Seay v. Cleveland: Resolution of the Ministerial Discretionary Dichotomy

INTRODUCTION

In 1992 the Georgia State Legislature passed the Georgia State Tort Claims Act ("GTCA") which waived the state's sovereign immunity.[1] The GTCA defines "state" as the "State of Georgia and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, and institutions" but the statute specifically excludes "counties, municipalities, school districts, other units of local government, hospital authorities, or housing and other local authorities."[2] Under the GTCA a discretionary function or duty is specifically defined by statue.[3] However, the common law distinction between ministerial and discretionary functions still applies to all entities exempted from the GTCA.[4]

I. FACTUAL BACKGROUND

In *Seay v. Cleveland*,[5] the Georgia Supreme Court addressed the issue of whether a sheriff can raise the defense of sovereign immunity when he is sued in his official capacity because of his deputies' negligent performance of a ministerial duty. On October 1, 1991, Arthur and Annie Cleveland purchased property in Cherokee County at a sheriff's sale. John Seay was the sheriff of Cherokee County, and his deputy, Shelley Laughhunn, administered the sale. After the Clevelands purchased the property, another sheriff's deputy deducted the county's cost of the sale and paid the balance to the attorney for the plaintiff in execution. However, the attorney kept the proceeds from the sale and failed to satisfy the existing superior liens. The Clevelands were

1. O.C.G.A. § 50-21-23(a)(1998).
2. *Id.* § 50-21-22(5).
3. *Id.* § 50-21-23(2).
4. Brantley v. Department of Human Resources, 271 Ga. 679, 681, 523 S.E.2d 571, 574 (1999).
5. 270 Ga. 64, 508 S.E.2d 159 (1998).

required to either pay off the superior mortgage or forfeit the property and all of the money paid for the property. Therefore, the Clevelands brought an action against Sheriff Seay in his official capacity alleging that he failed to disburse the funds from the sale as mandated by statute. The Clevelands also alleged that Sheriff Seay negligently supervised his deputies.[6]

At trial Seay moved for a directed verdict, but the motion was denied.[7] The trial court granted a directed verdict in favor of the Clevelands holding that Seay could not assert the defense of sovereign immunity because his deputies' acts were ministerial.[8] The court of appeals affirmed and further held "that an action on a sheriff's bond constitutes an action ex contractu, thus sovereign immunity is waived under OCGA § 50-21-1(a)."[9]

The Georgia Supreme Court granted certiorari and reversed, holding that sovereign immunity barred the Clevelands' claims against Seay and that there was no evidence that immunity had been waived.[10]

II. LEGAL BACKGROUND

By an act of the General Assembly, Georgia adopted the common law doctrine of sovereign immunity on February 25, 1784.[11] In 1974 the doctrine was given constitutional status, and the state remained absolutely immune until the 1983 amendment to the Georgia State Constitution.[12] A 1991 amendment added official immunity, a doctrine primarily developed through Georgia case law, to the Georgia State Constitution.[13] Official immunity provides that a public officer or employee may be held personally liable for his negligent performance of a ministerial duty but is immune from liability "for his discretionary acts unless such acts are willful, wanton, or outside the scope of his authority."[14]

In the 1980 case *Hennessy v. Webb*,[15] the Supreme Court of Georgia held that if a public employee of the state is sued in his official capacity,

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6. *Id.* at 64, 508 S.E.2d at 160.
7. *Id.*
8. *Id.*
9. *Id.* at 65, 508 S.E.2d at 160.
10. *Id.*
11. Crowder v. Department of State Parks, 228 Ga. 436, 439, 185 S.E.2d 908, 911 (1971).
12. Gilbert v. Richardson, 264 Ga. 744, 745-46, 452 S.E.2d 476, 478 (1994).
13. *Id.* at 752, 452 S.E.2d at 482-83 (citing GA. CONST. of 1983 art. I, § 2 para. 9).
14. *Id.*, 452 S.E.2d at 482 (citing Hennessy v. Webb, 245 Ga. 329, 330-31, 264 S.E.2d 878, 880 (1980)).
15. 245 Ga. 329, 264 S.E.2d 878 (1980).

