, 420 U.S. 308, 331 (1975).
2. Barr v. Mateo, 360 U.S. 564, 571 (1959).
3. *Id.*
4. Schuer v. Rhodes, 416 U.S. 232, 240 (1974).
5. *See* Dickens v. Thorne, 110 N.C. App. 39, 45, 429 S.E.2d 176, 180 (1993) [citing Whitaker v. Clark, 109 N.C. App. 379, 427 S.E.2d 142, *cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993)].
6. Although North Carolina courts use the terms interchangeably, "sovereign immunity" is used in this article to refer to the immunity afforded to the state of North Carolina, while "governmental immunity" refers to the immunity granted local subdivisions of the state.

Public Official Immunity

Legal Standards of Liability

Public officials and public employees are subject to differing standards of liability. *Public employees* are not shielded from liability by common-law immunities and therefore may be held personally liable for injuries proximately caused by negligence in the performance of their duties.[7] However, a *public official* is shielded from liability for injuries he or she causes that arise from the exercise of discretion while engaged in a governmental duty, unless the official acted with malice, for corrupt reasons, or outside the scope of his or her official duties.[8] Questions regarding the definition of malice frequently arise. In other contexts malice is sometimes presumed when a plaintiff can prove grossly negligent, reckless, or wanton misconduct.[9] But neither allegations of gross negligence nor reckless indifference are sufficient to state a claim against a public official in his or her individual capacity.[10] Therefore, in keeping with the public-policy goal of protecting the decision making of public officials, a public official will not be held personally liable for a properly motivated judgment made in using or failing to use a governmental power within the scope of his or her authority.

Defining "Public Official"

The insulation from personal liability afforded to public officials means whenever a public servant is sued in his or her individual capacity, the court must determine whether the servant is an official or an employee. In *Pigott v. City of Wilmington* the court of appeals considered four factors in determining whether a city building inspector was a public official or employee: (1) whether the inspector held a position created by legislation; (2) whether his position normally required an oath of office; (3) whether he performed legally imposed public duties; and (4) whether he exercised a certain amount of discretion in doing his job.[11]

Pigott gives no indication of the weight that should be accorded each factor, but suggests that all the factors should be taken into account in deciding whether someone is a public official. Since *Pigott,* however, the court of appeals has emphasized the first three factors and paid little attention to the fourth.[12]

EEE-ZZZ Lay Drain Co. v. North Carolina Department of Human Resources is a recent example of the court's disproportionate reliance on the first, second, and third *Pigott* factors.[13] In *EEE-ZZZ* the plaintiff alleged that the Transylvania County health director wrongfully failed to approve a new type of septic system for use in the county. In addition to attempting to hold the county liable, the plaintiff sued the local health director and the Department of Environment, Health and Natural Resources' on-site sewage branch senior engineer and branch head in their respective individual capacities.

The court, looking at all four *Pigott* factors, held that the local health director was a public official. He was entitled, therefore, to immunity from negligence.

However, the court held that the branch head and the senior engineer were not public officials. A close examination of the court's analysis demonstrates that the court relied heavily on the fact that neither the branch head nor the senior engineer held a position established by law or which required an oath of office. Although the court purported to analyze the nature of the defendants' duties, its finding that the duties were ministerial is questionable. The defendants' role in advising a local health department on complex questions of law and policy involves the exercise of substantial judgment and discretion. Yet the court's opinion does not weigh those policy-making activities with any other duties the defendants may have had.[14] Assuming that evidence of the defendants'

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7. Harwood v. Johnson, 92 N.C. App. 306, 309, 374 S.E.2d 401, 404 (1988), *aff'd in part, rev'd in part on other grounds*, 326 N.C. 231, 388 S.E.2d 439 (1990).

8. *Id.* [citing Wiggins v. City of Monroe, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985)].

9. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964) (proof that defendant acted with reckless disregard for the truth is sufficient for public official or public figure to prove malice in a defamation case).

10. *See* Reid v. Roberts, 112 N.C. App. 222, 225, 435 S.E.2d 116, 120, *rev. denied*, 335 N.C. 559, 429 S.E.2d 151 (1993) (allegation of gross negligence is not sufficient to survive motion to dismiss based on public official immunity); Robinette v. Barriger, 116 N.C. App. 197, 203, 447 S.E.2d 498, 502 (1994) (allegation of reckless indifference insufficient); *but see* Givens v. Sellars, 273 N.C. 44, 49–50, 159 S.E.2d 530 (1968) (suggesting allegations of reckless indifference may be sufficient).

