

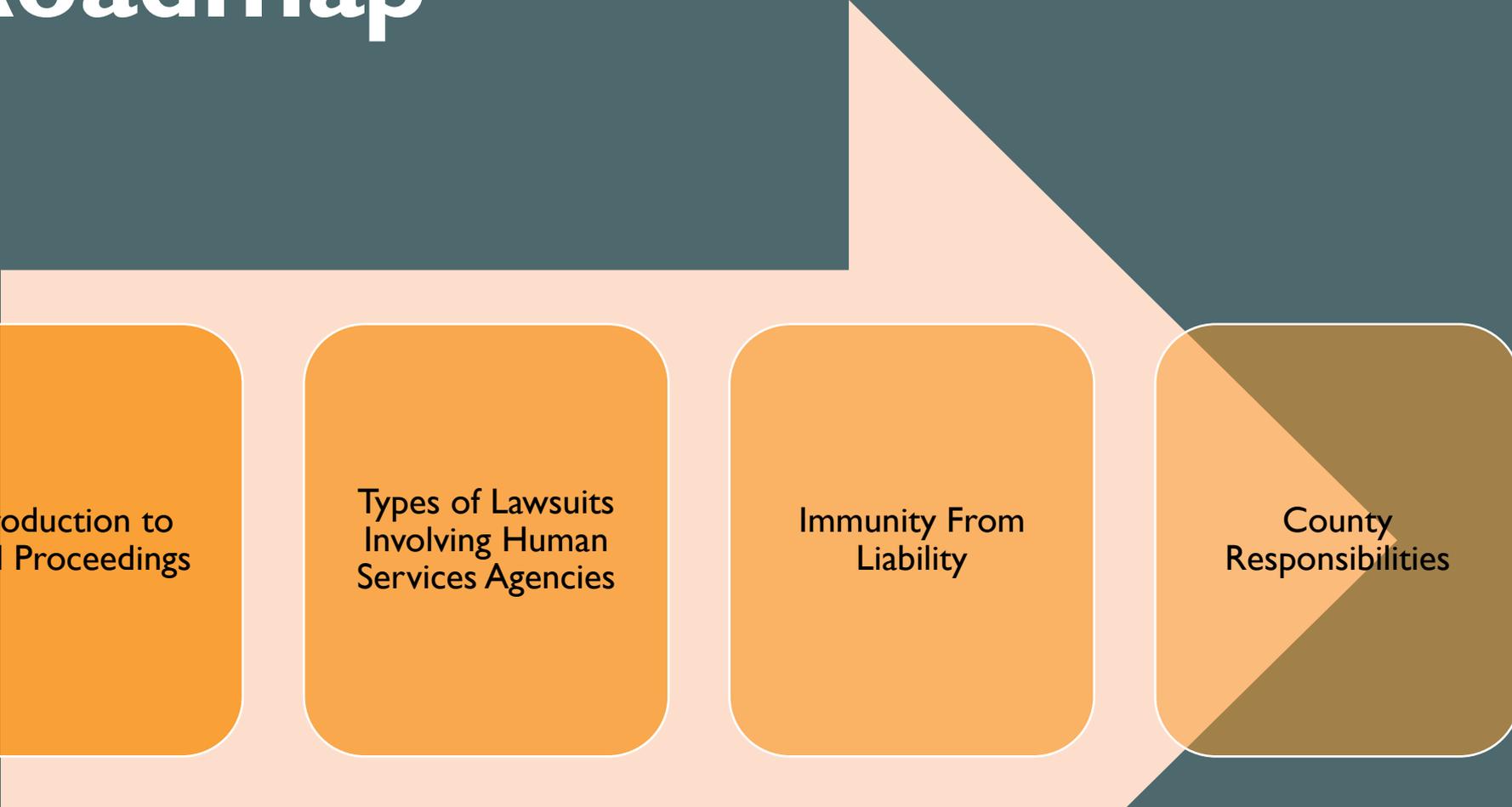
The background of the slide is a photograph of a classical building facade, featuring several large, fluted columns with ornate capitals. In the foreground, a decorative lamp post with multiple spherical globes is visible. The entire image is overlaid with a dark teal color filter. The text is centered and reads:

Liability:

**What Human Services Agencies
Need to Know**

Kristi Nickodem

Roadmap



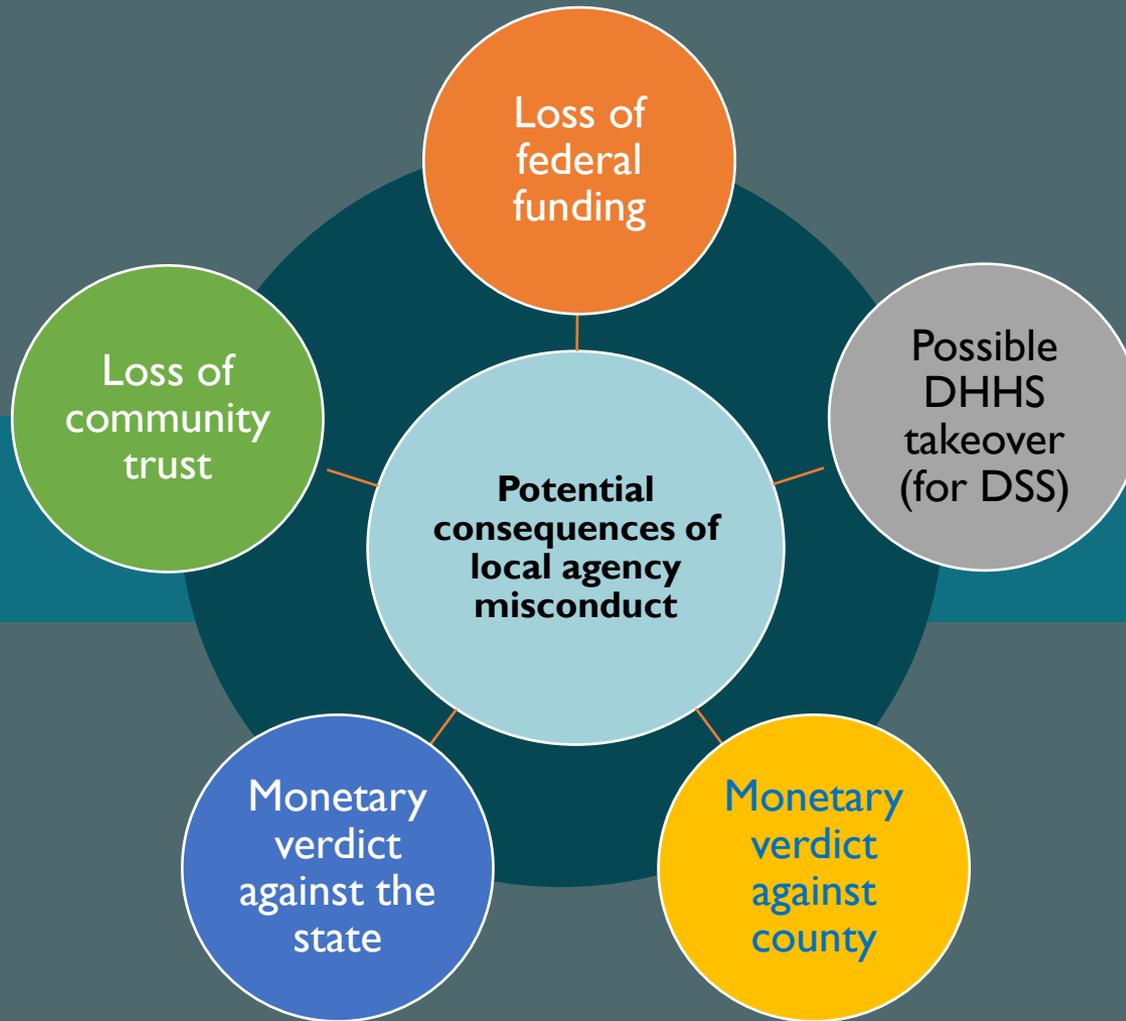
Introduction to
Legal Proceedings

Types of Lawsuits
Involving Human
Services Agencies

Immunity From
Liability

County
Responsibilities

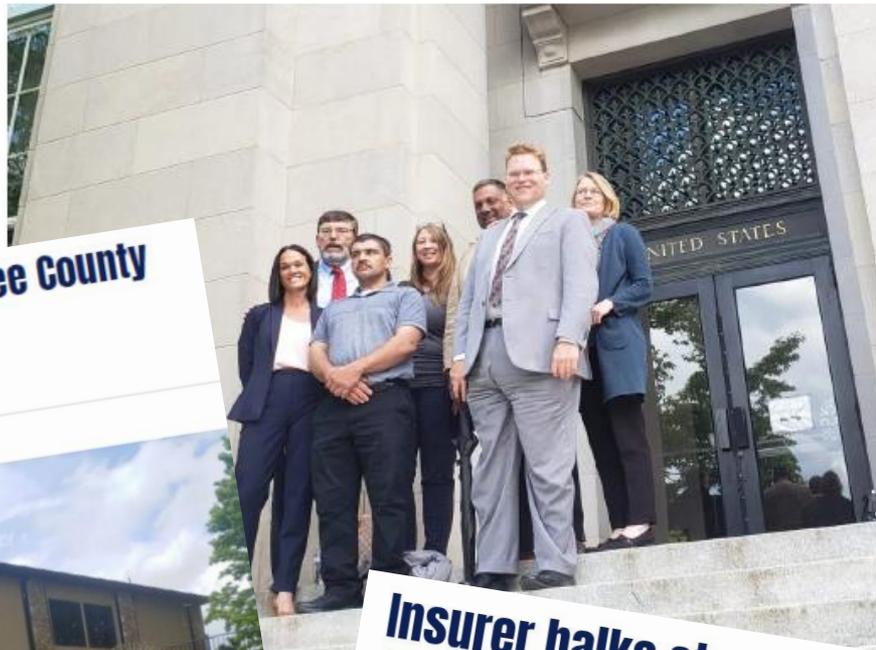
WHY DOES THIS MATTER?



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

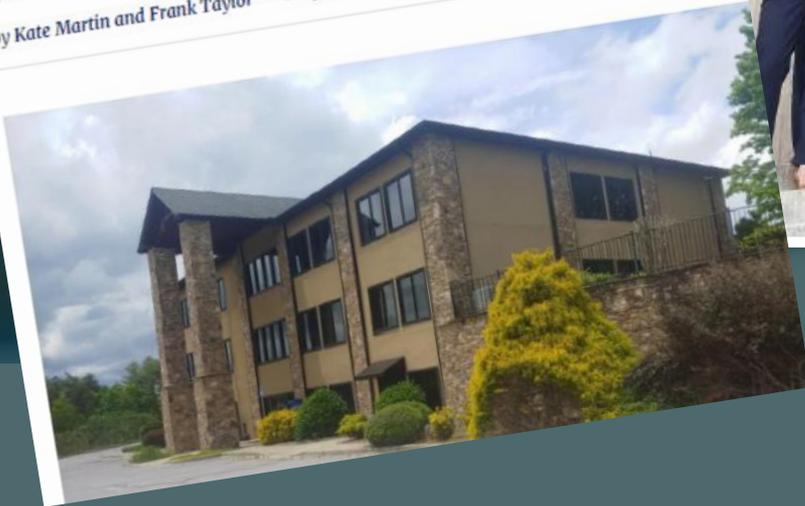
Jurors respond as closing arguments ask them to stand up for liberty of families against government elites who violate their rights.

by Kate Martin · May 13, 2021



Grand jury indicts former Cherokee County DSS officials

by Kate Martin and Frank Taylor · May 18, 2020



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



INTRODUCTION TO LEGAL PROCEEDINGS

Fundamentals of a Lawsuit

Complaint

- **The document filed with the court that initiates the legal proceeding**
- Sets forth the allegations of wrongdoing or unlawful conduct that form the basis for the lawsuit.

Answer

- **Responds to factual and legal allegations in the complaint by admitting or denying the allegations**
- Can raise affirmative defenses (including immunity) and counterclaims

Plaintiff/petitioner

- **The person or entity that files the complaint and seeks relief in the lawsuit**
- In criminal proceedings, the party bringing the case is the State.
- Generally has the burden of proving claims

Defendant/respondent

- **The person or entity that the lawsuit is filed against**

Steps in a Lawsuit



Plaintiff files complaint

- Must be the right court (jurisdiction) and the right plaintiff (standing)



Defendant files answer and/or a motion to dismiss

- Law was not violated even if all facts are true, complaint was filed too late; complaint filed in wrong court, etc.



Discovery

- Legal process for obtaining information from the opposing party.



Summary judgment

- Asks court to consider all undisputed facts and decide the case (or a claim) in favor of one party.
- If a party wins, the case may end or a claim may be resolved in favor of one party.