the action is really against the state, and the employee is entitled to the defense of sovereign immunity.[16] The court in *Webb* also concluded that the doctrine of sovereign immunity applied to counties.[17] In *Webb* a school principal was sued for injuries sustained by a student when the student tripped over a mat and fell into a door. Plaintiffs alleged the principal was negligent for allowing the rug and mat to be placed in front of the door. The trial court dismissed the action, holding the principal was immune from liability because of governmental immunity.[18] The court of appeals reversed.[19] The Supreme Court of Georgia stated that the board of education could clearly invoke governmental immunity, but the issue was whether "[sovereign] immunity extends to an agent of the board carrying out its duties to provide public education by exercising custody and control over the school premises."[20] Plaintiffs argued that the principal could not assert governmental immunity because he was being sued as an individual and not in his official capacity and that the principal's negligent act of placing the rug and mat in front of the door was ministerial and not discretionary.[21] However, the court noted that defendant was being sued solely because of his position and the duties imposed upon him as the principal of the school.[22] Furthermore, plaintiffs alleged that the principal "failed to exercise sound judgment (discretion) in allowing . . . a hazardous condition to exist."[23] The court explained that an officer invested with discretion and empowered to exercise his judgment is immune from liability "provided the acts complained of are done within the officer's authority, and without wilfulness, malice, or corruption."[24] However, public officials who fail to perform a ministerial duty are not immune from liability.[25] "'A ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty.'"[26] Because

16. *Id.* at 330, 264 S.E.2d at 879.

17. *Id.* at 329, 264 S.E.2d at 879 (citing Miree v. United States, 242 Ga. 126, 133, 249 S.E.2d 573, 578 (1973)).

18. *Id.* "'[G]overnmental immunity' is synonymous with sovereign immunity and not an umbrella term encompassing both sovereign and official immunity." *Gilbert*, 264 Ga. at 750, 452 S.E.2d at 481.

19. 245 Ga. at 329, 264 S.E.2d at 879.

20. *Id.* at 330, 264 S.E.2d at 879.

21. *Id.* at 331, 264 S.E.2d at 880.

22. *Id.*

23. *Id.* at 332, 264 S.E.2d at 880.

24. *Id.* at 331, 264 S.E.2d at 880 (internal quotations and emphasis omitted).

25. *Id.* at 330, 264 S.E.2d at 880.

26. Hemak v. Houston County Sch. Dist., 220 Ga. App. 110, 112, 469 S.E.2d 679, 681 (1996) (quoting Joyce v. Van Arsdale, 196 Ga. App. 95, 96, 395 S.E.2d 275, 276 (1990)).

defendant's act was discretionary and not ministerial, the court held defendant was entitled to governmental immunity.[27]

The doctrine of sovereign immunity was modified in 1983 when the voters approved an amendment to the state constitution waiving the state's sovereign immunity.[28] The 1983 amendment waived "the sovereign immunity of the state or any of its departments and agencies' in actions for which liability insurance protection was provided."[29] In the 1985 case *Toombs County v. O'Neal*,[30] the Georgia Supreme Court held that the 1983 amendment extended to the counties of the State of Georgia.[31] In *O'Neal* plaintiff fell in the lobby of the Toombs County Jail. Plaintiff later brought an action for negligence against Toombs County seeking medical expenses and damages for pain and suffering. Toombs County filed a motion to dismiss on the basis of sovereign immunity.[32]

The trial court denied the motion and held that pursuant to the 1983 amendment the county waived its sovereign immunity to the extent of applicable liability insurance.[33] On appeal Toombs County argued the trial court erred by holding that the 1983 amendment extends to the counties of Georgia.[34] However, the Supreme Court of Georgia found no indication that the electorate did not intend for the 1983 amendment to extend to counties and therefore held that sovereign immunity under the 1983 amendment extends to the counties of the State of Georgia.[35]