11. Pigott v. City of Wilmington, 50 N.C. App. 401,403-4, 273 S.E.2d 752, 754 *cert. denied*, 303 N.C. 180, 280 S.E.2d 453 (1981); *see also* State v. Hord, 264 N.C. 149, 141 S.E.2d 241, 245 (1965).

12. This approach is backed by some authority. *See id.* (supreme court quotes with approval article proclaiming public office must be created by the state constitution or statutes); *see, e.g.*, Harwood v. Johnson, 92 N.C. App. at 310–11, 374 S.E.2d at 404 (1988); *but see* Gunter v. Anders, 114 N.C. App. 61, 441 S.E.2d 167 (1994) (analyzing whether a superintendent of a school system is a public official under the first, third, and fourth factors).

13. EEE-ZZZ Lay Drain Co. v. North Carolina Dep't of Human Resources, 108 N.C. App. 24, 422 S.E.2d 338 (1992).

14. In fairness to the court, it should be noted that the opinion does not describe the evidence regarding the nature of the defendants' duties that was presented. Thus it is possible that the court was not aware of the extensive exercise of judgment and discretion inherent in the defendants' role.

role in policy making was before the court, the decision shows a reluctance to award public official status unless the position is created by legislation and requires an oath of office.

While *EEE-ZZZ* represents the focus of most courts, *Reid v. Roberts*[15] provides an interesting contrast. In *Reid* the plaintiff sued a district engineer, a district maintenance engineer, and a district traffic engineer of the North Carolina Department of Transportation (DOT). The plaintiff alleged that the defendants allowed tree limbs and brush to hide a stop sign. Consequently, the plaintiff was hurt when a truck ran the stop sign and collided with his motorcycle. The court held that the DOT engineers were public officials exercising discretionary powers in supervising the maintenance and design of state roads within their district. Relying on the fourth *Pigott* factor, the court found that the discretion inherent in these positions signified that each defendant exercised "some portion of the sovereign power."[16] The court did not analyze the first three factors.

Those who represent local officials will welcome *Reid* and its emphasis on the nature of the job because it expands the availability of public official immunity. This emphasis highlights an important public policy underscoring public official immunity—the need to safeguard the decision-making process of public officials. Assuming the legitimacy of the fear that, absent immunity, public officials would be so worried about liability that decision making would be unduly chilled, perhaps the emphasis is more properly placed on the nature of the job.

However, the more formal approach of *EEE-ZZZ* has some value because it gives clear answers: If your job description is in the general statutes and the job requires an oath of office, you are a public official; if it isn't, you're not. Moreover, since almost every government servant engages in some decision making, emphasis on the fourth factor will either result in a large number of wrongs committed without redress or unworkable distinctions arising between those positions protected by immunity and those that are not. Such distinctions will undoubtedly lead to future inconsistency and obscurity in an area of law that now holds that those with regional responsibility for stop signs are public officials, while those with statewide responsibility for issuing permits for septic systems are not.

15. Reid v. Roberts, 112 N.C. App. 222, 435 S.E.2d 116 (1993).

16. *Id.* at 225, 435 S.E.2d at 120.

Governmental Immunity in Individual-Capacity Cases

The New Rule of Individual Governmental Immunity

State and local governments are protected from liability for governmental activities by the doctrine of sovereign or governmental immunity, unless waived. Some recent cases strongly suggest that public officials and employees share in this immunity when sued in an individual capacity. Since sovereign and governmental immunity have traditionally been available only to governmental entities, these cases, in effect, suggest a new rule of immunity for both public officials and employees.

The following three cases illustrate the significance of this new rule. In *Whitaker v. Clark*[17] the plaintiff sued three social workers employed by the county's Department of Social Services (DSS) for negligence in the death of her son. The plaintiff claimed the defendants could have prevented her son's death if they had removed him from his father's custody. The defendant in *Taylor v. Ashburn*[18] was a firefighter for the city. He was responding to a call for assistance when the fire truck he was driving hit another car that injured Taylor, the plaintiff. In *Robinette v. Barriger*[19] the plaintiff alleged that the defendant Barriger, the county environmental health supervisor, intentionally issued permits with soils data and other statements that were false in an effort to conceal "his past malfeasance."

