

Liability and Immunity in the Health and Human Services Context

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*The information
provided in this
presentation does not
constitute legal advice.*

*Consult with your local
attorney.*



Consequences of Misconduct

Loss of funding

Possible DHHS takeover (for DSS)

Monetary verdict against county

Monetary verdict against the state

Lost time

Loss of community trust



Verdict: Federal jury awards millions to daughter, father separated by Cherokee County DSS

Grand jury indicts former Cherokee County DSS officials

Insurer balks at paying \$4.6 million verdict in Cherokee County case

Risk management agency for counties says its liability is limited due to dishonesty of public officials. More lawsuits over child removal

Cherokee County details \$53 million paid over 25 illegal custody DSS lawsuits

Roadmap

Introduction to
Legal
Proceedings

Types of
Lawsuits
Involving
Human Services
Agencies

Immunity From
Liability

County
Responsibilities



Introduction to Legal Proceedings

What is a Legal Action Seeking?



Compensatory
damages



Punitive
damages



Injunctive
relief



Declaratory
judgment



Attorneys'
fees



Complaint

Document filed with the court that initiates the legal proceeding

Answer

Responds to factual and legal allegations in the complaint by admitting or denying the allegations

Plaintiff/ Petitioner

The person or entity that files the complaint and seeks relief in the lawsuit

Defendant/ Respondent

The person or entity that the lawsuit is filed against

First Steps



Contact legal counsel



Issue internal notice to
preserve records



Notify insurer

Steps in a Lawsuit



Plaintiff files
complaint



Defendant files
answer and/or
a motion to
dismiss



Discovery



Motion for
summary
judgment

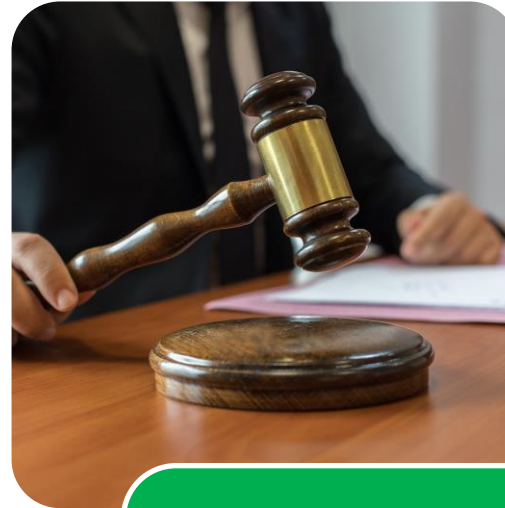


Settlement

Can happen at any time
in a civil case

(but almost always
prior to trial).

Steps in a Lawsuit



Trial

Judgment

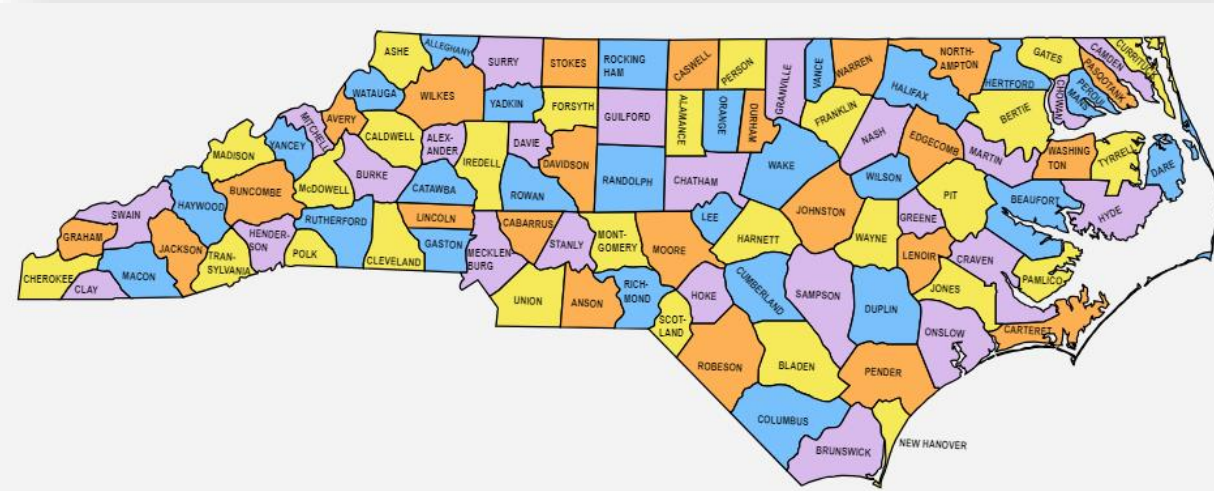
Appeal?