The immunity enjoyed by public officers and employees was made part of the Georgia State Constitution by the 1991 amendment to the doctrine of sovereign immunity.[36] The court in *Gilbert v. Richardson*[37] stated that according to the 1991 amendment, "state officers and employees and those of its departments and agencies are subject to suit only when they negligently perform or fail to perform their 'ministerial functions' or when they act with actual malice or intent to cause injury in the

27. *Webb*, 245 Ga. at 332, 264 S.E.2d at 880-81.
28. *Gilbert*, 264 Ga. at 745-46, 452 S.E.2d at 478.
29. *Id.* at 746, 452 S.E.2d at 478 (quoting GA. CONST. art. I, § 2 para. 9).
30. 254 Ga. 390, 330 S.E.2d 95 (1985).
31. *Id.* at 391, 330 S.E.2d at 97.
32. *Id.* at 390, 330 S.E.2d at 96.
33. *Id.*
34. *Id.*
35. *Id.* at 391, 330 S.E.2d at 96.
36. *Gilbert*, 264 Ga. at 752, 452 S.E.2d at 482-83.
37. 264 Ga. 744, 452 S.E.2d 476 (1994).

performance of their 'official functions.'"[38] The court held that the 1991 amendment also applied to counties.[39]

In *Gilbert* plaintiffs brought an action against the Walker County sheriff and deputy sheriff for damages sustained when the deputy's vehicle collided with plaintiffs' automobile. Deputy Sheriff Richardson was responding to an emergency call when she collided with plaintiffs. Plaintiffs alleged that Sheriff Millard was liable because he was responsible for Richardson's acts as her employer. Both Millard and Richardson moved for summary judgment alleging that Millard was immune from suit under the doctrine of sovereign immunity and that Richardson was immune from suit under the doctrine of official immunity because she was performing a discretionary function.[40] "'A discretionary act . . . calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed.'"[41] The trial court granted Millard's and Richardson's motion for summary judgment.[42] The court held that Walker County's participation in Georgia Interlocal Risk Management Agency ("GIRMA") did not waive sovereign immunity and that Richardson was protected from suit under the doctrine of official immunity because her actions were discretionary in nature.[43] The court of appeals affirmed.[44]

Under the 1991 amendment, the court in *Gilbert* interpreted the term "official functions" to include both ministerial and discretionary acts.[45] The court held that responding to an emergency call is a discretionary function and, therefore, Richardson was barred from suit under the doctrine of official immunity.[46] However, the court determined that Sheriff Millard was not entitled to Richardson's immunity.[47] The court held that "the official immunity of a public employee does not protect a governmental entity from liability under the doctrine of respondeat superior."[48] "A county may be liable for a county employee's negligence in performing an official function to the extent the county has waived

38. *Id.* at 752-53, 452 S.E.2d at 483.
39. *Id.* at 747, 452 S.E.2d at 479.
40. *Id.* at 745, 452 S.E.2d at 478.
41. *Hemak*, 220 Ga. App. at 112, 469 S.E.2d at 681 (quoting *Joyce*, 196 Ga. App. at 96, 395 S.E.2d at 276).
42. *Gilbert*, 264 Ga. at 745, 452 S.E.2d at 478.
43. *Id.*
44. *Id.*
45. *Id.* at 753, 452 S.E.2d at 483.
46. *Id.*
47. *Id.* at 754, 452 S.E.2d at 484.
48. *Id.*

sovereign immunity."[49] In conclusion, Millard was able to assert Walker County's defense of sovereign immunity because Millard was being sued in his official capacity but was not entitled to Richardson's official immunity.[50] However, the court determined that the county waived its sovereign immunity through its purchase of GIRMA coverage.[51] The court's rationale was that "the government should be liable for the 'inevitable mishaps which will occur when its employees perform their functions without fear of liability . . . .'"[52] The court found that Deputy Richardson was completely immune from liability but that Sheriff Millard was liable only to the extent the county waived sovereign immunity.[53] Therefore, after *Gilbert*, it was clear that under a theory of respondeat superior a county employer would not be entitled to an employee's defense of official immunity.

