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RESOLVING THE UNCERTAINTY: MEYER V. WALL

■ Anita R. Brown-Graham and Paul Meyer

In *Meyer v. Wall*,[1] the North Carolina Supreme Court clarified several rules of public liability relevant to the ever-increasing number of cases that allege citizen injuries caused by the negligent acts of local governments administering programs cooperatively funded and managed by the state. Questions of whether the state or the local government bears legal responsibility for the injuries have abounded recently, as have questions of whether the plaintiff may look to individual public servants for recovery or be limited to suing a governmental entity only. For at least six years, litigants and lower courts have grappled with the questions of who is a proper defendant and, consequently, which forum is the proper one for the lawsuit.

The Facts

Clearman Frisbee allegedly committed suicide on February 9, 1992 by placing an explosive blasting cap in his mouth and detonating it with a battery. Frisbee had suffered from multiple medical and psychological problems, including chronic alcohol abuse with resulting organic brain syndrome with dementia. His medical and psychological conditions so impaired his ability to care for himself that in 1989 Frisbee was declared legally incompetent and placed under the guardianship of the Buncombe County Department of Social Services (DSS).

The DSS placed Frisbee at a licensed domiciliary care home for the aged in Haywood County, North Carolina. Frisbee was permitted to leave the home to perform light work for an excavating company, the same company from which he allegedly obtained the explosives responsible for his death. He was allowed to keep his earnings from this job. Before his death, Frisbee allegedly used the money he earned to buy rubbing alcohol, which he then consumed.

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1. 347 N.C. 97, 489 S.E.2d 880 (1997).

The Claim

The plaintiff, Patricia Meyer, filed a wrongful death civil action in her capacity as administratix of her father's estate. She claimed that the negligence and the willful and wanton conduct of several defendants caused his death. Among other allegations, the complaint asserted that Buncombe County, the Buncombe County Department of Social Services and its employees, director Calvin Underwood, the supervisor of Adult Protective Services, Kay Barrow, and the social worker handling Mr. Frisbee's case, Mackey Miller, failed to make provisions for Frisbee's care, comfort, and maintenance and failed to act in his best interest as required under applicable statutes and implementing regulations. The plaintiff further complained that these defendants failed to respond to information provided by family members regarding Frisbee's state of mind and need for hospitalization.

The Individual Defendants' Liability

In *Meyer*, the caption and allegations of the complaint clearly indicated the plaintiff's intent to sue Underwood, Barrow, and Mackey in both their individual and official capacities. The trial court dismissed the actions against the defendants in their individual capacities on the ground that the plaintiff had failed to state a claim upon which relief could be granted. The court of appeals reversed the dismissals.

Until recently the law appeared fairly settled that a plaintiff could choose to sue a public servant in an official capacity, an individual capacity, or both. If the legal action was brought against the public servant in an official capacity, it was to be considered an action against the entity for which the public servant worked.[2] As such, the same defenses and immunities available to the entity were available to the public servant. On the other hand, if the action was brought against the public servant in an individual capacity, it represented an allegation by the plaintiff that the public servant was personally liable to the plaintiff.[3] Immunities separate and distinct from those available to the entity would provide the only protections for the public servant.

However, several recent opinions from the court of appeals have suggested that where the allegations in a complaint involve acts of public servants performed within the bounds of their official duties, the individual defendants could not be sued in their individual capacities.[4] Although inconsistent with prior North Carolina Supreme Court precedent, this line of cases purported to effectively immunize public servants from personal liability for all acts committed within the scope of their employment.

In *Meyer*, the supreme court resoundingly rejected any contention that a public servant may never be sued in her individual capacity for injuries caused while engaged in official duties. The court similarly cast aside the notion that, when sued in their individual capacities, public servants were entitled to share in the governmental immunity enjoyed by their local governments.[5] In affirming the court of appeals' decision to reverse the trial court's dismissal of the actions against the defendants as individuals, the supreme court reiterated:

> 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 government 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 both, then the claims proceed in both capacities.[6]

In ascertaining the capacity in which the plaintiff seeks to sue the defendant, the court will typically first

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2. *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, *rev. denied*, 333 N.C. 795, 431 S.E 2d 31 (1993)].