Steps in a Lawsuit



Trial

- Could be bench trial or jury trial



Judgment

- In a civil suit, the judge may have the authority to increase or decrease the amount of damages awarded by the jury

Appeal

- Losing party may be able to appeal to a higher court
- Must have a legal basis - typically errors in procedure or errors in the court's interpretation of the law.

Settlement

Can happen at any point in the civil litigation process, typically prior to trial.

WHO IS THE PROPER DEFENDANT?

1. 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).

2. Directors and Staff

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

Makes a difference in which party is liable for damages and what types of immunity are available

3. 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.
 - **Industrial Commission** has jurisdiction over claims that arose as a result of the negligence of any agent of the state while acting within the scope of his or her employment.

A plaintiff may maintain a suit against a state agency in the Industrial Commission under the Tort Claims Act **and** a suit against the negligent employee in Superior Court for common-law negligence.



STATE TORT CLAIMS ACT

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

NC DHHS may be **vicariously liable** for the actions of a local health department acting as the agent of NC DHHS.

- Departments of social services and local health departments are **not state agencies** entitled to sovereign immunity.
- The Tort Claims Act does not confer jurisdiction in the Industrial Commission over a claim against a **county or county department**.

STATE TORT CLAIMS ACT

In certain cases, health department employees may act directly as agents of the State in a manner that makes claims against them subject to the State Tort Claims Act.



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

The EHS is authorized to enforce state environmental health program rules;

The action or omission leading to the negligence claim arises out of the EHS's enforcement of those state rules; and

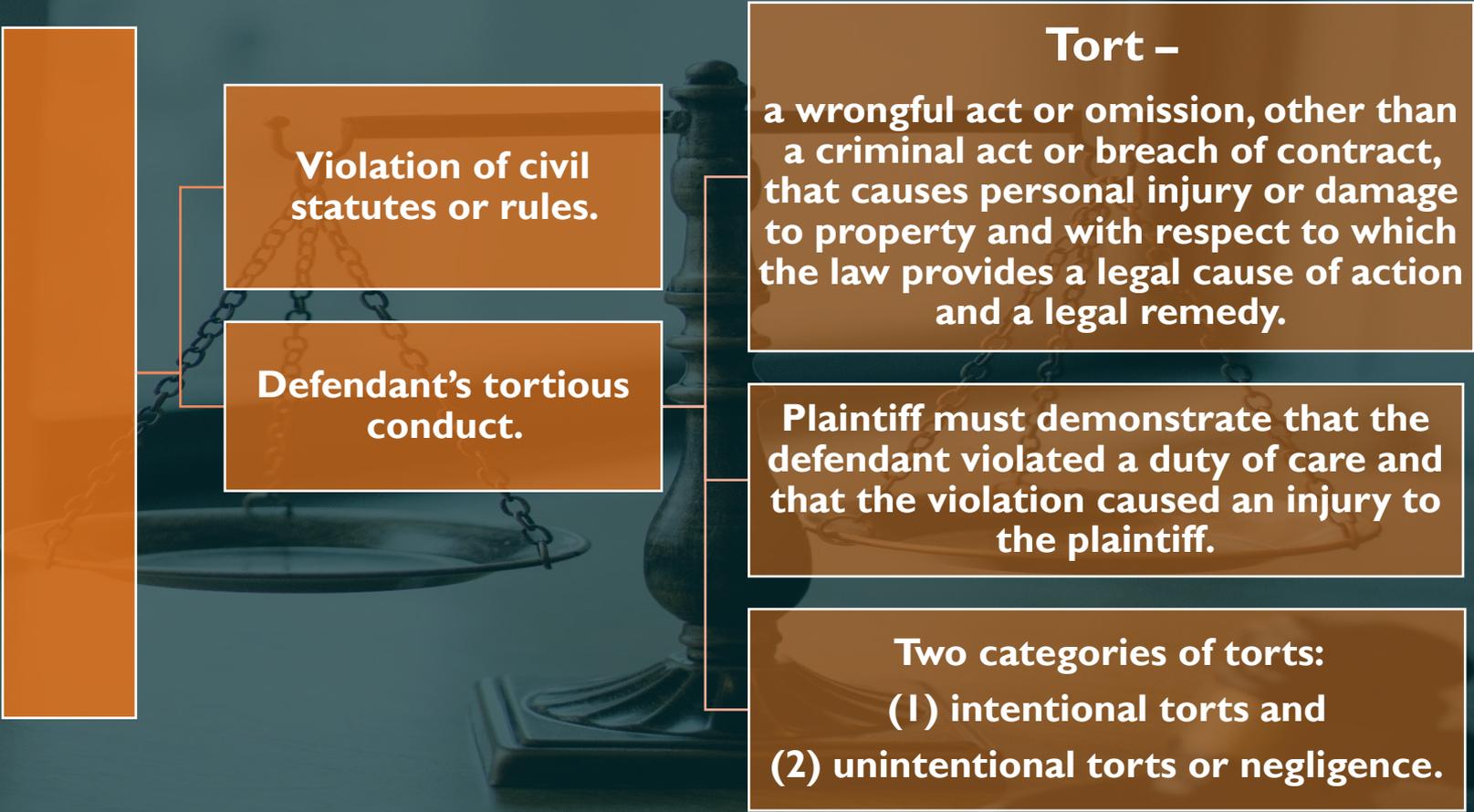
The EHS was acting within the scope of the EHS's role as a state agent when the alleged negligence occurred.