III. RATIONALE OF COURT

In *Seay v. Cleveland*,[54] the Georgia Supreme Court reversed the court of appeals decision because the Clevelands' claims against Sheriff Seay were barred by the doctrine of sovereign immunity.[55] The court stated that *Seay* was governed by *Gilbert* in which the court determined that a sheriff "sued in his official capacity could be held liable for a deputy's negligence in performing an official function only to the extent the county had waived sovereign immunity."[56] The court in *Gilbert* also determined that the term "official function" includes both ministerial and discretionary acts.[57]

According to the supreme court, the court of appeals improperly distinguished *Gilbert* on the facts in affirming the trial court's grant of a directed verdict.[58] The only factual difference between *Seay* and *Gilbert* is that the deputy in *Seay* negligently performed a ministerial duty, whereas the deputy in *Gilbert* negligently performed a discretionary duty. The court of appeals held that Seay forfeited the protection of sovereign immunity because Seay's deputy negligently performed a

49. *Id.*
50. *Id.*
51. *Id.* at 752, 452 S.E.2d at 482.
52. *Id.* at 754, 452 S.E.2d at 484 (citations omitted).
53. *Id.*
54. 270 Ga. 64, 508 S.E.2d 159 (1998).
55. *Id.* at 65, 508 S.E.2d at 160.
56. *Id.* (citing *Gilbert*, 264 Ga. at 754, 452 S.E.2d at 484).
57. *Id.*
58. *Id.*

ministerial duty as opposed to a discretionary duty.[59] However, as discussed in *Gilbert*, sovereign immunity applies to official functions whether ministerial or discretionary in nature.[60] In *Seay* the deputies were charged with the negligent performance of official functions. Therefore, Sheriff Seay could invoke the defense of sovereign immunity and would only be held liable to the extent the county had waived sovereign immunity through the purchase of liability insurance.[61] The supreme court stated:

> For the benefit of both the bench and bar, we reiterate what we said in *Gilbert*: a sheriff sued in his official capacity may be held liable for the negligent performance of ministerial or discretionary acts of his employees only to the extent the county has waived sovereign immunity because he can only be sued in his official capacity under respondeat superior.[62]

The court further noted that Seay may have been liable for negligent supervision had he been sued in his personal capacity.[63]

The court in *Seay* next addressed the issue of whether sovereign immunity had been waived by the county. The court of appeals determined that sovereign immunity was waived because an action on a sheriff's bond constitutes an action ex contractu which, pursuant to O.C.G.A. section 50-21-1(a), waives sovereign immunity.[64] However, the Clevelands had not previously pursued that allegation, and because the issue "was never presented to nor ruled upon by the trial court, it present[ed] nothing for review on appeal."[65]

IV. IMPLICATIONS

The decision in *Seay* illustrates the broad coverage of the doctrine of sovereign immunity. It is likely that sovereign immunity will be asserted more often in light of its applicability to both ministerial and discretionary acts.

The decision in *Seay* will probably clarify the confusion surrounding the doctrine of sovereign immunity. Just seven months before the decision in *Seay*, but four years after *Gilbert*, the court in *Cantrell v.*

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59. Seay v. Cleveland, 228 Ga. App. 836, 838, 493 S.E.2d 30, 32 (1997), *rev'd*, 270 Ga. 64, 508 S.E.2d 159 (1998).

60. *Seay*, 270 Ga. at 65, 508 S.E.2d at 160.

61. *Id.*, 508 S.E.2d at 160-61.

62. *Id.* at 65-66 n.1, 508 S.E.2d at 161 n.1.

63. *Id.*

64. *Id.* at 66, 508 S.E.2d at 161.