3. *See, e.g.*, 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); Lewis v. Hunter, 212 N.C. 504, 193 S.E.2d 814 (1937); Wirth v. Bracey, 258 N.C. 505, 128 S.E.2d 810 (1963).

4. *See, e.g.*, Aune v. University of North Carolina, 120 N.C. App. 430, 437, 462 S.E.2d 678, 683 (1995); Gregory v. City of Kings Mountain, 117 N.C. App 99, 450 S.E.2d 349 (1994).

5. *But see* McCarn v Beach, ___ N.C. App. ___, 496 S.E.2d 402 (1998) (continuing to immunize public servants from individual capacity claims against them for injuries caused while engaged in official duties).

6. *Meyer*, 347 N.C. at 110, 489 S.E.2d at 887 (citing Anita R. Brown-Graham & Jeffrey S. Koeze, "Immunity for Personal Liability Under State Law for Public Officials and Employees: An Update," Local Government Law Bulletin 67 (Apr. 1995):7).

look to the caption of the complaint. If the capacity is unclear from the caption, the trial court will then look to the allegations of the complaint and to the course of the proceedings. Absent some clear indication in the allegations or procedural history of the case, however, the court will not presume that the plaintiff sought to impose personal liability on the defendant. Instead, the presumption will operate in favor of finding only official-capacity liability. Plaintiffs and their counsel would do well, therefore, to heed the advice of the court in the more recent case, *Mullis v. Sechrest*:[7]

> It is a simple matter for attorneys to clarify the capacity in which a defendant is being sued. Pleadings should indicate in the caption the capacity in which a plaintiff intends to hold a defendant liable. For example, including the words "in his official capacity" or "in his individual capacity" after a defendant's name obviously clarifies the defendant's status. In addition, the allegations as to the extent of liability claimed should provide further evidence of capacity. Finally, in the prayer for relief, plaintiffs should indicate whether they seek to recover damages from the defendant individually or as an agent of the governmental entity.[8]

Public Officer Immunity

After finding that the individual defendants could be sued personally, the supreme court turned its attention to the question of whether the trial court properly dismissed the claims against Underwood, Barrow, and Miller in their individual capacities for failure to state a claim upon which relief could be granted. The court readily acknowledged that the determination would turn on whether any of the individual defendants were entitled to assert public officer immunity.

In North Carolina different standards of liability apply to public servants deemed to be public officers than apply to public employees. A *public employee* may be held personally liable for injuries proximately caused by his negligence in performing his duties.[9] However, a *public officer* is shielded from liability for injuries that arise from the exercise of discretion while engaged in a governmental activity, unless she acted with malice, for corrupt reasons, or outside the scope of her official duties.[10]

The court of appeals had determined in *Meyer*, consistent with existing case law, that Underwood was a public officer, but found that the facts supporting the allegation that Underwood's conduct was "willful, wanton and in reckless disregard of the rights of Clearman Frisbee" were enough to overcome public officer immunity. The supreme court agreed.

The court of appeals held that Barrow and Miller were public employees and, therefore, not entitled to assert public officer immunity. The conclusion with respect to Miller is clearly supported by existing law. In at least two previous cases, North Carolina courts have held that line social workers are public employees.[11] The case law is not as clear with respect to Barrow; however, the defendants did not appeal that holding to the supreme court.

The County's Liability

Absent its consent to suit, the state is shielded from tort claims by the doctrine of sovereign immunity. As political subdivisions of the state, local governments receive a limited extension of this immunity for torts committed while carrying out a governmental function. This limited type of immunity is called governmental immunity. Both immunities are partially waived under the North Carolina General Statutes: sovereign immunity through the Tort Claims Act, and governmental immunity through the purchase of liability insurance by the local government.