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



TYPES OF LAWSUITS INVOLVING HUMAN SERVICES AGENCIES

Civil Liability



The diagram illustrates the components of Civil Liability. It features a vertical orange bar on the left, with two orange boxes branching off to the right. The top box contains the text 'Violation of civil statutes or rules.' and the bottom box contains 'Defendant's tortious conduct.' To the right of these boxes are three stacked orange boxes. The top box is titled 'Tort -' and contains a definition of a tort. The middle box contains the text 'Plaintiff must demonstrate that the defendant violated a duty of care and that the violation caused an injury to the plaintiff.' The bottom box contains the text 'Two categories of torts: (1) intentional torts and (2) unintentional torts or negligence.' The background of the slide shows a pair of scales of justice.

Violation of civil statutes or rules.

Defendant's tortious conduct.

Tort –

a wrongful act or omission, other than a criminal act or breach of contract, that causes personal injury or damage to property and with respect to which the law provides a legal cause of action and a legal remedy.

Plaintiff must demonstrate that the defendant violated a duty of care and that the violation caused an injury to the plaintiff.

**Two categories of torts:
(1) intentional torts and
(2) unintentional torts or negligence.**

NEGLIGENCE

Examples:

- Negligent placement of a child in a foster or adoptive home
 - Negligent assessment of a report of abuse or neglect
 - Negligence in performing guardianship duties
 - 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 Hiring/Retention/Supervision of Staff
 - *Related claim:* Respondeat Superior
 - 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 a particular adoptive or foster home



Basic elements:

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

OTHER CLAIMS

Wrongful Death

- Failure to thoroughly investigate and adequately respond to claims of abuse or neglect.

Abuse of Process

- Defendant had an ulterior motive to achieve a collateral purpose not within the normal scope of the process used, and
- Defendant committed some act that is a “malicious misuse or misapplication of that process.”

Intentional or Negligent Infliction of Emotional Distress

Intentional (IIED):

- (1) Extreme and outrageous conduct,
- (2) which is intended to cause, and
- (3) does cause severe emotional distress to another.

Negligent (NIED):

- (1) The defendant negligently engaged in conduct;
- (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress or mental anguish; and
- (3) the conduct did in fact cause the plaintiff severe emotional distress.

CLAIMS RELATED TO EMPLOYMENT

SHRA:

- Failure to follow proper procedures prior to taking disciplinary action
- Failure to follow proper procedures in dismissal
- Dismissal from employment without just cause



Federal anti-discrimination laws:

- 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

Anti-retaliation laws:

- Retaliatory Employment Discrimination Act (REDA)
- Family and Medical Leave Act (FMLA)
- Anti-discrimination laws also have an anti-retaliation component

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.”

Plaintiff must prove the county’s policy or custom caused the constitutional violations.