65. *Id.*

Thurman[66] stated that providing medical care to prisoners "is a ministerial act by the sheriff and his or her deputies and does not involve the exercise of discretion . . . thus, such act is *not* subject to either sovereign immunity or official immunity."[67] In *Cantrell* plaintiff injured his foot while incarcerated at the Bartow County jail under the custody of Sheriff Donald E. Thurman and Deputy Sheriff William Hart. Plaintiff's foot became infected and plaintiff developed a fever reaching 107 degrees Fahrenheit. Plaintiff repeatedly requested medical care and his foot was eventually examined by Dr. May who diagnosed plaintiff with two broken toes. However, Dr. May performed no blood test or took any x-rays and only treated plaintiff with Ibuprophen. Plaintiff's condition worsened and he was taken to Cartersville Medical Center where, for the first time, his foot was diagnosed as infected. Plaintiff was required to undergo numerous surgeries that resulted in the loss of several toes.[68]

As a result, plaintiff sued the sheriff and deputy sheriff under 42 U.S.C. § 1983 "for wilful and wanton denial of adequate medical care of an inmate in their custody."[69] Defendants raised the defenses of qualified/good faith immunity and official immunity.[70] However, the court held that providing adequate medical attention is a ministerial duty and therefore neither sovereign immunity nor official immunity are applicable.[71] Apparently, the proposition in *Gilbert* that sovereign immunity applies to both ministerial and discretionary acts must not have been clear until stated in *Seay*. If the *Cantrell* case had been decided after *Seay*, the court in *Cantrell* may have reached a different conclusion.

The decision in *Seay* provides broad protection for public employees sued in their official capacity under the doctrine of respondeat superior. However, the court in *Seay* stated that the sheriff "might be held liable for negligent supervision had he been sued in his personal capacity."[72] Many plaintiffs will now, in instances where sovereign immunity precludes liability, sue public employees in their personal capacity for negligent supervision. Courts will probably begin to recognize supervision as a ministerial duty.

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66. 231 Ga. App. 510, 499 S.E.2d 416 (1998).
67. *Id.* at 514, 499 S.E.2d at 421.
68. *Id.* at 510-11, 499 S.E.2d at 418-19.
69. *Id.* at 511, 499 S.E.2d at 419.
70. *Id.*
71. *Id.* at 514, 499 S.E.2d at 421.
72. *Seay*, 270 Ga. at 65, 508 S.E.2d 161.

For example, in *Howard v. City of Columbus*,[73] James Howard was a diabetic with hypertension and a prisoner of the City of Columbus, Muscogee County, Georgia. According to policy, the screening of new inmates was performed by a deputy who had no medical training and who did not take a medical history for diabetes or hypertension. Therefore, Howard's medical records did not indicate his condition. While in prison, Howard's diabetic condition worsened. On April 23, 1992, Melson, Howard's cellmate, prepared a sick-call slip for Howard because Howard was too weak. By the first week of May, Howard was experiencing symptoms of overheating, constipation, and fainting. The jailors were told by the inmates that Howard was sick, but the jailors failed to examine Howard. On May 22, 1992, Officer Kennedy learned that Howard was sick. Kennedy tried several times to make arrangements for Howard to see the nurse; however, the nurse refused to see Howard. After notifying his supervisor, Kennedy prepared a written report of the incident according to standard procedure regarding medical care.[74]

On May 22, 1992, Howard manifested symptoms of weight loss, fainting, blurred vision, and profound weakness and was carried to the clinic. Howard had a heart rate of 148 b.p.m. The protocol required that 911 be called when a prisoner's heart rate exceeded 120 b.p.m.; however, nurse Thompson did not call 911 or a doctor but treated Howard for high blood pressure. Howard was kept in the clinic for approximately eight hours before being returned to his cell.[75]

