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Do Intentional Tort Claims Always Defeat Public Official Immunity?

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Litigation can be an occupational hazard for state and local officials. It is not unusual for officials to be sued by plaintiffs who want to hold them personally liable for bodily injury or property damage. In North Carolina, when the officials' allegedly harmful conduct falls within the scope of their authority, the doctrine of public official immunity can protect them from personal liability for certain kinds of civil claims, provided the officials did not act maliciously or corruptly.[1] When the immunity is found not to apply, a plaintiff may proceed with litigation directly against an official unless another defense bars the plaintiff's claims.

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1. This bulletin addresses the personal liability of public officials for their actions, not the liability of the state or local governments for harms resulting from the officials' conduct. There can be situations in which the state or a local government is liable for bodily injury or property damage caused by an official

It has long been clear that public official immunity can defeat negligence claims. Uncertainty has persisted, however, as to whether the immunity can ever block intentional tort claims such as assault, battery, false imprisonment, and malicious prosecution. The courts have generally been reluctant to hold that intentional wrongdoing falls within the scope of an official's authority. Furthermore, even when they have found or assumed that officials acted within their authority, the courts in some cases have declared that public official immunity will never defeat intentional tort claims because malice is part of every intentional tort. These pronouncements stand at odds with other cases in which the courts have approved the use of public official immunity to block intentional tort claims.[2]

This bulletin examines whether intentional torts necessarily involve malice for purposes of public official immunity. It begins by discussing fundamental principles of public official immunity and summarizing the conflict in the case law concerning the immunity's relationship to intentional tort claims. The bulletin then addresses the critical question of whether malice is an essential component of all intentional torts. It concludes that some intentional torts can occur without malice and, consequently, that public official immunity can bar at least some intentional tort claims. This bulletin further observes that whether an intentional tort triggers the immunity's malice exception can depend on whether the official acted with actual intent (deliberately) or constructive intent (willfully and wantonly). The last section of the bulletin attempts to distill the case law into a set of principles that could be used in future cases to determine when a public official has shown the desire to injure required to pierce public official immunity.

This bulletin covers complex legal concepts and a fairly large number of cases. Rather than reading it from start to finish, some readers may prefer to read the last section first and then turn to the remaining sections for the reasoning behind the principles it articulates.

I. Public Official Immunity Fundamentals

Public official immunity has been described as a "deceptively simple" doctrine whose complexities usually become evident only when a plaintiff actually tries to hold a public official liable in tort.[3] In a nutshell, the immunity shields public officials from personal liability for claims

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even though public official immunity shields the official from personal liability. Conversely, an official can be personally liable for bodily injury or property damage even when the state or local government is not.

It should also be noted that other common law or statutory immunities may shield public officials—or in some cases, public employees—from liability even when public official immunity does not apply.

2. In 2013 two unpublished decisions issued within a month of each other by the North Carolina Court of Appeals highlighted the unsettled state of the case law. In the first, the panel of judges stated that public official immunity can be a defense against intentional tort claims. Lowder v. Payne, 226 N.C. App. 201, *5 (2013) (unpublished) ("Plaintiff next contends that the trial court erred by granting summary judgment to [defendant police officer], individually, for assault and battery, because public official immunity does not shield an official from liability for intentional torts. We disagree."). A different panel said just the opposite in the second case. Red Arrow v. Pine Lake Preparatory, 226 N.C. App. 431, *4 (2013) (unpublished) (declaring that public official immunity "does not immunize public officials or public employees from suit in their individual capacities when a party alleges an intentional tort claim" (internal quotation marks omitted)). Like other unpublished decisions of the court of appeals, however, *Lowder* and *Red Arrow* are not binding authority, and citation to them in court briefs and memoranda is disfavored. N.C. R. App. P. 30(e).

3. Epps. v. Duke Univ., 122 N.C. App. 198, 204 (1996).

arising from the exercise of judgment and discretion, unless the officials acted (1) outside the scope of their authority or (2) with malice or corruption.[4] It is an affirmative defense, meaning that a court need not consider the immunity unless the defendant asserts the immunity.

Public official immunity furthers two primary goals. First, it promotes the "fearless, vigorous, and effective administration" of government policies.[5] Without the immunity, liability concerns rather than the public interest might drive the actions of some public officials. Second, it mitigates the negative impact that worries about personal liability might otherwise have on the willingness of individuals to assume public office.[6]

Three issues dominate much of the case law on public official immunity.