The plaintiff in *Whitaker* failed to specify whether the individuals named as defendants were being sued in their individual or official capacities. The court addressed the question of capacity by focusing on whether the acts and omissions complained of occurred while the defendants were carrying out their duties as DSS employees. The court held that "[a]bsent any allegations in the complaint separate and apart from official duties that would hold a non official liable for negligence, the complaint cannot be found to sufficiently state a claim against defendants individually."[20] Finding no such claim, the court held that the defendants were sued in their official capacities and dismissed the claims against them individually.[21]

The quoted language in the preceding paragraph is confusing for two reasons. First, it is not clear whether the court is contrasting the defendants with "non official[s]." If so, the

17. Whitaker v. Clark, 109 N.C. App. 379, 427 S.E.2d 142, *cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993).

18. Taylor v. Ashburn, 112 N.C. App. 604, 436 S.E.2d 276 (1993), *cert denied*, 336 N.C. 77, 445 S.E.2d 46 (1994).

19. *Robinette*, 116 N.C. App. at 203, 447 S.E.2d at 502.

20. *Whitaker*, 109 N.C. App. at 383–84, 427 S.E.2d at 145.

21. *Id.*

court might be taken to mean that the defendants were entitled to public official immunity. Second, the language also suggests that, although not public officials, social workers can have no personal liability for negligence while engaged in their official duties (i.e., while acting within the scope and course of their employment).

Both of the above readings of *Whitaker* are inconsistent with prior law. First, both *Hare v. Butler*[22] and *Coleman v. Cooper*[23] hold that social workers are not public officials. Second, both cases also hold that social workers may be *individually* liable for negligence for acts or omissions in the course of their employment.[24]

Perhaps the best reading of *Whitaker* is the most limiting—that the law requires plaintiffs to be absolutely explicit when suing a public servant in his or her individual capacity. Thus where the plaintiff fails to specify the capacity in which the defendant is sued, the court will strictly review the complaint and, absent very clear indication to the contrary, the court will find the defendant to have been sued only in his or her official capacity.

Taylor's interpretation of *Whitaker* is less limiting, however. Therefore, *Taylor* is much less susceptible to the interpretation that it stands for nothing more than a strict rule for pleading individual capacity. The plaintiff in *Taylor* also failed to designate in the complaint whether the defendant firefighter was being sued in his individual or official capacity. The court again held that the suit was an official-capacity suit, stating "[i]f the plaintiff fails to advance any allegations in his or her complaint other than those relating to a defendant's official duties, the complaint does not state a claim against a defendant in his or her individual capacity."[25]

But *Taylor* further expressed, albeit in dictum, that a designation appearing in the caption of the complaint indicating the capacity in which a defendant is sued is not conclusive in determining whether the lawsuit is an official- or individual-capacity suit. Even if the plaintiff carefully specifies individual capacity in the caption and lards the complaint with references to individual(s) and individual conduct, *Taylor* requires the court to examine the complaint to determine whether the allegations relate to official duties. If the allegations relate to the public servant's official duties in carrying out a governmental function, according to *Taylor* the suit is brought against the public servant in his or her official capacity.[26]

Unlike *Taylor* and *Whitaker*, the plaintiff in *Robinette* clearly indicated his intent to sue defendant Barriger in his individual capacity. However, the court noted that "[a] careful examination of the complaint reveal[ed] that plaintiff's allegations of negligence against defendant Barriger relate[d] directly to his official duties as a sanitarian." The court concluded that "[b]ecause the crux of plaintiff's action . . . is composed of allegations brought against defendant Barriger in his official capacity, rather than as an individual, the doctrine of governmental immunity applies."[27]

In his dissent to this holding, Judge Greene applied the standard for public official immunity (discussed above) and pointed out that the plaintiff's allegation that defendant Barriger fabricated data to protect his own interests was sufficient to take his actions outside the scope of his official duties as a sanitarian. [28]

Before *Robinette* and *Taylor*, an official-capacity suit was one against the government and implicated governmental immunities. *Taylor*, and perhaps even *Whitaker*, changed that rule by holding that an employee engaged in a governmental function enjoys governmental immunity along with the local government irrespective of the capacity in which plaintiff sues the defendant.