At 11:00 p.m. that same day Howard returned to the clinic and told nurse McLeod that he was dying. However, McLeod did not call 911 and continued to treat Howard for high blood pressure. McLeod had the authority to call an ambulance, but it was policy not to call an ambulance except in the case of a medical emergency. McLeod consulted with Dr. Chase, but Chase did not order that Howard be sent to the emergency room. Howard was again returned to his cell. On May 24, 1992, one of the jailors observed Howard's condition and called 911. The paramedics arrived and it was clear that Howard was in need of medical attention. However, Howard died of diabetic ketoacidosis at the Columbus Medical Center on May 25, 1992.[76]

A wrongful death action was brought against several people including J.E. Hodge, individually and in his official capacity as Sheriff of

73. 239 Ga. App. 399, 521 S.E.2d 51 (1999).
74. *Id.* at 399-400, 521 S.E.2d at 59.
75. *Id.* at 400-01, 521 S.E.2d at 59.
76. *Id.* at 401-03, 521 S.E.2d at 59-60.

Muscogee County, Georgia.[77] The court noted that Sheriff Hodge, in his official capacity, was protected from tort liability by sovereign immunity.[78] However, Sheriff Hodge was also sued in his personal capacity. The dissent cited *Lowe v. Jones County*[79] for the proposition that a sheriff's supervision is discretionary and not ministerial.[80] However, the court stated that "[i]f the statement of the Supreme Court is a correct statement of law, then supervision in a personal capacity is not discretionary but ministerial."[81]

Although the court in *Howard* indicated that it may be willing to recognize supervision as a ministerial duty, there is by no means a consensus on the issue. In *Rowe v. State Board of Pardons & Parole*,[82] the court held that the supervision of parolees is discretionary.[83] *Rowe* was decided after the passage of the GTCA which does not expressly define supervision as a discretionary function.[84] However, *Rowe* is an important case because it may indicate that future courts will hold supervision to be a discretionary function when dealing with entities that are exempt from the GTCA. In *Rowe* the decedent died in an automobile collision involving a car driven by Robert Lee Fuller. Daryl Eugene Rowe, as administrator of decedent's estate, sued the State Board of Pardons and Parole ("the Board"). Rowe claimed that defendant's negligent supervision of Fuller was the proximate cause of decedent's death. The Board argued that parolee supervision was discretionary. Rowe argued that the parole officers failed to report numerous violations of Fuller's parole and that reporting violations is a ministerial act.[85]

In holding that supervision was discretionary, the court reasoned that a parole supervisor is to use individual judgment in determining whether a parole violation has occurred.[86] "The use of individual judgment is consistent with the definition of 'discretionary' . . . ."[87] The

77. *Id.* at 399, 521 S.E.2d at 58.

78. *Id.* at 410, 521 S.E.2d at 65.

79. 231 Ga. App. 372, 499 S.E.2d 348 (1998).

80. *Howard*, 239 Ga. App. at 418, 521 S.E.2d at 70 (Smith, J., concurring in judgment only in part and dissenting in part).

81. *Id.* at 412, 521 S.E.2d at 66. The court is referring to the following statement in *Seay:* "[Sheriff] Seay might be held liable for negligent supervision had he been sued in his personal capacity." *Seay*, 270 Ga. at 65, 508 S.E.2d at 160.

82. 240 Ga. App. 163, 523 S.E.2d 40 (1999).

83. *Id.* at 165, 523 S.E.2d at 41.

84. O.C.G.A. § 50-21-22(2).

85. 240 Ga. App. at 163, 523 S.E.2d at 40-41.

86. *Id.* at 164, 523 S.E.2d at 41.

87. *Id.*

court continued by stating that "[t]he duties of a parole officer also include supervising people, which is generally held to constitute a 'discretionary' function."[88] Therefore, the debate is just beginning on whether supervision is a ministerial or discretionary duty.

In conclusion, sovereign immunity will continue to protect county employees sued in their official capacity under the doctrine of respondeat superior; but, as a result of *Seay*, these employees may be liable in their personal capacities for negligent supervision.

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88. *Id.*

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