North Carolina Central Law Review

Volume 21
Number 2 *Volume 21, Number 2*

Article 11

10-1-1995

The Duty to Control in Negligent Release Cases: King v. Durham County Mental Health Developmental Disabilities and Substance Abuse Authority

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NOTE

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INTRODUCTION

In *King v. Durham County Mental Health Developmental Disabilities and Substance Abuse Authority*[1] (hereafter *King*), the North Carolina Court of Appeals addressed the tort liability of a mental care provider for acts against third parties in negligent release cases. The issue in *King* was whether any of the defendants owed a duty to Sherri King, the third party victim, who was killed by a patient who escaped from the facility that was providing the care.[2] Without such a duty, the defendants cannot be liable in tort to the plaintiff.[3] In general, such a duty can arise only if a special relationship exists between the parties.[4]

This note will review the specific facts and procedural history of *King* and discuss the status of the law in this area. The note will analyze the reasoning of the two opposing views in this area of the law and discuss related policy considerations. The note will conclude that the North Carolina Court of Appeals has unnecessarily placed the public in danger by refusing to impose liability on an institution that negligently released a violent patient, despite a statutory scheme designed to permit the institution to exercise control over voluntarily committed patients.

THE CASE

Sherri King was shot and killed by Mohammed Thompson and Carlos Nichols during the robbery of a convenience store in Person County on February 27, 1990, after Thompson had escaped from a residential treatment program for minors with emotional handicaps coupled with violent behavior. Plaintiff Nesbit King, as administrator of the estate of his deceased wife, Sherri King, appealed from the dismissal of his complaint filed in superior court against Durham County

1. 113 N.C. App. 341, 439 S.E.2d 771, *cert. denied*, 336 N.C. 316, 445 S.E.2d 396 (1994).
2. *Id.* at 345, 439 S.E.2d at 774.
3. *See* RESTATEMENT (SECOND) OF TORTS § 315 (1965).
4. *Id.*

Mental Health Developmental Disaility and Substance Abuse Authority (Durham Mental Health), Lutheran Family Services in the Carolinas (Lutheran Services), and Durham County Guidance Clinic for Children and Youth, Inc. (Guidance Clinic).[5]

Thompson had a history of drug abuse and violent crime and had been certified as a Willie M. class member. A Willie M. class member is a minor "having serious emotional, mental or neurological handicaps accompanied by violent or assaultive behavior."[6] Defendant Durham Mental Health was responsible for administration of services to Willie M. class members in Durham County. Defendant Lutheran Services was responsible for providing evaluation and treatment of the residents of Triangle House. Lutheran Services also provided the Triangle House facilities for treatment of Willie M. class members. These facilities were supposed to be "equipped to prevent residents from escaping and posing a threat to the community."[7] Defendant Guidance Clinic contracted with Durham Mental Health to provide psychological testing, evaluation, and treatment of the residents of Triangle House.[8]

In January of 1990, Thompson was residing at Triangle House and receiving treatment as a Willie M. class member. Thompson was a drug abuser, and the possibility of his escape posed a "clear and present danger to the general public."[9] In mid-January 1990, Thompson escaped from Triangle House through a door left unlocked in violation of the facility's rules. After the escape, neither Lutheran Services, Durham Mental Health or Guidance Clinic informed the police that Thompson had escaped, nor did they seek his return to Triangle House.[10]

The complaint alleged that the defendants' failure to evaluate Thompson, failure to provide a secure facility, and the failure to seek his return after he left Triangle House was gross negligence. The complaint further alleged that it was reasonably foreseeable that Thompson's escape could lead to armed robbery and murder since he had a history of drug abuse, violence, and other unlawful activity.[11] The defendants moved to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.[12] The Durham County Superior Court allowed the dismissals, and the North Carolina Court