- ***Whether the defendant qualifies as a public official.*** As one would expect, elected officials are entitled to public official immunity when they exercise discretion within the scope of their authority without malice or corruption. Most of the case law involving public official immunity, though, arises from claims against state or local government employees, not elected officials. In general, public employees are personally liable for their own negligence or deliberate wrongdoing, even when they act pursuant to their duties. To qualify as public officials for purposes of public official immunity, public employees must demonstrate that (1) their positions originate in the state constitution or statute, (2) their duties require the use of discretion,[7] and (3) they exercise a portion of the state's sovereign power.[8] Applying these criteria, the courts have held that the following public employees, among others, enjoy public official immunity: police officers, county medical examiners, directors of

4. Smith v. State, 289 N.C. 303, 331 (1976). A few appellate cases specify that public official immunity can also be overcome by evidence that a plaintiff's injury stemmed from an official's bad faith or willful and deliberate behavior. *E.g.*, Smith v. Jackson Cty. Bd. of Educ., 168 N.C. App. 452, 468 (2005).

Generally public official immunity does not bar tort claims for harms attributable to an official's performance of ministerial—nondiscretionary—duties. It will defeat such claims, however, if (1) the official's ministerial duties are public in nature and imposed for the public good and (2) no statutory provision expressly allows for personal liability. Langley v. Taylor, 245 N.C. 59, 61 (1956). One example of a ministerial duty to which public official immunity attaches is a statutory obligation to furnish bonds for law enforcement officers. *Id.* at 62. Similarly a register of deeds enjoys public official immunity against tort claims arising from the register's performance of ministerial duties imposed by Chapter 161 of the General Statutes. Robinson v. Nash County, 43 N.C. App. 33, 38 (1979).

5. Pangburn v. Saad, 73 N.C. App. 336, 344 (1985) (internal quotation marks omitted).

6. *Id*. (noting that, without public official immunity, the "threat of suit could . . . deter competent people from taking office"). *See also* Isenhour v. Hutto, 350 N.C. 601, 610 (1999) ("Public officials receive immunity because 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 personally liable for acts or omissions involved in exercising their discretion." (internal quotation marks omitted)).

7. "Discretionary acts are those requiring personal deliberation, decision and judgment." *Isenhour*, 350 N.C. at 610 (internal quotation marks omitted).

8. *Id*. The courts have sometimes also looked at whether the defendant took an oath of office, but an absence of any evidence that the defendant took such an oath will not automatically render the defendant a public employee for immunity purposes. Baker v. Smith, 224 N.C. App. 423, 433 (2012) (observing that taking an oath of office is not essential for classification as a public official); McCoy v. Coker, 174 N.C. App. 311, 319 (2005) (classifying the defendant building inspector as a public official even though the evidence did not establish that he had been required to take an oath of office).

county social services departments, directors of county health departments, building inspectors, and public school principals.[9]

Although the failure to satisfy any of the three criteria usually renders a public employee ineligible for public official immunity, appellate court decisions denying the immunity to certain groups of public employees tend to focus on the employees' lack of control over how they do their jobs.[10] Public employees who have been denied public official immunity include assistant directors of social services departments, child and family services program administrators, emergency medical technicians, street sweepers, and public school teachers.[11]

- ***Whether the defendant acted beyond the scope of the defendant's authority.*** When a plaintiff contends that an official lacks immunity because the official acted outside her authority, the courts usually examine whether the alleged conduct falls within the authority conferred on the official by law. Thus the North Carolina Supreme Court ruled in one case that the plaintiffs could proceed with their wrongful autopsy claim against a medical examiner because the complaint successfully alleged that the examiner had exceeded his statutory authority by, among other things, supervising an autopsy involving excessive mutilation.[12]

  As noted above, the courts tend to regard intentional wrongdoing as outside the scope of a public official's authority. They have been most willing to find that an official's authority encompassed alleged intentional misconduct in cases arising from law enforcement activities. In one case, for example, the plaintiffs sued a town attorney and law enforcement officers, alleging claims of assault, battery, false imprisonment, and malicious prosecution arising from the defendants' respective roles in a drug raid. The court held that public official immunity barred the claims, in part because the evidence showed that the defendants had not exceeded their authority.[13]
- ***Whether the defendant acted maliciously.***[14] The law recognizes different types of malice in both criminal and civil cases. What the courts mean when they talk about malice in the context of public official immunity will be considered below.

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9. See Appendix A on page 22 for a list of local government positions that have been deemed to qualify for public official immunity.

10. It is often said that the duties performed by public employees ineligible for public official immunity are "ministerial" rather than discretionary in nature. *E.g.*, Hare v. Butler, 99 N.C. App. 693, 700 (1990) ("[Public] [o]fficers exercise a certain amount of discretion, while [public] employees perform ministerial duties."). Ministerial duties "are absolute and involve merely [the] execution of a specific duty arising from fixed and designated facts." *Isenhour*, 350 N.C. at 610 (internal quotation marks omitted).

