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# INDIVIDUAL CAPACITY LIABILITY FOR GOVERNMENT OFFICIALS FOLLOWING *BARNHART v. INGALLS*, 275 So.3d 1112 (Ala. 2018)

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In its 2018 decision in *Barnhart v. Ingalls*, 275 So.3d 1112 (Ala. 2018), the Alabama Supreme Court corrected an error in its jurisprudence that had incentivized plaintiffs to focus efforts on maintaining individual capacity liability claims against government officials and employees in Alabama for actions undertaken in the course of their official government duties. The Court in Barnhart reiterated the proper test for determining when a government officer or employee can have liability in their individual capacity in such cases. In doing so, the Court overruled prior precedent that had misapplied the test. The Court's decision in *Barnhart* has the potential to have a transformative impact on the manner in which claims are brought against government entities and governmental officers and employees in the State of Alabama. This article will examine the Supreme Court's decision in *Barnhart*, the corrections to the analysis of individual capacity liability made in that case, and potential future effects of the *Barnhart* decision.

## Capacity to be Sued Prior to *Barnhart*

The concept of capacity of a public official or employee to be sued is one of the least understood areas of public liability law. Indeed, as the Supreme Court has observed, the concept of the capacity in which a public officer may be sued "continues to confuse lawyers and to confound lower courts." Kentucky v. Graham, 473 U.S. 159, 165 (1985). One thing, however, is clear. It has long been recognized that "official capacity suits generally represent only another way of pleading an action against the entity of which the officer is an agent." Brandon v. Holt, 469 U.S. 464, 472, n. 21 (1985). See also Monell v. Department of Social Services, 436 U.S. 658, 690, n. 55 (1978). Such suits are "in actuality, suits directly against [the governmental entity] that the officer represents." Busby v. City of Orlando, 931 F.2d 764, 776 (11th Cir. 1991), citing Graham, 473 U.S. at 165-66. The same is true under Alabama law. See Smitherman v. Marshall County Commission, 746 So.2d 1001, 1007 (Ala. 1999) ("Claims against county commissioners and employees *in their official capacity* are, as a matter of law, claims against the County.") (emphasis in original); Morrow v. Caldwell, 153 So. 3d 764, 771 (Ala. 2014) ("[C]laims that are brought against municipal employees in their official capacity are . . . as a matter of law, claims against the municipality.")

*Following Barnhart, courts must now consider not just how the plaintiff's attorney labels the claim in the complaint, but also whether the defendant purportedly sued in his or her individual capacity actually had an individual duty that is triggered by the allegations of the case.*

By contrast, when an action is brought against a governmental officer in that officer's individual capacity, the action is one by the plaintiff to obtain "money damages directly from the individual officer." Busby, 931 F.2d at 772, citing Graham, 473 U.S. at 165. The Supreme Court of the United States has contrasted the difference between individual capacity suits and official capacity suits as follows:

> As long as the government entity receives notice and an opportunity to respond, an official capacity suit is, in all respects other than name, to be treated as a suit against the entity [citation omitted]. It is *not* a suit against the official personally, for the real party at interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.
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> Graham, 473 U.S. at 166. (emphasis in original).

At least as early as 2004, the Alabama Supreme Court developed a rubric for determining whether a suit against an individual government employee should be treated as an individual liability claim or an official capacity claim. In Haley v. Barbour County, 885 So. 2d 783 (Ala. 2004), the Court held that "in determining whether an action against a state officer or employee is, in fact, one against the State, a court will consider such factors as the nature of the action and the relief sought." Id. at 788 (quotations and bracketing omitted). After identifying this test – which focused ostensibly on the "nature of the action" *and* the "relief sought," the Court in Haley then went on to list several factors, including "whether a result favorable to the plaintiff would directly affect a contract or property right of the state . . . whether the defendant is merely a conduit through which the plaintiff seeks recovery of damages from the State . . . and whether a judgment against the officer would directly affect the financial status of the state treasury." Id. at 788 (internal quotations omitted). As the Supreme Court in Barnhart later observed, these listed factors "all . . . related to the issue of damages and whether any damages that might be awarded would flow from the State." Barnhart, 275 So.2d at 1126. The Court in Barnhart noted that "[s]ubsequent cases involving actions against State officials and questions regarding the applicability of State immunity have also focused on the damages being sought, on occasion to the exclusion of other factors." Id. (citing Ex Parte Bronner, 171 So. 3d 614, 622 n. 7 (Ala. 2014)).