Local government manifests a “policy or custom” in four ways:

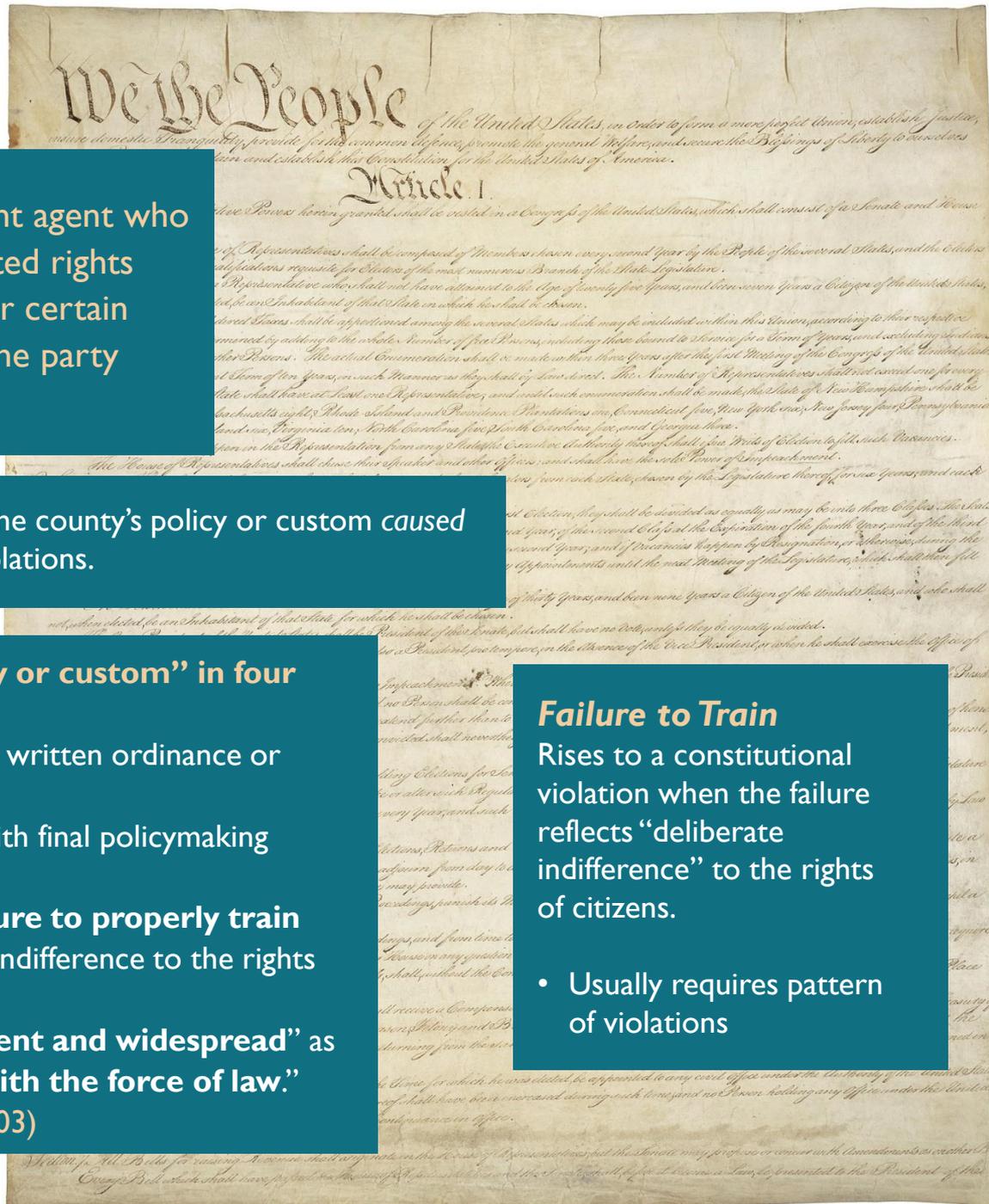
- (1) through an **express policy**, such as a written ordinance or regulation;
- (2) through the **decisions** of a person with final policymaking authority;
- (3) through an **omission**, such as a **failure to properly train officers**, that “manifest[s] deliberate indifference to the rights of citizens”; 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)

Failure to Train

Rises to a constitutional violation when the failure reflects “deliberate indifference” to the rights of citizens.

- Usually requires pattern of violations



SECTION 1983 –

Due Process

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 animated by a compelling purpose.

Deprivation of due process rights

- **Individual liability** - must show that the official acted personally in the deprivation of rights (personal knowledge of and involvement in the alleged deprivation is sufficient).
- **Supervisor liability** - the employee's misconduct must occur at the supervisor's direction or with the supervisor's knowledge and consent.
- **Local government liability** - May only be sued under Section 1983 only when their own policies, customs or practices cause the constitutional deprivation.