Who is the Defendant?

The County

“An action against a county agency which directly affects the rights of the county is in fact an action against the county.”

- *Meyer v. Walls*, 347 N.C. 97, 104 (1997).



Who is the Defendant?

Public Official or Employee

- **Official capacity** = Suing the government (the county)
- **Individual capacity** = Suing a government official or employee personally



Who is the Defendant?

The State

- **Sovereign immunity** -- The state is immune from liability for damages caused by tortious conduct, unless the state expressly consents to be sued.
- **State Tort Claims Act** -- North Carolina has consented to be sued and potentially held liable for damages caused when persons acting on behalf of the state are negligent.



State Tort Claims Act

NC DHHS may be **vicariously liable** for the actions of a county DSS acting as the agent of NC DHHS

G.S. 108A-14

DSS director acts “as agent of the Social Services Commission and DHHS in relation to work required by the Social Services Commission and DHHS in the county.”

Claim against a local environmental health specialist may be brought under the STCA if:

1. The EHS is authorized to enforce state environmental health program rules;
2. The action or omission leading to the negligence claim arises out of the EHS's enforcement of those state rules; and
3. The EHS was acting within the scope of the EHS's role as a state agent when the alleged negligence occurred.

No claim under STCA if the EHS is enforcing *local* rules.



SECTION 31.1.

G.S. 143-291 is amended by adding a new subsection to read:
“(e) This Article provides the sole and exclusive remedy for any claim that arises as a result of the negligence of any officer, employee, involuntary servant, or agent of the State while acting within the scope of his office, employment, service, agency, or authority, and the North Carolina Industrial Commission is the sole and exclusive forum for hearing any such claims. Any such claims filed in any other forum arising out of or relating to the same subject matter against the officer, employee, involuntary servant, or agent of the State is precluded.”

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Types of Lawsuits Against Health and Human Services Agencies

1. Violation of civil statutes or rules

2. Tortious conduct

Tort:

- **A wrongful act or omission**
- **Not a criminal act or breach of contract**
- **Causes personal injury (physical, emotional, reputational, etc.) or damage to property; and**
- **Courts recognize a legal cause of action and a legal remedy.**

Basic elements:

1. Duty of Care
2. Breach of the Duty
3. Causation
4. Damages



DSS:

- Negligent placement of a child in a foster home
- Negligent assessment of a report of abuse or neglect
- Negligence in performing guardianship duties

Health Department:

- Negligence in quarantining a person or an animal
- Negligence in conducting a soil analysis for an on-site septic system
- Negligence in approving a septic system permit