Given that the Court in Haley focused so singularly on the source of the damages sought – to the exclusion of other factors in referenced – plaintiffs' attorneys desirous of circumventing the State's immunity from tort liability under § 14 of the Alabama Constitution of 1901 began labeling claims against State officers and employees as "individual capacity" causes of action. This gambit worked exceedingly well. As long as a plaintiff alleged that such was the case, for many years there was no real inquiry by the courts into whether such a designation of the defendant's capacity was proper. See Wright v. Cleburne County Hospital Board, Inc., 255 So.3d 186, 192 (Ala. 2017) ("It is the plaintiff who elects whether to frame his claim as one seeking recovery against a defendant in his official capacity or one seeking a recovery against the defendant in his individual capacity—or both. . . . It is for the court to address the merit of the claim as framed by the plaintiff, not to reframe it.").

The problem was, this "framing" decision often had serious consequences for litigants. Indeed, the issue of capacity impacts more than the State's § 14 immunity. Alabama's statutory caps on damages for other, lesser government entities do not apply to individual capacity claims asserted against local governmental officers who are sued in their individual capacities. Likewise, exhaustion requirements particular to government defendants such as *ante litem* notice of claim requirements do not apply to truly individual capacity claims. For this reason, attorneys representing governmental liability plaintiffs have adopted a practice of suing individual government officers at all levels of government in their individual

capacities, knowing that doing so avoided the State's § 14 immunity from tort liability in suits against State officers, and, as to municipal and county officers, unlocked insurance dollars without triggering the statutory damages caps and other defenses.

## The Court's Decision in *Barnhart*

Barnhart re-focused the capacity analysis by returning to the test announced in Haley and clarifying its proper application. In so doing, the Court embraced the test announced in Haley but not how the test had been misapplied in subsequent cases. The Court expressly rejected the idea that the source-of-damages analysis was the exclusive method of determining whether a particular claim is an individual-capacity claim vs. an official-capacity claim. Barnhart, 275 So.3d at 1126-27. Instead, the Court in Barnhart held that the Haley test had always required courts to determine whether claims alleged against a public officer were individual or official capacity claims by consulting "the nature of the action," in *addition* to the source of the damages sought. Id.at 1126. The Court expressly overruled prior precedent which had focused on the source of the damages as the exclusive test for whether a particular claim was an official or an individual capacity claim. See 275 So.3d at 1127 (overruling Ex Parte Bronner to the extent that it held that fact that damages were only sought from the state officer in their individual capacity precluded claim from being considered an official capacity claim.) Although this may at first seem to only represent a subtle analytical shift, it will make a major practical difference, because the "nature of the action" is not something that can be so easily manipulated by plaintiffs' attorneys to foreclose legal defenses. In other words, following Barnhart, courts must now consider not just how the plaintiff's attorney labels the claim in the complaint, but also whether the defendant purportedly sued in his or her individual capacity actually had an individual *duty* that is triggered by the allegations of the case.

Applying this prong of the test, the Court in Barnhart made clear that this lesser-known and now re-animated prong of the Haley analysis can make a dispositive difference in a given case. In fact, it made such a difference in Barnhart. There, the Court held that "regardless of the *damages* being sought, the *nature* of those claims require[d]" a finding that the claim at issue was an official capacity claim and not an individual capacity claim. 275 So. 3d at 1126. (emphasis in original). In Barnhart, employees of the Alabama Space Science Exhibit Commission sued officers of the Commission in their individual capacities alleging that the officers had failed to pay the employees bonuses and holiday compensation as required by law. Id. at 1118. To determine the "nature of the action," the Supreme Court in Barnhart examined whether the duties the officers allegedly breached existed solely because of their official positions. Because the Supreme Court concluded that the answer to this question was yes, it held that the claims asserted against the Commission officers were not individual-capacity claims but were actually official-capacity claims. Id. at 1126. The Court stated: "[T]he . . . officers were, accordingly, acting *only* in their official capacities when they allegedly breached these duties . . . stated another way, the . . . officers had no duties *in their individual capacities* to give effect to the [wage loss]; rather, any duties they had in that regard existed solely because of their official positions in which they acted for the State. Accordingly, the individual-capacity claims are, in effect, claims against the State . . ." Id. (emphasis in original).