5. *King*, 113 N.C. App. at 342, 439 S.E.2d at 772.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 343, 439 S.E.2d at 772-73.
10. *Id.*, 439 S.E.2d at 773.
11. *Id.*
12. *Id.* at 345, S.E.2d at 774. The motions were converted into a motion for summary judgment under N.C. R. Civ. P. 56 because the trial court considered matters outside the pleadings.

of Appeals affirmed.[13] The North Carolina Supreme Court subsequently denied a petition for review without offering any specific reasons.[14]

BACKGROUND

In general, there is no duty to protect others against harm from third persons, unless a special relationship exists between the parties.[15] If a special relationship exists, there arises a duty "upon the actor to control the third person's conduct,"[16] and "to guard other persons against his dangerous propensities."[17] Some examples of legally recognized special relationships include: (1) parent-child,[18] (2) master-servant[19] (3) landowner-licensee[20] (4) custodian-prisoner[21] and (5) institution-involuntarily committed mental patient.[22] In each example, "the chief factors justifying imposition of liability are (1) the ability to control the person, and (2) knowledge of the person's propensity for violence."[23] The main issue in negligent release cases is whether the defendant owes a duty to protect the plaintiff from the acts of a third person.

In *Semler v. Psychiatric Inst.*,[24] the United States Court of Appeals for the Fourth Circuit considered whether a court order requiring treatment and confinement of a patient at the Psychiatric Institute im-

13. *Id.* at 345, 439 S.E.2d at 775, 777. The trial court also dismissed, pursuant to N.C. R. CIV. P. 12(b)(1), the complaints against Durham Mental Health and Lutheran Services, but the appellate court did not discuss these alternate dismissals, since its dismissal under N.C. R. CIV. P. 12(b)(6) was dispositive.

14. *King*, 336 N.C. 316, 445 S.E.2d 396 (1994).

15. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 383-85 (5th ed. 1984) (hereinafter PROSSER AND KEETON); *see also* RESTATEMENT (SECOND) OF TORTS, *supra* note 3, § 315.

16. RESTATEMENT (SECOND) OF TORTS, *supra* note 3, § 315(a).

17. PROSSER AND KEETON, *supra* note 15, § 56, at 383.

18. PROSSER AND KEETON, *supra* note 15, § 56, at 384; RESTATEMENT (SECOND) OF TORTS, *supra* note 3, § 316; *see also* Moore v. Crumpton, 55 N.C. App. 398, 403-04, 285 S.E.2d 842, 845, *modified*, 306 N.C. 618, 295 S.E.2d 436 (1982).

19. PROSSER AND KEETON, *supra* note 15, § 56, at 384; RESTATEMENT (SECOND) OF TORTS, *supra* note 3, § 317; *see also* Vaughn v. Dep't of Human Resources, 296 N.C. 683, 686, 252 S.E.2d 792, 795 (1979).

20. RESTATEMENT (SECOND) OF TORTS, *supra* note 3, § 318.

21. RESTATEMENT (SECOND) OF TORTS, *supra* note 3, § 319; Hull v. Oldham, 104 N.C. App. 29, 38, 407 S.E.2d 611, 616, *disc. rev. denied*, 330 N.C. 441, 412 S.E.2d 72 (1991).

22. PROSSER AND KEETON, *supra* note 15, § 56, at 384; RESTATEMENT (SECOND) OF TORTS, *supra* note 3, § 319; *see* Currie v. United States, 836 F.2d 209, 212 (4th Cir. 1987); Semler v. Psychiatric Inst., 538 F.2d 121, 125 (4th Cir.), *cert. denied*, 429 U.S. 827 (1976); Pangburn v. Saad, 73 N.C. App. 336, 347-348, 326 S.E.2d 365, 372-73 (1985).

23. King v. Durham County Mental Health Developmental Disabilities and Substance Abuse Auth., 113 N.C. App. 341, 348, 439 S.E.2d 771, 774 (1994) (quoting Abernathy v. United States, 773 F.2d 184, 189 (8th Cir. 1985)).