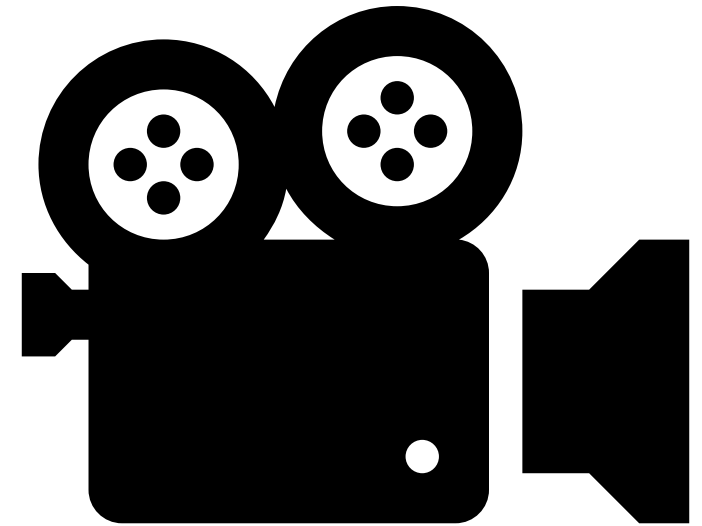
• Negligent Misrepresentation

- Health department misrepresented that certain property was suitable for supporting septic tank
- County DSS misrepresented facts regarding a child's background when placing child in an adoptive or foster home

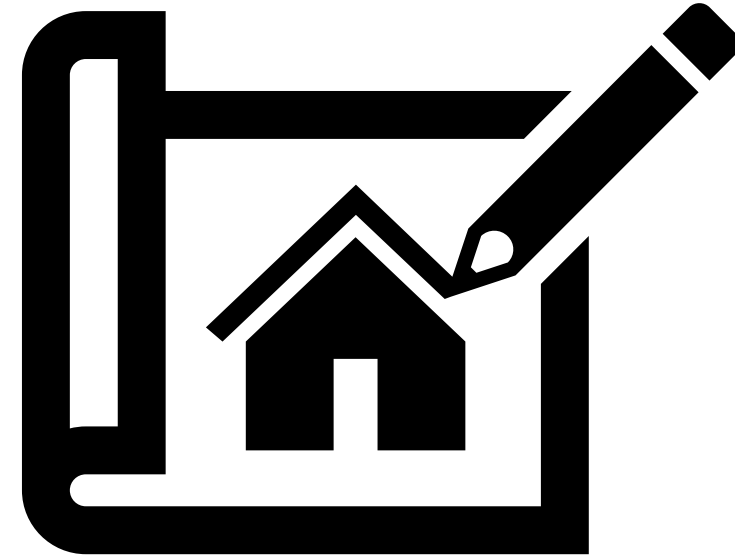
- **Negligent:**
 - Hiring
 - Retention
 - Supervision

Hare v. Butler, 99 N.C. App. 693 (1990)

- Wife alleges husband sexually abused son, but then told social worker “maybe the whole matter was just in her head.”
- Social worker videotaped interview with child, but then DSS closed investigation w/o filing a petition.
- Husband was charged criminally and sought interview videotape, but social worker had destroyed it.
- Criminal charges against husband dismissed
- Husband sued county & various DSS officials for negligent training and supervision of social workers involved in investigation.



- Couple wanted to subdivide property and place mobile home on part of the lot.
- EHS conducted site evaluation to verify soil would support 2nd septic system and (allegedly) said that improvement permit application would be approved.
- Couple began approval process with Planning Department, constructed a road, and bought mobile home.
- Health Department denied application.
- Couple sued county, Planning Department, Health Department, and EHS (in official capacity) for negligent misrepresentation.



Discrimination and Harassment

- **Americans with Disabilities Act (ADA)**
- **Age Discrimination in Employment Act (ADEA)**
- **Title VII**
 - Race, color, national origin, sex (including pregnancy, sexual orientation, and gender identity), or religion
- **Section 1981: race**

EEOC FORM 131 (11/09) U. S. Equal Employment Opportunity Commission

PERSON FILING CHARGE

THIS PERSON (check one or both)

Claims To Be Aggrieved

Is Filing on Behalf of Other(s)

EEOC CHARGE NO.

NOTICE OF CHARGE OF DISCRIMINATION
(See the enclosed for additional information)

This is notice that a charge of employment discrimination has been filed against your organization under:

Title VII of the Civil Rights Act (Title VII) The Equal Pay Act (EPA) The Americans with Disabilities Act (ADA)

The Age Discrimination in Employment Act (ADEA) The Genetic Information Nondiscrimination Act (GINA)

The boxes checked below apply to our handling of this charge:

1. No action is required by you at this time.

2. Please call the EEOC Representative listed below concerning the further handling of this charge.

3. Please provide by _____ a statement of your position on the issues covered by this charge, with copies of any supporting documentation to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.