Since its decision in Barnhart, the Supreme Court has applied the "nature of the action" test in subsequent cases to determine whether claims alleged against public officers were official-capacity claims or individual-capacity claims. In Anthony v. Datcher, ___ So.3d ___, 2020 WL 5268468 (Ala. Sept. 4, 2020), college instructors sued a state educational official for damages resulting from the official's alleged misclassification of their positions for salary purposes. The instructors' claims were purportedly asserted against the official in her individual capacity. Citing Barnhart, the Supreme Court in Anthony identified "[t]he key issue [as] whether those . . . claims against [the official] were actually individual-capacity claims or were in fact official-capacity claims mislabeled as individual-capacity claims." Id. at * 8. The Court in Anthony noted that under Barnhart, "the nature of a claim is crucial in determining whether it is actually an official-capacity claim or an individual-capacity claim." Id. The Court in Anthony examined the alleged breached duty of the official – the alleged improper classification of the instructors – and determined that the duty "existed only because of her official position in which she acted for the State." Id. at *10. After making this determination, the Court held that the claims against the official in Anthony "were not actually individual-capacity claims" but were in substance official-capacity claims. Id.

Similarly, in Meadows v. Shaver, ___ So.3d ___, 2020 WL 6815066 (Ala. Nov. 20, 2020), the Supreme Court again applied Barnhart's "nature of the action" test *ex mero motu* and determined that the duties of the defendant in that case (who was a circuit court clerk) which were allegedly breached existed solely because of the clerk's official position. Id. at * 3. The claims alleged by the plaintiff in Meadows, who was a prison inmate, involved the alleged mishandling by the circuit clerk's office of the plaintiff's sentence-status transcript. The Court in Meadows held that the facts as alleged by the plaintiff in the complaint made clear that the defendant circuit clerk's alleged duties "arose solely out of [the defendant clerk's] position as circuit clerk." Id. As a consequence, the Court held that "both [the plaintiff's] official-capacity claims and his purported individual-capacity claims against [the clerk] were, in effect against the State; they were, in substance, official capacity claims." Id.

At least one federal court in Alabama has applied Barnhart to dispose of individual capacity claims alleged against public school teachers and administrators. In Doe v. Huntsville City Schools Board of Education, No. 5:21-cv-00110-MHH, 2021 WL 2716117 at * 6 (N.D. Ala. July 1, 2021), the plaintiff alleged state law claims asserting that several teachers and administrators failed to "act in a reasonably prudent manner" to prevent a student from being bullied and assaulted. Id. The Court in Doe determined that the plaintiff's "state law claims against the individual defendants

pertain[ed] to those defendants' duties as public school teachers and administrators." Id. Because public school employees are state employees under Alabama law, the Court held that the plaintiff's claims against the defendants in Doe were "effectively against [the State of] Alabama, not the individual defendants, and the individual defendants are entitled to Section 14 immunity for John Doe's state law claims." Id.

