Coates' Canons Blog: Public Official Immunity for Intentional Torts? The Split Continues

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Elected officials, law enforcement officers, tax collectors, zoning inspectors and other public officials sometimes face lawsuits over decisions they have made or actions they have taken. To prevent the fear of lawsuits from unduly influencing the judgment of public officials, the law extends personal liability protection to them in the form of public official immunity ("POI").

POI will usually shield public officials from claims of negligent conduct, so long as they acted within the scope of their duties and without malice or corruption. The state's case law is split, though, over whether POI can ever protect public officials from intentional tort claims such as assault, battery, and trespass. One line of cases answers that question in the negative. In the other line, public officials have successfully invoked POI to defeat intentional tort claims.

The North Carolina Court of Appeals recently issued a decision that comes down firmly on one side of the divide, keeping the split alive. After setting out POI's basic features, this blog post briefly reviews that case and then examines the split in more detail, concluding that POI probably should be understood to bar some intentional tort claims. The post refers in several places to a 2016 Local Government Law Bulletin published by the School of Government and found online here.

POI Basics

POI is a derivative form of governmental immunity, the legal doctrine that can preserve municipalities, counties, and other local government units from civil liability in certain situations. (For an extended treatment of governmental immunity, see *Local Government Immunity to Lawsuits in North Carolina*.)

A prior blog post describes key principles governing POI:

> The general rule in North Carolina is that government personnel may be held personally liable for their on-the-job negligence or deliberate misconduct. The doctrine of public official immunity, however, shields "public officials" but not "public employees" from liability for tort claims, unless the officials act beyond the scope of their duties or maliciously or corruptly. Whether an individual qualifies as a public official in the context of a tort claim has little to do with how the person is categorized in other circumstances. Thus, the courts have classified principals as public officials and teachers as public employees for purposes of public official immunity, even though both are employees of their local school boards.
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> As with attempts to distinguish governmental from proprietary functions, it isn't always easy to tell whether a person should be regarded as a public official or public employee. The courts typically regard individuals as public officials if their positions originate in the state constitution or statute, their duties require the use of discretion, and they exercise some portion of the state's sovereign power. Personnel who perform tasks involving little or no discretion are considered public employees. Examples of public officials include elected officials, chiefs of police and police officers, sheriffs and their deputies, and county directors of social services. Street sweepers and emergency medical technicians are a few of the public servants who have been classified as public employees by the courts.

Moreover, as explained in the 2016 Local Government Law Bulletin referenced at the outset of this blog post:

> [POI] is designed to bring lawsuits against public officials to a halt except when plaintiffs allege claims not covered by the immunity. Accordingly, when a defendant asks a trial court to rule that [POI] forecloses a claim or lawsuit, the

> defendant has the right to an immediate appeal if the request is denied. If officials had to wait until after trial to appeal such rulings, much of [POI's] value to them would be lost.

In short, if POI can block intentional tort claims, there could be situations where public officials succeed in having such claims thrown out early in litigation, sometimes before the plaintiffs have had a chance to discover or produce evidence in support of their allegations.

McCullers v. Lewis

Last month the North Carolina Court of Appeals – actually a panel of the court, whose 15 members hear cases in three-judge panels – ruled on whether POI barred the tort claims alleged against two employees of the Raleigh Housing Authority. *McCullers v. Lewis*, 2019 WL 1996210 (N.C. App. May 7, 2019). The lawsuit asserted claims for intentional infliction of emotional distress ("IIED"), negligent infliction of emotional distress ("NIED"), and negligence, all arising from the employees' failure to transfer the plaintiffs to another RHA-administered apartment. The employees appealed the trial court's denial of their motions to dismiss, arguing that POI exempted them from personal liability on any of the plaintiffs' claims.

The court of appeals ruled that POI foreclosed the plaintiffs' claims for NIED and negligence, but it also held that POI was not a defense to the plaintiffs' IIED claims:

> Since public official immunity may only insulate public officials from allegations of mere negligence, only those of Plaintiffs' causes of action sounding in negligence come within the doctrine's reach. Accordingly, we affirm the trial court's denial of Defendants' motion to dismiss Plaintiffs' first cause of action for [IIED], which is an intentional tort claim.

McCullers, 2019 WL 1996210, at *3.

The court cited *Hawkins v. State*, 117 N.C. App. 615 (1995) as authority for its view that intentional tort allegations fall outside the liability protection afforded by POI. As explained in the 2016 Local Government Law Bulletin linked to above, the *Hawkins* decision lies at the root of the split over the relationship between POI and intentional tort claims.