The “interest of parents in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests recognized.”



Fundamental interests may be outweighed by a legitimate governmental interest.

SECTION 1983 – Equal Protection

Equal Protection:

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 and Equal Protection Claims

- Issuing “Notice of Intent to Suspend Improvement” permits 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 Plaintiff’s 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, 713 S.E.2d 546 (2011).





IMMUNITY

GOVERNMENTAL IMMUNITY



Lawsuits Against the County: Governmental Immunity

- Sovereign or governmental immunity bars actions against municipalities and public officials sued in their official capacity.
 - *Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680 (2000).
- 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.
 - *Clayton v. Branson*, 153 N.C.App. 488 (2002).

Waiver of Governmental Immunity

- A county may waive its immunity by purchasing liability insurance covering a particular risk.” *Ballard v. Shelley*, 257 N.C. App. 561 (2018).
- A county's immunity is not waived if the action is explicitly **excluded** from coverage by the terms of the insurance policy.

GOVERNMENTAL IMMUNITY

Governmental Functions vs. Proprietary Functions

- Governmental immunity shields counties and officers sued in their official capacities from suits based on torts committed while performing a governmental function, but not when performing a proprietary function.
- **Government 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, 381 (1993).
- A county is immune from liability for injuries caused by negligent social services employees working in the course of their duties absent a waiver of that immunity.” *Patrick v. Wake Cty. Dep't of Human Servs.*, 188 N.C.App. 592, 597 (2008).

Health Department

- 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

PUBLIC OFFICIAL IMMUNITY: Lawsuits Against the Individual

Public immunity doctrine protects **public officials** from individual liability for negligence in the performance of their *governmental or discretionary* duties.

- Public official immunity is not a defense to *intentional* torts.

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, 787 (1945).

By contrast, a **public employee** IS personally liable for negligence in the performance of his or her duties that causes an injury.

PUBLIC OFFICIAL IMMUNITY: Public Official vs. Public Employee

Three primary distinctions between public officials and public employees:

1. A public office is a position created by the constitution or statutes
2. A public official exercises a portion of the sovereign power
3. A public official exercises discretion, while public employees perform ministerial duties

Isehour v. Hutto, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (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)

PUBLIC OFFICIAL IMMUNITY: Public Official vs. Public Employee

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).

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

- Held that three DSS positions (Protective Services Investigation Supervisor, Program Administrator for Child and Family Services, and Assistant Director) were public employees (not officials) because their positions were not created by statute nor did they exercise any sovereign power.

Each claim must be analyzed based on the facts and circumstances of the situation.

Who May be a Public Official Under Certain Circumstances?

“[W]here a statute expressly creates the authority to delegate a duty, a person or organization who is delegated and performs the duty on behalf of the person or organization in whom the statute vests the authority to delegate passes the first *Isenhour* factor.”

McCullers v. Lewis, 265 N.C.App. 216 (2019).

PUBLIC OFFICIAL IMMUNITY: Public Official vs. Public Employee

DSS Staff

- DSS director has the statutory authority to delegate his or her responsibilities to staff members. G.S. § 108A-14(b).
- “This statutory language...creates a structure under which department of social services staff members may function as public officers.” *Hobbs v. N.C. Dep't of Human Res.*, 135 N.C.App. 412 (1999).

Social workers assessing reports of child abuse or neglect will almost always be deemed public officials

(see *Hunter v. Transylvania Cty. Dep't of Soc. Servs.*, 207 N.C.App. 735 (2010)).

Social workers performing general guardianship duties?

Meyer v. Walls, 122 N.C.App. 507 (1996)

Court says 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)

Says social workers involved in guardianship duties do receive public official immunity (doesn't cite to *Meyer*)

QUALIFIED IMMUNITY: Section 1983 Claims



Shields government officials performing discretionary functions from **personal-capacity liability** for civil damages under Section 1983, unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known.

Protects government officials from liability with respect to “bad guesses in gray areas.”

Court must determine:

- (1) whether a constitutional right has been violated, and
- (2) whether that right was clearly established at the time of the alleged violation.



COUNTY RESPONSIBILITY



Insurance and Payment

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



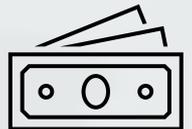
Defense of Officials and Employees

- **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?