*If the Supreme Court does extend the Barnhart analysis to purported individual capacity claims against municipal and county officers, this could have a profound effect upon individual capacity liability in Alabama for county and municipal officers, as well as upon the applicability of the statutory caps on damages in cases.*

The courts in the Barnhart line of cases all held that the purported "individual capacity" claims asserted in those cases were in reality official capacity claims by determining that the plaintiffs' claims arose from the performance by the defendant officers of their official job functions. In formulating its new test for determining whether a claim was an individual or official capacity claim, the Court in Barnhart emphasized that the officers had no duty in their individual capacities to perform the duties giving rise to the plaintiffs' claims in those cases because "any duties they had . . . existed solely because of their official positions in which they acted." The Court in Barnhart stated as follows:

It is clear, however, from the named plaintiffs' statement of th[e] claims [alleged in the complaint] that the duties allegedly breached by the Commission officers were owed to the putative class members *only* because of the positions the Commission officers held and that the Commission officers were, accordingly, acting *only* in their official capacities when they allegedly breached those duties by failing to give effect to the benefit statutes. Stated another way, the Commission officers had no duties *in their individual capacities* to give effect to the benefit statutes; rather, any duties they had in that regard existed solely because of their official positions in which they acted for the State.

275 So. 3d at 1126. (emphasis in original)

## Potential Ramifications of *Barnhart*

All of the cases that have applied the Barnhart analysis to determine that purported individual capacity claims asserted in those cases were actually official capacity claims have thus far involved State, as opposed to county or municipal officers. However, there does not appear to be any analytical difference between the formulation developed in Barnhart for determining the nature of the claims alleged against the State officers in those cases and any analysis of similar claims alleged against county or municipal officers. At bottom, the question is one of capacity, which has never depended on the identity of the employing entity. If the Supreme Court does extend the Barnhart analysis to purported individual capacity claims against municipal and county officers, this could have a profound effect upon individual capacity liability in Alabama for county and municipal officers, as well as upon the applicability of the statutory caps on damages in cases.

For example, if a local governmental employee is sued in his or her individual capacity in a case in which the local governmental entity is also already a separately named defendant, and the individual capacity claim is determined under the Barnhart analysis to be an official capacity claim, the question arises as to whether the employee should even remain as a defendant in the action. Where a local government entity is already a separately named defendant in an action, official capacity claims asserted against the entity's officers or employees in the same action are superfluous and redundant and are due to be dismissed. See Busby, 931 F.2d at 776 ("Because suits against a municipal officer sued in his official capacity and direct suits against municipalities are functionally equivalent, there no longer exists the need to bring official-capacity actions against local governmental officials, because local governmental units can be sued directly . . ."); Higdon v. Fulton County, 746 Fed. Appx. 796, 799 (11th Cir. 2018) ("Because local government units can be sued directly – and suits against a municipal officer sued in his official capacity and direct suits against municipalities are functionally equivalent – there is no need to bring official capacity actions against local government officials. . . . Thus, official-capacity claims against municipal officers should be dismissed, as keeping the claims against both the municipality and the officers would be redundant.")

Similarly, if the Barnhart analysis is employed to determine whether individual capacity claims alleged against county and municipal employees are, in effect, official capacity claims, there could be significant implications for the imposition of the statutory caps on claims against individual defendants in Alabama. Under Ala. Code § 11-93-2, recovery for damages for personal injury and property is limited to $100,000 in a claim against a county, municipality, or other defined "governmental entity," which includes certain school boards and hospital boards. Section 11-47-190 also provides municipalities with a $100,000 damages cap per injured person, up to a maximum of $300,000 in the case of multiple injuries.

In Suttles v. Roy, 75 So.3d 90 (Ala. 2010), the Supreme Court held that an individual capacity claim alleged against a municipal officer or employee is not subject to the $100,000 statutory cap on damages contained in § 11-93-2, even where the officer or employee is acting within the line and scope of his or her duties at the time of the occurrence of the matters at issue. The Supreme Court in Roy held that the $100,000 damage cap in § 11-93-2 is only applicable to the governmental entity itself and is not applicable to the individual capacity claims against officers or employees. The Supreme Court held in Roy that only caps against public employees in their official capacities, which again, are claims against the entity by which the employee is employed, are subject to the $100,000 cap. In so holding, the Supreme Court stated:

> Insofar as Roy's action seeks damages against Suttles in his official capacity, as noted in Smitherman, the cap of § 11-93-2 limits any recovery against Homewood and Suttles to $100,000. Suttles and Homewood thus contend that "it makes no sense at all" for the claims against Suttles in his official capacity "to be governed by the statutory damages cap" without the claims against him in his individual capacity also being subject to the cap. Homewood and Suttles's brief at 20. *This distinction—capping damages for claims against Suttles in his official capacity but not capping damages for claims asserted against him in his individual capacity—however, is clearly provided by the cited authorities.*
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> 75 So. 3d at 97-98 (emphasis added).