A more recent case goes even further by cloaking public servants with governmental immunity even when they are not engaged in a governmental activity. In *Gregory v. City of Kings Mountain* the plaintiffs filed an action against the gas superintendent of the City of Kings Mountain Building Standards Department and the City of Kings Mountain, alleging negligent inspection and regulation of a gas heating system.[29] The court dismissed the individual employee, claiming he was shielded from liability for negligence by governmental immunity; but, holding the operation of a natural gas supply utility to be a proprietary, not a governmental function, the court refused to extend the same defense to the city. After *Gregory*, it appears that the sovereign or governmental immunity that public servants enjoy is greater than that enjoyed by their employers. The genesis and the parameters of this new rule of individual immunity, however, remain a mystery.

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22. Hare v. Butler, 99 N.C. App. 693, 700, 394 S.E.2d 231, 236, *rev. denied*, 327 N.C. 634, 399 S.E.2d 121 (1990).

23. Coleman v. Cooper, 102 N.C. App. 650, 654–55, 403 S.E.2d 577, 580, *rev. denied*, 329 N.C. 786, 1991 N.C. LEXIS 465.

24. *Id.* at 655, 403 S.E.2d at 580; *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236.

25. *Taylor*, 112 N.C. App. at 607, 436 S.E.2d at 279.

26. *Id.* It is interesting to speculate whether there might be duties that are within the scope and course of a public employee's employment that are not "official duties," but nothing in *Whitaker* or *Taylor* suggests whether that might be a fruitful line of argument for plaintiffs trying to avoid the rule in these cases.

27. *Robinette*, 116 N.C. App. at 207, 447 S.E.2d at 502.

28. If the majority's opinion is also read to have applied the traditional public official immunity standard, it represents nothing more than an incredulously broad interpretation of defendant Barriger's duties and an equally narrow interpretation of "corruption" and "malice."

29. Gregory v. City of Kings Mountain, 117 N.C. App. 99, 450 S.E.2d 349 (1994).

Precedent for Individual Governmental Immunity Rule?

Robinette, *Taylor*, *Whitaker*, and *Gregory* stand without good precedent, although the first three purport to rely, in part, on the earlier court of appeals decision, *Stancill v. City of Washington*.[30] In *Stancill* the plaintiff sued the city of Washington and the city manager, plainly indicating in the caption that the latter was sued in his individual capacity. The court disregarded the plaintiff's designation, found that all the allegations in the complaint related to the city manager's official capacity, and upheld the trial court's grant of summary judgment in the city manager's favor. The court did not explain its holding or cite a case to support it. There is no indication, therefore, that the court's granting of summary judgment for the city manager was based on governmental immunity. In fact, the court's reversal of summary judgment for the defendant city suggests that governmental immunity was not available. Thus, although *Stancill* does stand for the dubious proposition that the court can look beyond the plaintiff's clear designation to determine whether the defendant has been sued in his official capacity, it does not stand for the even more dubious proposition that a public servant sued in his individual capacity can avail himself of governmental immunity.

While *Stancill* may have been grossly misinterpreted, *Robinson v. Nash County*[31] may provide some support for the proposition that a public official is shielded from tort liability by governmental immunity when acting in her capacity as a public official. In *Robinson* the plaintiff sued Nash County and the Nash County register of deeds in both her individual and official capacities under the wrongful death statute. The plaintiff's mother had fallen down the steps in the register of deeds' office while looking at records alleged to have been placed in a dangerous spot at the top of the stairwell. The trial court granted summary judgment for both defendants.

The court of appeals affirmed, finding correctly that the operation of the register of deeds' office was a governmental activity and therefore the county had governmental immunity. This holding necessarily disposed of the official capacity claim against the register of deeds, since that claim was redundant of the claim against the county.