24. Semler v. Psychiatric Inst., 538 F.2d 121, 125 (4th Cir.), *cert. denied*, 429 U.S. 827 (1976).

posed a duty on the Institute to the public.[25] In *Semler*, the patient, Gilreath, was convicted of abducting a young girl, but his sentence was suspended on the condition that he "receive treatment at and remain confined in the Psychiatric Institute until released by the Court."[26] A few months after entering the Institute, the doctor recommended and the judge approved weekend passes for Gilreath. Several months later, the judge approved Gilreath for status as a day care patient. The Institute then approved passes, without the consent of the probation authorities, for Gilreath to go to Ohio to investigate the possibility of transferring to be closer to his parents. On August 29, 1973, after three months as a day care patient, Gilreath was discharged from the Institute on the assumption that he would be accepted for probation in Ohio. However, the Ohio authorities rejected Gilreath's transfer. In September, Gilreath again visited the doctor at the Institute but was not restored to day care status. In October, Gilreath killed the plaintiff's daughter.[27]

The court in *Semler* followed the *Restatement (Second) of Torts* formulation: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."[28] The court held that the appropriate standard of care was "delineated by the precise language of the court order."[29] The opinion stated that the "appellants would not be liable had Gilreath escaped despite their exercise of reasonable care. . . ."[30]

In *Pangburn v. Saad*,[31] the North Carolina Court of Appeals considered whether the doctor of a mental patient owed a duty to a third person with regard to the acts of his patient. The plaintiff brought the action to recover for personal injuries suffered as a result of the wrongful release of her brother, who had a history of violence and mental illness, by a staff psychiatrist at the hospital.[32] Sixteen hours after the patient was released, he stabbed the plaintiff twenty times with a kitchen knife, inflicting "serious, disfiguring and life-threatening wounds."[33]

The *Pangburn* decision analyzed the legal duty involved in negligent release cases:

25. *Id.* at 124.
26. *Id.*
27. *Id.* at 123-24.
28. RESTATEMENT (SECOND) OF TORTS, *supra* note 3, § 319.
29. *Semler*, 538 F.2d at 125.
30. *Id.*
31. 73 N.C. App. 336, 326 S.E.2d 365 (1985).
32. *Id.* at 337, 326 S.E.2d at 366-67.
33. *Id.*

> [W]here the course of treatment of a mental patient involves an exercise of "control" over [the patient] by a physician who knows or should know that the patient is likely to cause bodily harm to others, an independent duty arises from that relationship and falls upon the physician to exercise that control with such reasonable care as to prevent harm to others at the hands of the patient.[34]

Applying North Carolina tort principles, the *Pangburn* court found that the "plaintiff states a claim for actionable negligence, namely, that defendant breached a duty that he owed to plaintiff, and that she was injured as proximate cause of that breach, it being reasonably foreseeable that her injuries would result from the breach."[35]

Once the *Pangburn* court found a duty, it then wrestled with the possible immunity provided by North Carolina General Statute § 122-24, which provides that "[n]o administrator, chief of medical services, or any staff member under the supervision and direction of the administrator or chief of medical services of any State hospital shall be personally liable for any act or thing done under or in pursuance of any of the provisions of this Chapter."[36] The plaintiff in *Pangburn* challenged the constitutionality of this statute by arguing that the statute violated the equal protection clause[37] and the "open courts" provision[38] of the North Carolina Constitution. The court rejected both constitutional challenges but construed the statute to grant a qualified immunity, rather than an absolute immunity. The court concluded that N.C. Gen. Stat. § 122-24 was "intended to create a qualified immunity for those state employees it protects, extending only to their ordinary negligent acts. It does not, however, protect a tortfeasor from personal liability for gross negligence and intentional torts."[39] Since the plaintiff alleged gross negligence, the court held that the "allegations were sufficient to state a claim for relief against defendant, sufficient, at the pleadings level to overcome defendant's immunity."[40] Both parties had conceded that plaintiff had a remedy under the State

34. *Id.* at 338, 326 S.E.2d at 367 (quoting Bradley Ctr., Inc. v. Wessner, 287 S.E.2d 716, 721 (Ga. App. 1982)).