The Split over Public Official Immunity and Intentional Torts

The plaintiff in *Hawkins v. State* lost his job with the Department of Human Resources for refusing to submit a urine sample during a workplace investigation into missing valium. He filed a lawsuit alleging IIED claims against the DHR Secretary and individuals in his division. The defendants argued that POI barred the plaintiff's intentional tort claims, but the court of appeals disagreed, reasoning: "Because malice encompasses intent, we conclude that if a party alleges an intentional tort claim, [POI] does not immunize public officials or public employees from suit in their individual capacities." 117 N.C. App. at 630. Apparently, then, the court determined that POI cannot overcome intentional tort allegations because (1) POI does not cover public officials who act maliciously and (2) intentional torts entail malice.

In the nearly 25 years since *Hawkins*, the court of appeals has followed the *Hawkins* line on several occasions. *E.g.*, *Wells v. N.C. Dep't of Corrections*, 152 N.C. App. 307, 320 (2002) ("[I]f the plaintiff alleges an intentional tort claim, a [POI] determination is unnecessary since, in such cases, neither a public official nor a public employee is immunized from suit in his individual capacity.").

In many other post-*Hawkins* decisions, however, the court has ruled that POI blocked the plaintiffs from pursuing intentional tort claims. *E.g.*, *Brown v. Town of Chapel Hill*, 233 N.C. App. 257, 271 (2014) (POI barred plaintiff's false imprisonment claim against defendant police officer); *Campbell v. Anderson*, 156 N.C. App. 371, 377 (2003) (POI defeated plaintiff's claims for trespass, malicious prosecution, and false arrest). Indeed, an unpublished opinion issued by the court explicitly disputes the notion that POI is incapable of shielding public officials from such claims. *Lowder v. Payne*, 226 N.C. App. 201, *5 (2013) (unpublished) ("Plaintiff next contends that the trial court erred by granting summary judgment to [defendant police officer], individually, for assault and battery, because public official immunity does not shield an official from liability for intentional torts. We disagree.").

The split in our POI case law has led to a parallel division in federal court decisions interpreting North Carolina law. Some

federal judges have followed *Hawkins*, while others have thrown out intentional tort claims on POI grounds. At least one federal judge has commented on the division in the state's POI jurisprudence. *Maney v. Fealy*, 69 F. Supp. 3d 553, 565 (2014) ("[T]hese cases seem to be in conflict, because while some have said that the defense does not apply to all intentional torts, others have applied the defense to the intentional torts of battery and assault."), *aff'd*, 681 F. App'x 210 (4th Cir. 2017) (unpublished).

I see no obvious way to reconcile the two lines of POI cases completely, though the following points strike me as noteworthy.

- It is possible to read *Hawkins* and a number of the cases that follow it as merely eliminating POI as a defense to intentional tort claims at the motion-to-dismiss stage, when a trial court is obliged to treat the plaintiff's allegations as true. This approach would leave POI available as a potential defense to intentional tort claims in later stages of litigation, such as summary judgment, when a trial court would be in a position to consider it in light of the evidence presented. One obstacle to this approach is that the court of appeals has actually cited *Hawkins* as authority for rejecting a POI defense to intentional tort claims at summary judgment. *Wells,* 152 N.C. App. at 321 (defendants not entitled to summary judgment on POI grounds "[b]ecause intentional infliction of emotional distress is an intentional tort").
- Many post-*Hawkins* cases in which the court of appeals has applied POI to intentional tort claims have involved law enforcement officers and have come to the court from trial court orders denying summary judgment motions. Law enforcement officers frequently have to employ force or enter upon or confiscate private property in the performance of their duties, a reality that makes them more likely than other public officials to face intentional tort claims such as false imprisonment, assault, battery, and trespass. If POI were entirely confined to negligence claims, its value to law enforcement officers – the public officials perhaps most in need of its protection – would be seriously reduced. When the court of appeals has applied POI to intentional tort claims against law enforcement officers, its willingness to do so has often seemed tied to a negative assessment of the merits of the claims alleged. Instead of returning the cases to the lower courts for trial, the court has used the officers' POI appeals to end litigation that appeared baseless in light of the evidence on record.

Questioning*Hawkins*

The 2016 Local Government Law Bulletin concludes that the cases applying POI to intentional tort claims have the better of the argument. It offers several reasons in support of that position, two of which I will summarize here.