The court of appeals then ostensibly turned its attention to the individual claim against the register of deeds.[32] The register of deeds argued she was a public official and so she could not be liable for ordinary negligence.[33] The plaintiff conceded this point, but argued that public official immunity did not apply because the register of deeds' obligation to maintain a safe place for the public to conduct business did not involve discretion and therefore did not implicate public official immunity.[34]

The court rejected the plaintiff's contentions, stating public officers are "protected from liability by governmental immunity to the same extent" as their employers.[35] To support this novel proposition the court provided nothing but a citation to *Seibold v. Kinston-Lenoir Public Library*,[36] which contains some language loosely supporting the *Robinson* approach. That language, however, comes from a per curiam decision in which it is clear that the persons named as defendants were named solely in their official capacity.

Moreover, the *Robinson* court's opinion is by no means a model of clarity. The court uses the phrases "official capacity" and "individual public officer" so carelessly that it is impossible to tell whether the court's assertion that the "individual public officer [is] protected from tort liability by governmental immunity to the same extent as the defendant Nash County" refers to the individual defendant in her official or individual capacity.[37] In fact, the court goes on to explicitly dismiss the significance of whether the acts performed were governmental in nature (implicitly dismissing a requirement for governmental immunity), finding instead that a public official is always immune from individual liability "where the duties are of a public nature, imposed entirely for the public benefit. . . ."[38] *Robinson* is so ambiguous that no real value can be given to its meaning.

Traditional Rule Regarding Individual-Capacity Liability

On the other hand, the rule of "individual governmental immunity" enunciated in *Robinette*, *Taylor*, and perhaps

30. Stancill v. City of Washington, 29 N.C. App. 707, 225 S.E.2d 834 (1976).

31. Robinson v. Nash County, 43 N.C. App. 33, 257 S.E.2d 679 (1979).

32. *See id.* at 37, 257 S.E.2d at 681. Unfortunately the court introduces this discussion by saying "With respect to the actions of defendant . . . in her official capacity, the question before this Court. . . ." The reference to official capacity is a mistake for the reason given in the text—disposing of the claim against the county necessarily disposes of the official-capacity claim. In fact, in the next sentence the court continues "That is, is this individual public officer protected from tort liability. . . ."

33. *Id.* at 36, 257 S.E.2d at 681.

34. *Id.* at 36–37, 257 S.E.2d at 681.

35. *Id.*, 257 S.E.2d at 681.

36. Siebold v. Kinston-Lenoir County Public Library, 264 N.C. 360, 361, 141 S.E.2d 519, 520 (1965).

37. *Robinson*, 43 N.C. App. at 37, 257 S.E.2d at 681.

38. *Id.* at 38, 257 S.E.2d at 682 [quoting Hipp v. Ferrall, 173 N.C. 167, 169, 91 S.E 2d 831, 832 (1917) (setting forth "public duty doctrine," which immunizes public servants from liability for acts or omissions when the underlying duty is entirely for the public benefit)]. The public-duty doctrine has been, and should remain, separate and distinct from public official and governmental immunities.

Whitaker stands in direct contradiction to both court of appeals and supreme court cases holding individuals liable even though their employers were entitled to claim governmental immunity. For example, in *Lewis v. Hunter* the court held that an employee of a police department could be individually liable for negligence in operating a police car although the city was entitled to governmental immunity.[39] *Wirth v. Bracey* reached the same result with respect to a state trooper.[40]

Similarly inconsistent is the recent case, *Epps v. Duke University*, where the plaintiff alleged the medical examiner acted beyond the scope of his official duties in authorizing and/or supervising an autopsy involving procedures not routinely performed and seemingly unrelated to the cause of death.[41] The court found the allegations against the medical examiner, a public official, sufficient to state a claim against him in his individual capacity.[42] *Epps* stands in most marked contrast to *Robinette* because both are public official cases involving allegations that the defendant went beyond the scope of his official duties.[43] Yet *Robinette*, in following *Taylor* and *Whitaker*, appears to adopt the new individual governmental immunity rule, while *Epps* follows the previously established rule of immunity for public officials set forth earlier.

Effect of Individual Governmental Immunity on Public Official Immunity

If the dismissal of the individual defendant in *Gregory* was correct, then public offical immunity is an obsolete doctrine. There is no need to provide a rule of limited qualified immunity for public officials when a more encompassing immunity exists.

However, if *Gregory* is merely an anomaly in a curious line of cases, the proprietary/governmental activity distinction remains important in these individual governmental immunity cases. Thus, a brief discussion of the distinction is necessary.