*It appears likely that the Barnhart analysis is applicable to claims against county and municipal officers and employees of public hospital boards.*

The Alabama Supreme Court has reiterated this holding in Roy in a series of cases since Roy was decided. See Wright v. Cleburne County Hospital Board, Inc., 255 So.3d 186, 194-95 (Ala. 2017) ("explaining that, in Suttles, '[t]his Court stated that, although the statutory cap on recovery against 'a governmental entity' set forth in § 11-93-2 applied to a suit against a municipal employee in his individual capacity, it did not apply to a suit against a municipal employee who is sued in his individual capacity.'") (quoting Alabama Mun. Ins. Corp. v. Allen, 164 So.3d 568, 574 (Ala. 2014)). In addition, the Alabama Supreme Court has extended this holding to the statutory damages cap codified at § 11-47-190, finding "no language" in that statute to suggest "that it is intended to apply to claims against municipal employees who are sued in their individual capacities." Morrow v. Caldwell, 153 So.3d 764, 771 (Ala. 2014).

However, in light of the newly developing Alabama Supreme Court precedent beginning with Barnhart, there exists an argument that any individual capacity claim asserted against a county or municipal employee which is determined to be an official capacity claim under the Barnhart analysis is subject to the statutory cap. This is so because the Supreme Court has squarely held that official capacity claims against municipal and county officers are capped at $100,000 under Ala. Code § 11-93-2. See Smitherman, 746 So.2d at 1007 ("Claims against county commissioners and employees in their official capacity are, as a matter of law, claims against the county and are subject to the $100,000 cap contained in § 11-93-2."). See also Alabama Mun. Ins. Corp. v. Allen, 164 So.3d 568, 574 (Ala. 2014) (explaining that, in Suttles, "[t]his court stated that, although the statutory cap on recovery against a governmental entity set forth in § 11-93-2 applied to a suit against a municipal employee in his official capacity, it did not apply to suit against a municipal employee who was sued in his individual capacity.").

Counsel representing governmental liability plaintiffs may resist this conclusion by pointing out that in declining to apply the § 11-93-2 statutory cap to the claims against the individual defendants in Roy, the Supreme Court stated: "[N]o authority is cited or argument advanced demonstrating that this court or the trial court can consider the official capacity claim against [the individual defendant] as, in substance, an official-capacity claim subject to the cap of § 11-93-2; further, nothing in Benson [v. City of Birmingham, 659 So.2d 82 (Ala. 1995)], Smitherman [v. Marshall County Commission, 746 So.2d 1001 (Ala. 1999)], or § 11-93-2 allows such a result." Roy, 75 So.3d at 97-98. Plaintiffs' attorneys will also likely argue that the Court doubled down on this position in Wright where, quoting Roy, the Court stated: "And, we repeat, 'nothing in . . . Smitherman[] or § 11-93-2 allows [the] result' that a court can confer a claim framed by the plaintiff as one against a governmental employee in his individual capacity into 'an official-capacity claim' so as to make it 'subject to the cap of § 11-93-2.'. . . . Again, official-capacity and individual-capacity claims are two distinctly different types of claims, and it is the plaintiff as the 'master of his complaint' that decides whether to pursue one or the other – or both." 255 So.3d at 195. The Court in Wright continued by stating that "[i]f a plaintiff choses to sue an official or employee in his official capacity, such a claim is treated as a claim against the 'governmental entity' because it constitutes an attempt to reach the public coffers. As Suttles clearly states, the purpose of the § 11-93-2 damages cap is to protect the public coffers; therefore, the cap

would apply to that claim." Id.