35. *Pangburn* 73 N.C. App. at 338-39, 326 S.E.2d at 367.

36. N.C. GEN. STAT. § 122-24 (1981).

37. N.C. CONST. art. I, § 19, which states:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

38. N.C. CONST. art. I, § 18, which states: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."

39. *Pangburn*, 73 N.C. App. at 347, 326 S.E.2d at 372.

40. *Id.* at 349, 326 S.E.2d at 373 (Wells, J., concurring).

Tort Claims Act[41] which "permits a cause of action against the State for injuries arising out of the negligent acts of a State employee, while the employee was acting within the scope of employment."[42]

A later decision by the United States District Court for the Eastern District of North Carolina contradicts the *Semler* and *Pangburn* holdings. In *Cantrell v. United States*,[43] the court held that the voluntary commitment of a patient (Puckett) to a Veterans Administration (VA) hospital for mental treatment imposed no duty on the hospital to control the patient or to seek involuntary commitment. The court recognized that "when a mentally ill person [has] been lawfully committed to the institution and that institution has control and the power to restrain a patient, negligent failure to exercise such authority over a mentally ill patient could subject the institution to liability."[44] The court went on to hold that although "Puckett had been voluntarily committed at his request, insufficient control exists for the imposition of a duty to control and consequently liability for negligence."[45] In its reasoning, the court focused on North Carolina General Statute § 122C-212(a) which states that "an individual who has been voluntarily admitted to a facility shall be discharged upon his own request."[46] Such a facility has the discretion to hold patient for up to 72 hours after the request for discharge is made.[47] This enables the institution to attempt to gain control over the patient by seeking involuntary commitment. The court then reasoned that "[v]oluntary commitment by Puckett would not have conferred control over him . . . absent an involuntary commitment proceeding."[48]

The *Cantrell* court also briefly discussed whether the VA's medical personnel had a duty to warn threatened third persons. The court concluded that it does not "recognize such a duty by mental health professionals to warn potential and identifiable victims of possible violence by mentally ill patients."[49] Even if such a duty existed, the court opposed extending such a duty to warn unidentified third parties. The court held that "[n]o duty would extend to Steven Cantrell because he

41. N.C. GEN. STAT., §§ 143-291 to 300.1 (1993).

42. *Id.* at 342, 326 S.E.2d at 369.

43. 735 F. Supp. 670 (E.D.N.C. 1988).

44. *Id.* at 673 (discussing the Fourth Circuit's reasoning in Currie v. United States, 836 F.2d 209 (4th Cir. 1987)).

45. *Id.*

46. *Id.* (quoting N.C. GEN STAT. § 122C-212(a)).

47. N.C. GEN. STAT. § 122C-212(b) (1986).

48. *Cantrell*, 735 F. Supp. at 673; *see also* Hasenei v. United States, 541 F. Supp. 999, 1011-12 (D. Md. 1982) (holding that the hospital had no duty to control a voluntary outpatient and therefore no duty was imposed on the hospital to control him).

49. *Cantrell*, 735 F. Supp. at 674.

was not identified by Puckett as a potential victim when consulting with medical personnel."[50]

ANALYSIS

In *King*, no one disputed that the "defendants were aware of Thompson's propensity for violence. A Willie M. certified class member is by definition a violent person, and the defendants were charged with the responsibility of providing treatment especially designed for Willie M. children."[51] The crucial issue was "whether any of the defendants had custody of Thompson or the ability or right to control him."[52] The *King* court held that the defendants could not be held liable for the conduct of Thompson after his escape:

> Materials in this record establish that the State of North Carolina is obligated to provide appropriate services to every Willie M. certified class member in this state. The participation by the class member is voluntary, however, and, in absence of a court order, cannot be mandated. Thus, although defendants had an obligation to ensure the safety of the community, may have had an obligation to report Thompson's absence from Triangle House to the police and an obligation to seek his return, because there is no evidence of a court order requiring participation in the Willie M. program, they had no legal right to mandate his return to the facility. It cannot therefore be said that any of the defendants had custody of Thompson or that they had the ability or right to control him.[53]

This rationale attempts to follow the *Cantrell* decision which imposed no duty on a mental hospital to control a voluntarily committed patient. Both *Cantrell* and *King* involved mental patients with a history of violence who were undergoing voluntary treatment. In both cases, the court found that the treatment facilities had no duty to control the patients' conduct and imposed no liability on the facilities for the violent acts committed by their patient against third persons.

In *King*, Thompson was residing at the Triangle House facility and "was required to stay at the facility at all times in order to prevent his continued abuse of drugs;"[54] thus, the Triangle House had physical control over Thompson. In *Cantrell*, by contrast, the patient was living at home and was only scheduled for individual outpatient consultation.[55] Since the facility in *Cantrell* did not exert any physical control over the patient, its facts are distinguishable from *King*.

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50. *Id.*
51. *King*, 113 N.C. App. 341, 346, 439 S.E.2d 771, 775.
52. *Id.*
53. *Id.* This passage expresses the court's sole rationale for its holding.
54. *Id.*, 113 N.C. App. at 341, 439 S.E.2d at 772.
55. *Cantrell*, 735 F. Supp. at 672.

In addition, it was conceded in *King* that "a Willie M. certified class member is by definition a violent person."[56] The *King* court noted that liability is justifiably imposed when the ability to control the person, coupled with knowledge of the person's propensity for violence, creates a special relationship.[57] It is clear from the facts that Triangle House had knowledge of Thompson's propensity for violence; this was not disputed by the defendants.[58] The remaining issue was whether the defendants had the "ability to control" Thompson. The *King* and *Cantrell* courts blindly reasoned that there was no control or duty without involuntary commitment proceedings or a court order.

Although Thompson was not required to enter the Willie M. program, the opinion clearly states that "Thompson was required to stay at the facility at all times. . . ."[59] This statement implies that Triangle House was authorized to exercise control over Thompson in order to make sure he stayed at the facility. Further, the purpose of his treatment was to cure his drug addiction by confining him to the facility. It is difficult to understand the appellate court's conclusion that Triangle House did not have the ability to control Thompson, especially since Thompson left Triangle House through a door left unlocked in violation of the facility's rules.[60] If the rules dictated that the doors be locked, then Triangle House was required to maintain physical control over the residents by keeping them at the facility. Again, *King* can be distinguished from *Cantrell* since Thompson was supposed to be locked inside the facility.

The *Cantrell* decision concluded that "even if [the patient] had been voluntarily committed at his request, insufficient control exists for the imposition of a duty to control and consequently liability for negligence."[61] The court reasoned that since a voluntarily committed individual could be discharged upon his own request, the facility did not have any control of the patient.[62] Further, the *Cantrell* court noted that a facility has, by statute, "up to 72 hours after the request for discharge is made . . . to attempt to gain control which it does not have over the patient by seeking involuntary commitment."[63] This analysis completely ignores the control of the hospital prior to releasing the patient. Indeed, the statute actually allows the facility to maintain

56. *King*, 113 N.C. App. at 346, 439 S.E.2d at 775.

57. *Id.* at 345-346, 439 S.E.2d at 774; *see also* RESTATEMENT (SECOND) OF TORTS, *supra* note 3, § 315.

58. *Id.*

59. *Id.* at 343, 439 S.E.2d at 773.

60. *Id.*

61. *Cantrell*, 735 F. Supp. at 673.

62. *Id.*

63. *Id.* at 673; *see* N.C. GEN. STAT. § 122C-212(b) (1986).

control over a voluntary patient who wants to be released for up to an additional three days.