First, the North Carolina Tort Claims Act provides a general waiver of immunity for claims against "the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State . . ." where the claim "arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant . . . ."[12] Exclusive jurisdiction for such claims rests with the Industrial Commission. Causes of action accruing before October 1, 1994, are capped at

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7. __ N.C. __, 495 S.E.2d 721 (1998).

8. *Id. at* __, 495 S.E2d at 723.

9. 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).

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

11. *See* Vaughn v. N.C. Dept. of Human Resources, 296 N.C. 683, 252 S.E.2d 792 (1979); Coleman v. Cooper, 102 N.C. App. 650, 403 S.E.2d 577 (1991).

12. N.C. Gen. Stat. 143-291(a).

$100,000, and those accruing on or after October 1, 1994, at $150,000.

Second, the governmental immunity of counties is partially waived by the purchase of liability insurance. As provided by statute, "[p]urchase of insurance . . . waives the county's governmental immunity, to the extent of insurance coverage . . . ."[13] Absent a waiver, local governments are shielded from liability for acts and omissions arising in the exercise of governmental functions. Recoverable damages are thus capped by the policy limits in effect at the time the claim accrued.

Questions regarding the appropriate application of the two immunity waiver provisions arise because North Carolina's counties often administer programs that are funded and regulated by the state. As such, courts have had considerable difficulty determining whether the state or county bears liability for county employees' torts committed while they are acting as agents of the state.

A series of recent cases address the relative liability of state and local governments for torts committed by county employees. These cases include *Vaughn v. North Carolina Department of Human Resources*,[14] *Coleman v. Cooper*,[15] *EEE-ZZZ Lay Drain v. North Carolina Department of Human Resources*,[16] *Robinette v. Barriger*,[17] and *Gammons v. North Carolina Department* of Human Resources.[18] The general issues presented were whether (1) as a result of its control over local government programs, the state can be held liable as a principal for acts of local government employees in performing their duties; and (2) exclusive jurisdiction rests with the Industrial Commission over tort claims committed by local government employees acting as agents of the state.

In *Vaughn*, Durham County was sued as a result of the negligent placement of a child in a foster home by the Durham County Department of Social Services (DSS). The plaintiff sued in superior court, and the case was dismissed due to governmental immunity of the county (Durham County did not purchase liability insurance). The plaintiff then filed a claim with the North Carolina Industrial Commission against the North Carolina Department of Human Resources (NCDHR), alleging Durham County DSS was an agent of the state (NCDHR) in conducting foster care placements, and thus the state, as the principal, should be held liable. After examining DSS's statutory duties, state policies and guidelines, and program-funding sources, the court determined that the county DSS acts as an agent of the state in foster care placement because of the amount of control that the state retains over the program. The court expressly limited its decision to foster care placement cases.

As an extension of *Vaughn, Coleman* held that a county is an agent of the state when providing child protective services. However, *Coleman* added a jurisdictional twist: the plaintiff sued Wake County in superior court because the county had purchased liability insurance, thus waiving its governmental immunity. The county argued that: (1) as an agent of the state it could not be sued in superior court, (2) the state was the proper defendant and the Industrial Commission the proper forum, and (3) the county should have no liability. Surprisingly, the court of appeals agreed, thereby establishing a new rule of law: claims against counties would be considered as "originating under the Tort Claims Act....as a subordinate division of the State, [and, therefore,] must be brought before the Industrial Commission."[19] For the first time, the wording of the Tort Claims Act (claims against "the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State....") had been extended to include acts of local government employees. A plaintiff could no longer sue a county in superior court as the employer of the social worker causing the injuries, even if the county had waived governmental immunity through the purchase of insurance.