4. Please respond fully by _____ to the enclosed request for information and send your response to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.

5. EEOC has a Mediation program that gives parties an opportunity to resolve the issues of a charge without extensive investigation or expenditure of resources. If you would like to participate, please say so on the enclosed form and respond by _____ to _____.

If you DO NOT wish to try Mediation, you must respond to any request(s) made above by the date(s) specified there.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

EEOC Representative
Telephone _____

Enclosure(s): Copy of Charge

CIRCUMSTANCES OF ALLEGED DISCRIMINATION

Race Color Sex Religion National Origin Age Disability Retaliation Genetic Information Other

See enclosed copy of charge of discrimination.

Date _____ Name / Title of Authorized Official _____ Signature _____

Filing with OAH's Civil Rights Division or EEOC



- **Who?**
 - Employee subject to the SHRA– can file w/ OAH (CRD-EDS) or EEOC.
 - Other county employees—can only file w/ EEOC.
- **When?**
 - Charge must be filed with CRD-EDS within **180** days from the date of the alleged violation.
 - County employees covered by SHRA have **300** days to file a charge directly with **EEOC**.
 - Employees not covered by SHRA have **180** days to file a charge w/ **EEOC**.

- **NC Retaliatory Employment Discrimination Act (REDA)**
- **Family and Medical Leave Act (FMLA)**
- **Fair Labor Standards Act (FLSA)**
- **ADA, ADEA, Title VII**



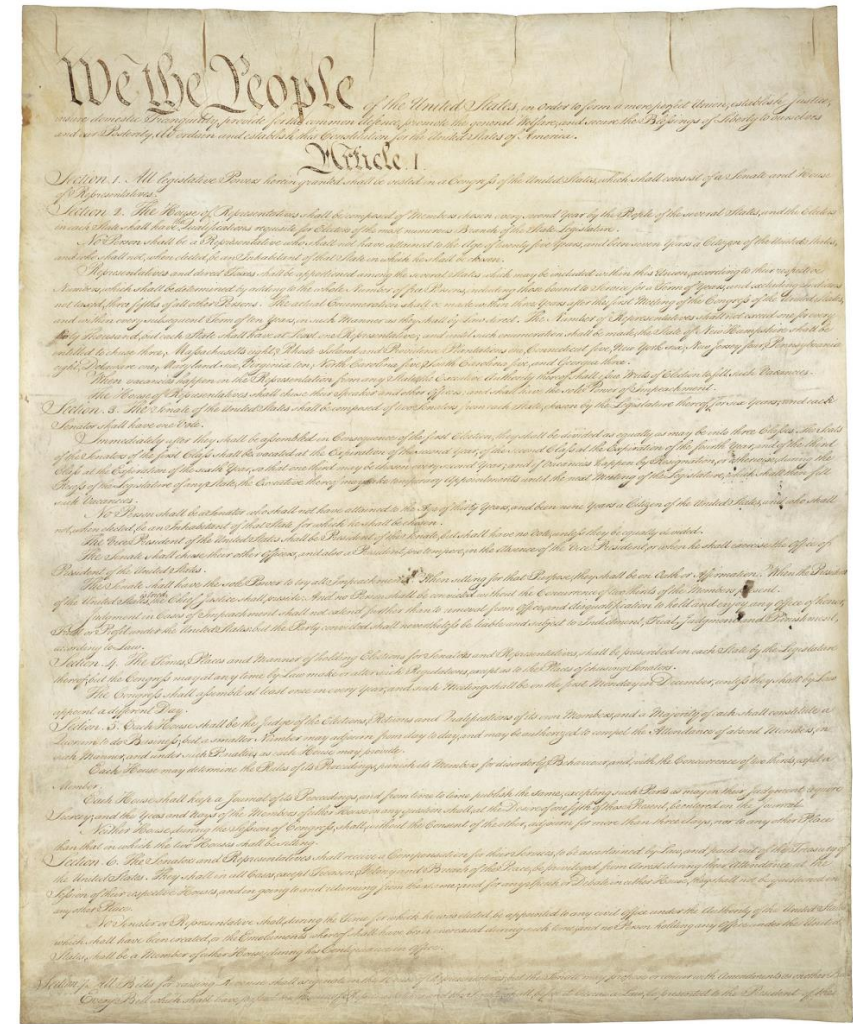
Constitutional Claims – Section 1983

42 U.S.C. § 1983

Any government agent who violates someone's federally protected rights (constitutional rights or rights under certain federal statutes) "shall be liable to the party injured."