In *King*, Thompson escaped through an unlocked door. He did not make an official request for discharge. Thus, his escape circumvented the statutory plan of allowing Triangle House to seek involuntary commitment if the staff thought he was dangerous to the public. Given the distinguishing facts indicating an "escape" from a secured facility, the *King* court improperly relied on the *Cantrell* analysis. The court admits that "the defendants had an obligation to ensure the safety of the community, [and] may have had an obligation to report Thompson's absence from Triangle House to the police and an obligation to seek his return . . . ."[64] It does not seem consistent to say that the defendants had an obligation to ensure the community's safety, but to impose no duty on the defendants to fulfill that obligation.

Finally, public policy dictates the imposition of liability in negligent release cases, especially if the defendants were grossly negligent. In order to be certified as a Willie M. class member, there must be evidence of one of the following:

(a) physical attacks against other persons, with or without weapons;
(b) physical attacks against property, including burning;
(c) physical attacks against animals;
(d) self abusive or injurious behavior, including suicide attempts;
(e) threatened attack with a deadly weapon;
(f) forcible sexual attacks.[65]

The Willie M. certified class member is a social deviant with violent propensities. To protect the community, the defendants should have been legally responsible for keeping the Willie M. members locked up during their stay at Triangle House. The institution's own rules required the doors to be locked. It is not unreasonable to impose liability on the defendants for injuries that were reasonably foreseeable when a Willie M. member escaped from the facility. To conclude otherwise puts the community at risk of violence. If the court will not impose a duty on the defendants in this situation, then the Willie M. program should be abolished and the members should be locked up in jail or some other facility that will ensure the community's safety.

The rate of violent crime in Durham increased 8.5 percent in 1994, mirroring a national trend."[66] Our society is currently clamoring for stiffer punishment of criminals and greater protection of the general

64. *King*, 113 N.C. App. at 346-47, 439 S.E.2d at 775.

65. *Id.* at 344, 439 S.E.2d at 774 (quoting a document entitled "Criteria for Certification as a [Willie M.] Class Member" presented to the trial court at the hearing).

66. Kammie Michael, *Reported Crime in Durham Drops 6 Percent*, HERALD-SUN (Durham, N.C.), Dec. 7, 1994, at A1. The article stated further:

public from random violence. There is no more effective way to achieve these goals than to provide an economic incentive for facilities like Triangle House to carry out their functions with reasonable care. Imposing a duty will provide that economic incentive.

CONCLUSION

The North Carolina Supreme Court and the North Carolina Court of Appeals have unnecessarily put the general public in peril by not imposing a duty on institutions to protect third persons from harm when one of their patients escape, especially when the patients are certified to have violent propensities, as did the Willie M. class members in *King*. The court of appeals justified its decision by following the *Cantrell* holding that only involuntary commitment or a court order can impose such a duty. However, this analysis bypasses the legislature's statutory plan utilizing involuntary commitment proceedings to protect the general public. When a violent patient escapes from a secured facility through a door left unlocked, the statutory protection of involuntary commitment is lost. The North Carolina courts should adopt the proposition, supported by the greater weight of authority in other jurisdictions, that a duty arises out of the special relationship of institution-patient when the patient escapes without formal discharge, even if the treatment was voluntary.

TIMOTHY J. TURNER

Violent crime in Durham increased precipitously during the first two years of this decade but then dropped more than 6 percent last year. Police officials blame the increased violence on the influx of crack cocaine to Durham and on an increased tendency toward violence among teens. "To me, the concern is youth violence. People realize that youthful offenders [under 18] are more violent than they used to be," [Durham Police Lt. Col. Kent] Fletcher said. The city's 6 percent drop in overall reported crime was fueled mainly by sizable decreases in the number of reported burglaries and larcenies during the first half of the year. "The thing that drives the crime rate is the number of larcenies and burglaries," Fletcher said.

Id. Note that in the *King* case, Thompson was a teenage drug addict.