In two subsequent cases, cited above, the court of appeals followed the new rule established in *Coleman*. In *EEE-ZZZ Lay Drain*, the plaintiff sued the Transylvania County Health Department and the North Carolina Department of Environment, Health, and Natural Resources (DEHNR) in superior court over the issuance of various permits. The trial court denied the defendants' motion for summary judgment and motion to dismiss based on sovereign and governmental immunity. The appellate court dismissed the claims, holding sovereign immunity protects DEHNR from suit, unless waived under the Tort Claims Act; and the county health department, as an agent of the State, "is, like DEHNR, immune from suit."[20]

The uncertainty created by the court of appeals' decisions continued after the supreme court failed to reach a majority opinion in *Robinette v. Barriger*.[21] The supreme court's impasse had the effect of leaving

13. N.C. Gen. Stat. 153A-435(a).
14. 296 N.C. 683, 252 S.E.2d 792.
15. 102 N.C. App. 650, 403 S.E.2d 577.
16. 108 N.C. App. 24, 422 S.E.2d 338 (1992).
17. 116 N.C. App. 197, 447 S.E.2d 498 (1994).
18. 344 N.C. 51, 472 S.E.2d 722 (1996).
19. Coleman, 102 N.C. App. at 658, 403 S.E.2d at 660.
20. EEE-ZZZ Lay Drain, 108 N.C. App. at 28, 422 S.E.2d 340.
21. 116 N.C. App 197, 447 S.E.2d 498.

undisturbed, albeit without precedential value, the court of appeals' holding that the superior court did not have subject matter jurisdiction over a claim against a county for delaying a permitting process. According to the court of appeals, the county health department was functioning as an agent of the state (and therefore a state agency) in carrying out the permitting process. Thus, a claim could only be asserted against the state, even though the county employed the offending individuals.

In *Meyer v. Wall*, the state supreme court reinterpreted the North Carolina Tort Claims Act, holding that it was limited to state agencies only, and did not apply to claims against counties as agents of the state. In construing the Tort Claims Act, the court applied the principle of *ejusdem generis*,[22] drew a bright line distinction between agents and agencies, and concluded the North Carolina Tort Claims Act did not encompass claims against the county DSS. The court overruled all previous decisions holding that counties could be considered state agencies (for purposes of the Tort Claims Act) when acting as agents of the state. Thus, notwithstanding the court's decision that the Buncombe County DSS was acting as an agent of the North Carolina Department of Human Resources, the court held that jurisdiction could not lie in the Industrial Commission. Instead, the county had to be sued in superior court (assuming it had waived its governmental immunity through the purchase of liability insurance).

22. The *ejusdem generis* rule of statutory interpretation requires that where general words follow an enumeration of persons or things, such words are to be held as applying only to persons or things of the same general kind or class specifically mentioned. See Black's Law Dictionary (6th Edition 1990).

The *Meyer* court did not, however, overrule the holding in *Gammon* that a plaintiff can file a claim with the Industrial Commission against the state (there, the NCDHR) for the vicarious liability of its agent, the county DSS. *Meyer* emphasizes that Tort Claims Act vicarious liability claims may be filed against both the principal and the agent. In essence, *Meyer* now enables similarly situated plaintiffs to file two lawsuits: one against the county DSS in superior court, and one against the NCDHR for the vicarious liability of its agent, the county DSS, with the Industrial Commission.

Conclusion

Meyer clearly establishes three rules of law formerly in question. First, public servants may be sued in their individual capacities for injuries cased by job-related activity. Unless a personal immunity, such as public officer immunity, serves to shield these public servants, they will be held personally liable for their torts. Second, local governments can now be held liable for the torts of their employees, even if the employees were acting as agents of the state. Finally, in cases where a county's employees are found to have been acting as agents of the state, jurisdiction over claims against the county lies in superior court, not with the Industrial Commission. Jurisdiction for claims against the state agency based on a county employee's wrongdoing remains with the Industrial Commission.

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