Can be against the individual and/or the county

- If against county--plaintiff must prove the county's policy or custom *caused* the constitutional violations.

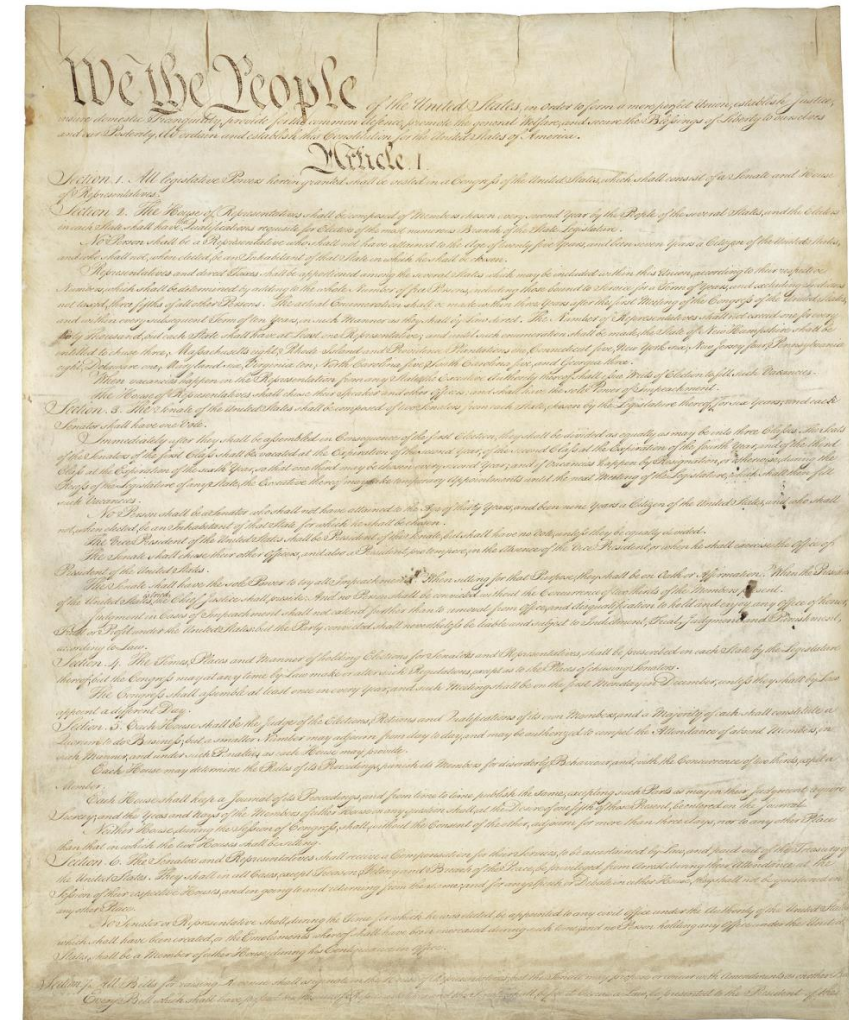


Constitutional Claims – Section 1983

Policy or custom manifests:

- (1) through an **express policy**, such as a written ordinance or regulation;
- (2) through the **decisions** of a person with final policymaking authority;
- (3) through an **omission**, such as a failure to properly train employees, that “manifest[s] deliberate indifference to the rights of citizens”; or
- (4) through a practice that is so “**persistent and widespread**” as to constitute a “**custom or usage with the force of law.**”

Lytle v. Doyle, 326 F.3d 463, 471 (4th Cir. 2003)



Procedural due process

When the government acts in such a way that denies a citizen a **life, liberty, or property interest**, the person must be given:

- notice;
- the opportunity to be heard;
- and a decision by a neutral decisionmaker.