Critically, Barnhart itself provides guidance as to the continuing vitality of this language from Roy and Wright following the Court's revision of the test first announced in Haley. While not citing Roy or Wright, the Court in Barnhart specifically observed that cases subsequent to Haley "have also focused on the damages being sought, on occasion to the exclusion of other factors." Barnhart, 275 So.2d at 1126. Acknowledging the dispositive weight that the Alabama Supreme Court had previously placed on the source of the damages in deciding questions of capacity, the Court in Barnhart nevertheless made clear that such decisions would no longer control. The Court in Barnhart framed the analysis as follows:

Inasmuch as the named plaintiffs in the present case have made it clear that they are seeking *personal* payment from the Commission officers for the tortious misconduct alleged in the individual-capacities claims — and such a judgment would therefore have no effect on the State treasury — it might seem, based on Ex parte Bronner, that the individual-capacities claims are not claims against the State and, accordingly, are not barred by § 14. However, regardless of the *damages* being sought, the *nature* of those claims requires us to hold otherwise.

Barnhart, 275 So.2d at 1126. (emphasis in original). The Court in Barnhart then went on to specifically overrule any cases "containing language indicating that the State immunity afforded by § 14 cannot apply when monetary damages are being sought from State officers in their individual capacities." Id. at 1127. While Roy and Wright were not § 14 immunity cases, they likewise held that plaintiffs could circumvent damages caps and other defenses through the simple artifice of purporting to seek monetary damages solely from government officials in their individual capacities – that is, their holdings focused solely on the source of the damages sought. The Court's decision in Barnhart makes plain that the test announced in Haley is not to be applied in this manner and cannot support such a result. Instead, post-Barnhart, courts must look beyond the mere source of the damages and must also consider the *nature of the action*. Moreover and critically, where the two factors conflict, the Court in Barnhart made clear that the nature of the action controls. Id. at 1126.

There are at least three additional reasons why Roy and Wright should not control the capacity inquiry post-Barnhart. First, the language of Roy (repeated in Wright) discussing this issue noted that at the time of that decision "no authority or argument" was cited to the Court that an individual-capacity claim may be considered in substance, an official-capacity claim subject to the cap of § 11-93-2. 75 So.2d at 98. Now, because of Barnhart, unlike the situation that existed at the time Roy and Wright were decided, recent authority can now be cited for the conclusion that purported individual capacity claims may be reclassified as official capacity claims making them subject to the statutory cap. Second, the Wright decision noted that Roy was bottomed on then existing law holding that official capacity claims were "treated as a claim against 'the governmental entity' because [they] constitute[d] an attempt to reach the public coffers." 255 So.3d at 195. Post-Barnhart, the "public coffers" source-of-the-damages test for official capacity claims is no longer the law. As the above discussion of Barnhart makes clear, the "nature of the action" analysis has now been re-inserted into the analysis and controls where there is a conflict with the "source-of-the-damages" test. Finally, there appears that there is some sentiment on the Court indicating that, despite language quoted above from the Roy and Wright decisions, this issue is not settled. See Wright, 255 So.3d at 196-98 (Sellers, J., dissenting); see also id. at 198 (noting that "[i]n a special concurrence on the denial of rehearing [in Roy] Justice Shaw noted that the opinion on original submission had acknowledged 'that no authority was cited for the proposition that § 11-93-2 capped any claims against [the officer] in his official capacity at $100,000.' . . . Thus, contrary to *Wright*'s position in present case, it appears that *Suttles* did not settle the issue.").

In summary, it appears likely that the *Barnhart* analysis is applicable to claims against county and municipal officers and employees of public hospital boards. If application of the test announced in Barnhart results in nominal individual capacity claims being transformed into effective official capacity claims, such claims may be subject to dismissal as redundant and superfluous where the local governmental entity is already a separately named defendant. In addition, if the *Barnhart* analysis is held applicable to claims against local governmental officers, any determination of whether an individual capacity claim asserted against such officers is actually an official capacity claim, and thus subject to the statutory caps, will depend upon whether the duties allegedly breached by the defendant officer arose from discharge by the defendant public officer of their official duties and not simply upon allegations regarding capacity made by the plaintiff in their complaint.

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