1. **Not every intentional tort involves malice**. As noted above, *Hawkins* seems to assume that malice is part of every intentional tort. There are, of course, intentional torts for which malice is an element, malicious prosecution being one example. Yet our appellate courts have acknowledged in other contexts that some intentional torts can occur without malice. Both the North Carolina Supreme Court and the court of appeals have denied, for instance, that malice is a necessary component of every assault and battery. *Shugar v. Hill*, 304 N.C. 332, 338 (1981) ("[I]n cases involving assault and battery, punitive damages are recoverable only when the assault and battery is accompanied by an element of aggravation such as malice or other aggravating circumstances.") *Myrick v. Cooley*, 91 N.C. App. 209, 215 (1988) ("[A]n assault and battery need not necessarily be perpetrated with maliciousness, willfulness or wantonness[.]"). If an intentional tort can occur without malice, then it does not necessarily fall within the malice exception to POI. Consequently, if a plaintiff's factual allegations, taken as true, fail to establish malice, POI should be a viable defense to the plaintiff's intentional tort claims at the motion-to-dismiss stage. Similarly, a public official asserting POI should be able to have intentional tort claims thrown out at summary judgment if there is no evidence of malice.
2. **Pre-*Hawkins* decisions by the court of appeals recognize that POI can defeat some intentional tort claims**. *E.g.*, *Mullins v. Friend*, 116 N.C. App. 676, 681 (1994) (police officer entitled to POI with respect to false imprisonment claim asserted by plaintiff detained on suspicion of shoplifting); *Jacobs v. Sherard*, 36 N.C. App. 60, 65 (1978) (POI barred wrongful ejectment claims against police officers who had acted pursuant to a court order later held to have exceeded the trial court's authority). The *Hawkins* decision did not expressly take these prior cases into account.

Identifying POI Defeats Intentional Tort Claims

The 2016 bulletin proposes a framework for analyzing when the malice exception to POI eliminates POI as a valid defense

to intentional tort claims. The framework rests on a large body of tort cases analyzing the concepts of intent and malice. It incorporates several factors, including whether the plaintiff has premised her claims on actual intent or constructive intent. Interested readers will find that framework on pages 21-22.

Of course, the ultimate resolution to the conflict in our POI case law could look quite different from what the bulletin proposes. Unless the General Assembly passes legislation on the matter, the resolution will have to come from the state supreme court or from the court of appeals itself, which now has a formal procedure for bringing uniformity to its own case law. *See* N.C.R.App. P. 31.1(a)(1) (court of appeals may order en banc proceeding when "en banc consideration is necessary to secure or maintain uniformity of the court's decisions"). Possible outcomes range from the abrogation of *Hawkins* and its progeny all the way to the absolute exclusion of POI as a defense against intentional tort claims. Whatever the eventual result, this is a problem in need of a solution.

Other Significant Issues in*McCullers*

The *McCullers* decision makes three other points about POI that warrant attention.

Eligibility for POI. Earlier in this post, I noted that public employees are not eligible for public official immunity unless their positions are created by state law. The *McCullers* decision highlights an exception to this rule. Although neither employee occupied a position created by state law, the court of appeals granted both employees POI on the plaintiff's negligence claims, partly because the RHA had delegated to them a portion of its housing duties under Chapter 157 of the General Statutes. The court explained that it had previously done likewise for public employees who occupied positions not created by state law but who had been delegated statutory duties by officials or organizations statutorily authorized to make the delegation. *See Chastain v. Arndt*, ____ N.C. App. ____, 800 S.E.2d 68 (2017) (basic law enforcement trainer); *Baker v. Smith*, 224 N.C. App. 423, 428 (2012) (assistant jailer); *Hunter v. Transylvania County Dep't of Soc. Servs*., 207 N.C. App. 735, 740 (2010) (social worker); *Cherry v. Harris*, 110 N.C. App. 478 (1993) (forensic pathologist).

POI and Punitive Damages. In addition to tort claims, the complaint filed by the *McCullers* plaintiff included a claim for punitive damages. In response to the defendants' POI defense, the court of appeals stated that POI is not a defense to punitive damages claims.

If POI is restricted to negligence claims, the court was plainly right, since a plaintiff cannot qualify for punitive damages without proving that the defendant's conduct went beyond mere negligence. *See* G.S. 1D-15(a) (punitive damages allowed only if plaintiff proves that defendant acted with malice, fraud, or willful and wanton conduct). Additionally, even if POI can bar some intentional tort claims, it probably should not be considered a possible defense to claims for punitive damages. For reasons too complex to go through here, any conduct sufficient to establish a basis for punitive damages likely proves malice for POI purposes.

Right to Immediate Appeal. In a prior blog post, I looked at case law that limits the right of local governments to appeal immediately when trial courts deny motions to dismiss asserting governmental immunity. Whether those limitations apply in a given case depends on precisely how the local government asserted the immunity in its motion. The *McCullers* decision indicates that the same rules apply to appeals involving POI. Attorneys for local governments or public officials should know the rules so that they can raise POI in a manner that preserves the option for an immediate appeal.

This post was previously published on the School of Government'sOn the Civil Side blog.

Links

- www.sog.unc.edu/publications/bulletins/do-intentional-tort-claims-always-defeat-public-official-immunity
- www.sog.unc.edu/publications/books/local-government-immunity-lawsuits-north-carolina
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_1d/GS_1d-15.html
- civil.sog.unc.edu/public-official-immunity-for-intentional-torts-the-split-continues/