Substantive due process

Protects fundamental rights from government action, unless the action is necessary and driven by a compelling purpose.



Fundamental rights may be outweighed by a compelling governmental interest.



Plaintiff must show that “he has been treated differently from others with whom he is **similarly situated** and that the unequal treatment was the result of **intentional or purposeful discrimination.**”

Local Health Departments

- Issuing “Notice of Intent to Suspend Improvement Permit” to some county property owners missing permit documentation but not others allegedly violated plaintiff’s equal protection rights.

--*Bufflehead Point, LLC v. Pamlico County* (E.D.N.C. May 4, 2020).

- Revoking health permit allegedly violated Plaintiff's due process and equal protection rights.

--*Motel 6 Operating, L.P. v. Gaston County*, (W.D.N.C. Sept. 18, 2008).

- Smoking Ban's private club definition, exempting nonprofit private clubs but not those that were for profit, did not violate equal protection clause.

--*Liebes v. Guilford Cty. Dep't of Pub. Health*, 213 N.C. App. 426 (2011).



Immunity



Governmental Immunity:

Counties are immune from liability for the torts committed by public officials and their employees while they are performing a governmental function, unless the county has waived immunity.



Governmental functions

Activities performed by the government which are not ordinarily performed by private corporations.

Proprietary functions

Traditionally performed by private corporations, often involves charging a fee that is above and beyond costs of providing the service.

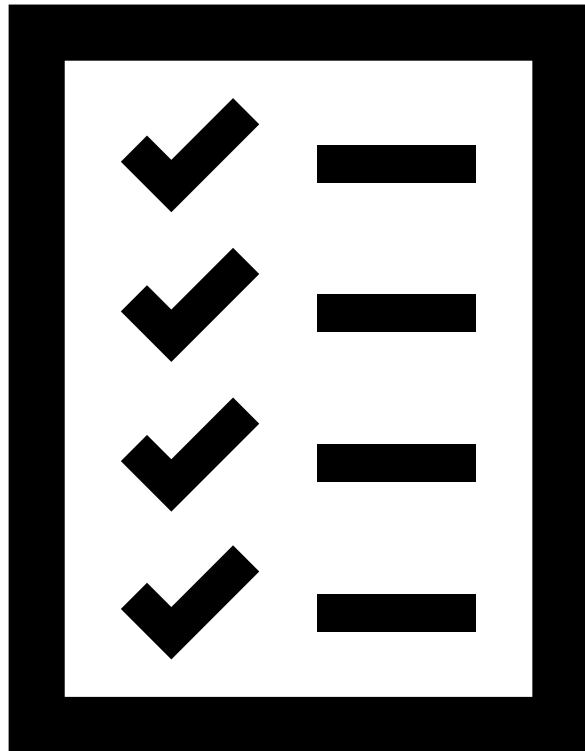


DSS

- Services provided by local Departments of Social Services are governmental functions to which governmental immunity applies.
--*Whitaker v. Clark*, 109 N.C. App. 379 (1993).

LHD

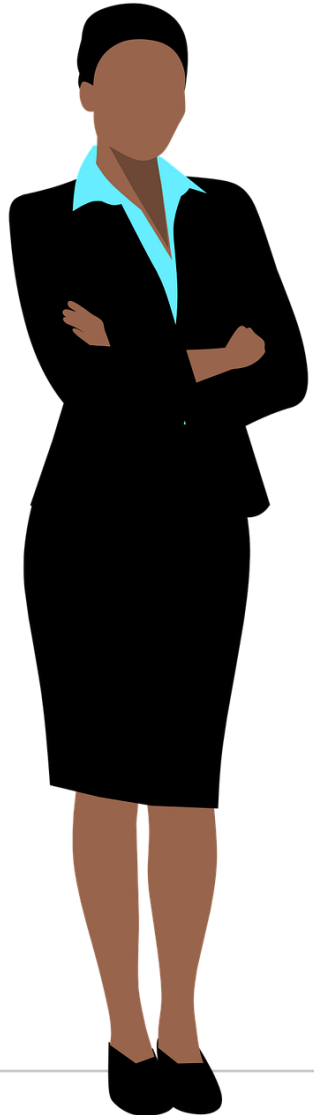
- Approving or denying permits for septic tank systems is a governmental function (despite the fact that a fee is charged)
 - Family planning services is a governmental function
 - Exercising quarantine authority is a governmental function
-