Local governments are entitled to governmental immunity if the activity undertaken is governmental rather than proprietary.[44] Proprietary activities of a local government are those considered to yield more private benefit to its residents than to the interests of the state.[45] The distinction between those activities and governmental activities is as difficult to identify as any in public liability law and cannot be more fully explained here, but an example will illustrate: The operation of a municipal golf course is a proprietary activity; the operation of a police department is a governmental activity.

Until *Robinson* the availability of public official immunity was not restricted to governmental activities, but was enjoyed by public officials carrying out duties in both proprietary and governmental activities. Furthermore, the availability was not restricted by principles of waiver because public officials cannot waive official immunity. A local government, however, may waive governmental immunity by the purchase of insurance.[46] What effect the purchase of insurance would have on public official immunity under *Robinson* is unclear.[47]

On the other hand, the consequences of granting public officials governmental immunity may favor public officials if the new immunity adds to, rather than replaces, public official immunity. Its primary application would be in a case like *Robinson* in which a public official's alleged activity involves an arguably ministerial task to which public official immunity might not apply. Those cases, however, are rare. No court has had to face the issue of governmental immunity for ministerial acts directly, but several continue to restate the general rules governing public officials' liability. For example, in *Wiggins v. City of Monroe,* without mention of *Robinson*, the court restated the traditional rule that public officials enjoy immunity only for the exercise of duties involving "judgment and discretion," that is, for discretionary acts.[48]

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39. Lewis v. Hunter, 212 N.C. 504, 193 S.E.2d 814 (1937).

40. Wirth v. Bracey, 258 N.C. 505, 128 S.E.2d 810 (1963).

41. Epps v. Duke University, 116 N.C. App. 305, 447 S.E.2d 444 (1994).

42. *Id.* at 309–10, 447 S.E.2d at 448.

43. Interestingly, *Robinette* involves allegations that the defendant in performing acts within his official duties (issuing the permit) acted with improper motivation in performing acts outside of his official duties (fabricating data), while *Epps* merely alleges that the defendant exceeded the scope of his normal routine.

44. Motiff v. City of Asheville, 103 N.C. 237, 9 S.E. 695 (1889).

45. *See* Millar v. City of Wilson, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942).

46. N.C. GEN. STAT. (hereinafter G.S.) § 160A-485 (city permitted to waive by purchase of insurance); G.S. 153A-435 (county permitted to waive by purchase of insurance).

47. In *Taylor*, 112 N.C. App. at 607, 436 S.E.2d at 279, the court suggests that a waiver of governmental immunity by the purchase of insurance also waives the governmental immunity shared by the public employee sued in that case. However, the court did not consider the effect on public official immunity.

48. Wiggins v. City of Monroe, 73 N.C. App. 44, 48–49, 326 S.E.2d 43, 44 (1985). *Wiggins* has been misquoted in two other cases in a way that suggests that public officials are immune from liability for negligence in the performance of all their duties. Neither of those cases, however, relied on *Robinson* or its rationale for that suggestion. The mischaracterization appears, therefore, to be merely the result of carelessness. Yet as reflected above by *Stancill*. Unless the *Wiggins* case is clarified, the courts will simply continue to mischaracterize its holding until it is misapplied, resulting in further confusion.

A Proposed Legal Framework for Public Official Immunity Cases

Has the Defendant Been Sued in an "Individual Capacity?"

Perhaps as troubling as the emergence of "individual sovereign or governmental immunity" is the fact that the court of appeals seems willing to ignore valid efforts of plaintiffs to seek personal redress from government officials and employees.

In the confusion between official- and individual-capacity suits, the courts have focused on the wrong issue. Suing a defendant in his or her individual capacity means simply that a plaintiff seeks recovery from the defendant directly.[49] "Official capacity" is not synonymous with "official duties"; it is a legal term of art with a narrow meaning—the suit is in effect one against the entity.[50]

It is true that it is often not clear in which capacity the plaintiff seeks to sue the defendant. In such cases it is appropriate for the court to either look to the allegations contained in the complaint to determine plaintiff's intentions or assume that the plaintiff meant to bring the action against the defendant in his or her official capacity.[51] On the other hand, when the plaintiff makes clear the intention to sue a public servant in his or her individual capacity, it is questionable whether the court should engage in the type of second-guessing apparent in the above-cited cases.

The crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant is named in an official capacity. If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities.[52]

Does Public Official Immunity Apply?

If the court determines the defendant is being sued in his or her individual capacity, it must then consider whether the defendant is a public official or employee.[53] When the defendant holds a position created by legislation, with legally imposed public duties and requiring an oath of office, the court probably need look no further to determine that the defendant is a public official.[54] However, courts should be reluctant to assume that the converse is true. A public servant who does not meet any of the first three *Pigott* factors may exercise sufficient discretion to warrant the protection that public official immunity affords.[55]

The court's determination that the defendant is a public official does not necessarily guarantee that the defendant will be cloaked by public official immunity for his or her negligent acts. In its analysis the court need only answer one of the following questions in the affirmative for the immunity to fail:

1. Did the activity complained of entail ministerial duties, rather than the exercise of discretion or judgment?
2. Was the defendant motivated by malice?
3. Was the defendant motivated by corruption? or
4. Did the defendant act outside the scope of his or her authority?

The court must be especially careful in considering the second, third, and fourth questions. Not all official duties that relate to one's authority can be said to fall within the scope of one's official authority. Furthermore, a defendant can act within the scope of his or her authority and yet be denied public official immunity because the defendant was motivated by malice or corruption. So a county environmental health supervisor who intentionally issues permits based on data that he fabricates to cover up his earlier wrongdoing, may act within the scope of his authority in issuing permits; but he should be denied public official immunity because (1) in falsifying the data, he acted not to further the business of the county, but rather to protect his own personal interests, and (2) the personal interest that motivated him was corrupt.[56]

If public official immunity does not apply—either because the defendant is not a public official or after finding the

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49. *See* Kentucky v. Graham, 473 U.S. 159, 165–167 (1985).

50. *Id.*

51. *See, e.g.*, Melton v. City of Oklahoma City, 879 F.2d 706 (10th Cir. 1989), *reh'g en banc*, 928 F.2d 920, *cert. denied*, 502 U.S. 906 (1991) (court looks beyond ambiguous pleadings to determine whether defendant was sued in official or individual capacity); Yeksigan v. Napp, 900 F.2d 101, 104 (7th Cir. 1990) (court employs presumption against personal liability in the absence of clear expression that plaintiff intends to sue defendants in their individual capacities).

52. Of course, the plaintiff is barred from a double recovery.

53. *See* Harwood v. Johnson, 92 N.C. App. 306, 309, 374 S.E.2d 401, 404 (1988).

54. *See* Pigott v. City of Wilmington, 50 N.C. App. 401, 403-4, 273 S.E.2d 752, 754 (1981).

55. *See* Reid v. Roberts, 112 N.C. App. 222, 225, 435 S.E.2d 116, 120 (1993).

56. *See* Robinette v. Barriger, 116 N.C. App. 197, 207, 447 S.E.2d 498, 502 (1994).

defendant to be a public official the court answers one of the above four questions in the affirmative—the defendant is liable in his or her individual capacity for the tort committed. This may mean that a public servant will be held liable for mere negligence. If such a result is unpalatable, then the legislature or courts should squarely confront the public policy at stake and provide relief through some other avenue. It is not an appropriate solution, however, to disregard the fundamental principles of public official immunity and governmental immunity to create the hybrid "individual governmental immunity."

Conclusion

With the exception of the court of appeals' reluctance to grant public official status, the cases regarding public official immunity do not seem to reflect any consistent theme, although the results favor the defendants. Perhaps these results are appropriate. In the effort to balance the need to protect public officials with the need to compensate plaintiffs for injuries suffered, courts have generally thought it apt to give public officials the advantage. The United States Supreme Court has itself expressed that

> [i]mplicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide to act or act at all.[57]

Thus it is not the result of any individual case, but the further confusion and obscurity that each new decision causes to this problematic area of law, that is troubling. Irrespective of who the balance tips in favor of, knowing and being able to separate the rules at the outset would greatly assist public servants, lawyers, and trial judges in effectuating good government, advising clients, and handling litigation.

57. Schuer v. Rhodes, 416 U.S. 232, 241–42 (1974).

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