Waiver of Immunity:

- A county may waive its immunity by purchasing liability insurance covering a particular risk.
- A county's immunity is not waived if the action is explicitly **excluded** from coverage by the terms of the insurance policy.

Lawsuit Against the Individual -- Public Official Immunity



Protects **public officials** from individual liability for **negligence** in the performance of their *governmental or discretionary* duties.

Not a defense to *intentional* torts or gross negligence.

Does not apply when conduct is malicious, corrupt, or outside the scope of official authority.

“It would be difficult to find those who would accept public office or engage in the administration of public affairs if they were to be held personally liable for acts or omissions involved in the exercise of discretion and sound judgment which they had performed to the best of their ability, and without any malevolent intention toward anyone who might be affected thereby.”

Miller v. Jones, 224 N.C. 783 (1945).

Who is a “public official”?

Three primary distinctions:

1. Holds a position created by the constitution or statutes;
2. Exercises a portion of the sovereign power; and
3. Exercises discretion (while public employees perform ministerial duties).

Isenhour v. Hutto, 350 N.C. 601 (1999).

Who is a Public Official?

DSS Director

Hare v. Butler,
99 N.C. App. 693 (1990)

Local Health Director

Satorre v. New Hanover County Bd. of Comm'rs,
165 N.C. App. 173 (2004)

CHS Director

(no case law yet)

Who is (or isn't) a "public official"?

Public health: who is *not* a public official?

• Environmental Health Specialist

- *Block v. County of Person*, 141 N.C. App. 273 (2000)

• Environmental Health Supervisor

- *Block v. County of Person*, 141 N.C. App. 273 (2000)

• Environmental Health Administrator

- *Cline v. James Bane Home Bldg., LLC*, 2021-NCCOA-266, ¶ 33, 862 S.E.2d 54, 65).

Social workers assessing reports of child abuse or neglect are almost always deemed "public officials"

G.S. 108A-14(b).

Social workers performing guardianship duties?

- *Meyer v. Walls*, 122 N.C. App. 507 (1996): No public official immunity for director of APS unit and social worker engaged in general guardianship duties
- *Dalenko v. Wake Cty. Dep't of Hum. Servs.*, 157 N.C. App. 49 (2003): Social workers involved in guardianship duties receive public official immunity

DSS Supervisors/Administrators?

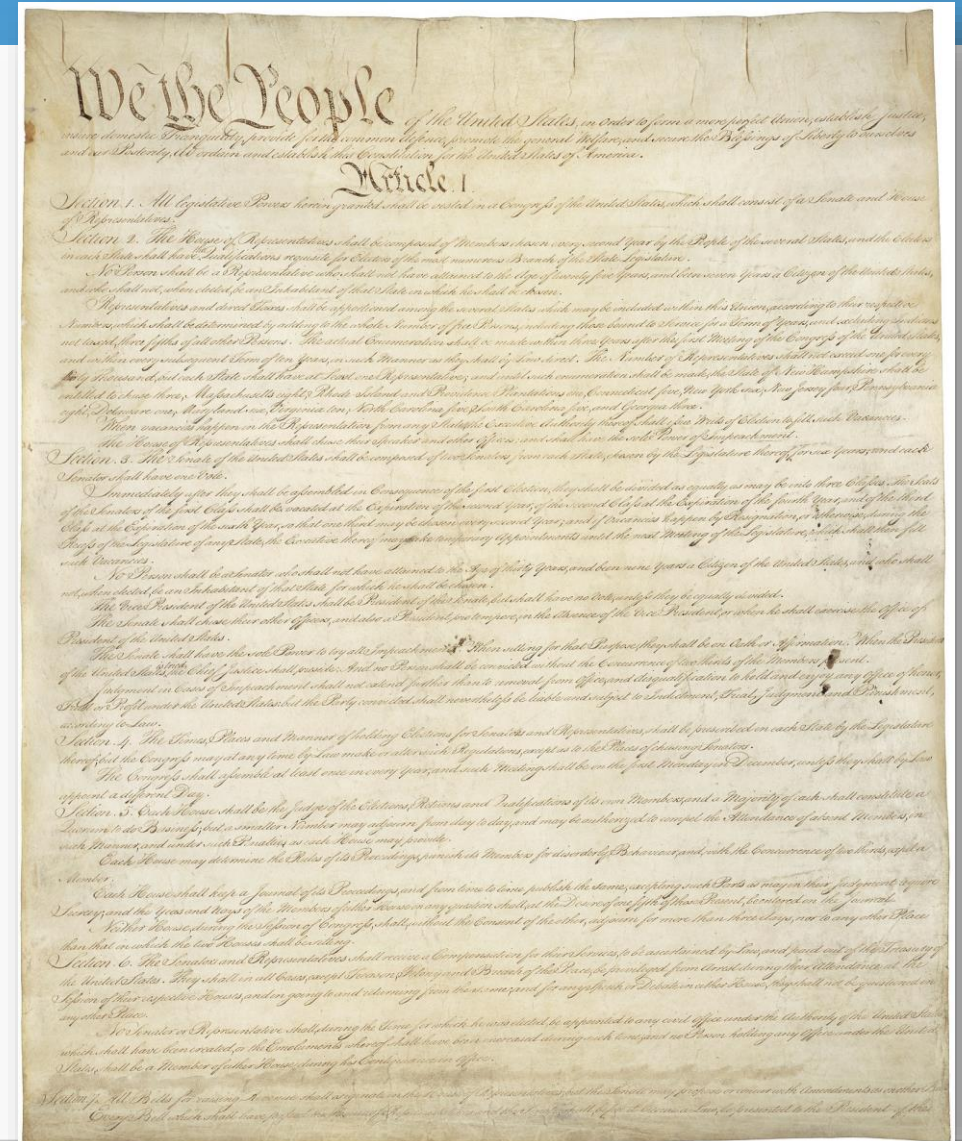
Hare v. Butler, 99 N.C. App. 693 (1990): Held that Protective Services Investigation Supervisor, Program Administrator for Child and Family Services, and Assistant DSS Director were public employees (not officials).

Section 1983 Claims: Qualified Immunity



SCHOOL OF GOVERNMENT

Shields government officials performing discretionary functions from personal-capacity liability for civil damages, unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known.



Case Study – What survived initial motion to dismiss?

- **Constitutional Claims (Section 1983)**

- Substantive Due Process
- Procedural Due Process
- Fourth Amendment

- **State Law Claims**

- Negligence
- Negligent misrepresentation
- Negligent supervision
- Negligent hiring and retention
- Fraud



What does immunity not cover?

- Criminal conduct
- Breach of contract
- Intentional torts*
- Violations of state statutes
- Violations of federal laws (Title VII, ADA, ADEA, etc.)
- Violating a clearly established constitutional right

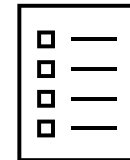


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County Responsibility

Insurance

- BOCC has discretion in deciding which liabilities, claims, officials, and/or employees will be covered
- Governmental immunity waived to the extent of county's insurance coverage



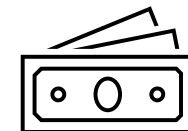
Defense of Officials and Employees

- Authorized, but not required



Paying Judgments Against Officials and Employees

- Authorized, not required
- Fraud, corruption, or malice = no payment
- Must have uniform standards for payment in place before settlement or judgment



Questions?

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