11. See Appendix B on page 23 for a list of local government positions to which the courts have declined to extend public official immunity.

12. Epps v. Duke Univ., 116 N.C. App. 305, 311 (1994). Some behaviors always fall outside the scope of a public official's duties or authority. Medlin v. Bass, 327 N.C. 587, 594 (1990) (holding that a principal who sexually assaulted a student in his office was not entitled to public official immunity because his actions "were beyond the course and scope of his employment as a matter of law").

13. Barnett v. Karpinos, 119 N.C. App. 719, 729 (1995).

14. As noted above, public official immunity can also be defeated by a showing that an official acted corruptly. "Malice and corruption are not synonymous, and much might be said by way of defining those terms." Charles E. Daye & Mark W. Morris, North Carolina Law of Torts § 19.40[2][d][iv], at 481–82 (3d ed. 2012). According to the North Carolina Supreme Court, the corruption that will overcome public official immunity can be likened to "malignancy, hatred, ill-will, or spite, and flows from

Public official immunity confers immunity from litigation, not merely immunity from liability.[15] It is designed to bring lawsuits against public officials to a halt except when plaintiffs allege claims not covered by the immunity. Accordingly, when a defendant asks a trial court to rule that public official immunity forecloses a claim or lawsuit, the defendant has the right to an immediate appeal if the request is denied.[16] If officials had to wait until after trial to appeal such rulings, much of the immunity's value to them would be lost.[17]

II. Public Official Immunity and Intentional Tort Claims: A Malicious Split in the Case Law

Appellate court decisions leave no doubt that public official immunity is a defense to claims premised on nothing more than ordinary negligence, so long as officials act within the scope of their duties.[18] Under North Carolina law, ordinary negligence consists of the failure to exercise reasonable care in the performance of a legal duty owed to another under the circumstances, such as a driver's duty to his passengers and other motorists not to exceed the speed limit.[19] The duty necessary for a negligence claim can arise under a statute or under the general principle, articulated by the courts, that a person must exercise reasonable care in his undertakings to avoid harming others.[20]

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improper motives." *Id*. § 19.40[2][d][iv], at 481–82 n.562 (quoting Betts v. Jones, 208 N.C. 410, 412 (1935)). Plaintiffs have usually preferred trying to prove malice, perhaps because, as will be seen, malice can be shown without evidence of an actual intent to harm when public official immunity is at issue.

15. Farrell v. Transylvania Cty. Bd. of Educ., 175 N.C. App. 689, 694 (2006) (observing that "[a] valid claim of [public official] immunity is more than a defense in a lawsuit; it is in essence immunity from suit" (internal quotation marks omitted)).

16. Summey v. Barker, 142 N.C. App. 688, 689 (2001) ("Orders denying dispositive motions based on public official's immunity affect a substantial right and are immediately appealable.").

17. *Farrell*, 175 N.C. App. at 694 (noting that, "[w]ere [a] case [in which the defendant had asserted public official immunity] to be erroneously permitted to proceed to trial, immunity would be effectively lost" (internal quotation marks omitted)).

18. *See, e.g.*, Smith v. Hefner, 235 N.C. 1, 7 (1952) ("It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto."); Meyer v. Walls, 347 N.C. 97, 112 (1997) ("Public officials cannot be held individually liable for damages caused by mere negligence in the performance of their governmental or discretionary duties; public employees can."); Clayton v. Branson, 153 N.C. App. 488, 492 (2002) (same); Thompson v. Town of Dallas, 142 N.C. App. 651, 655 (2001) ("The doctrine of public official's immunity serves to protect officials from individual liability for mere negligence, but not for malicious or corrupt conduct, in the performance of their official duties."); Schlossberg v. Goins, 141 N.C. App. 436, 437 (2000) ("[P]ublic officers' immunity protects public officials from actions for mere negligence in the performance of their duties.").

19. Moore v. Moore, 268 N.C. 110, 112 (1966) ("Negligence is the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them."); Norfleet v. Hall, 204 N.C. 573, 577 (1933) ("The speed at which the defendant was driving his automobile was unlawful [because it violated a statute prohibiting the operation of automobiles on a state highway at more than 45 miles per hour], and therefore constituted negligence.").

20. Lynn v. Burnette, 138 N.C. App. 435, 439 (2000) ("The law may impose [the duty necessary for a negligence claim] by statute, or else generally by operation of law under application of the basic rule of the common law which requires one to exercise due care when performing an undertaking and not to endanger the person or property of others." (internal quotation marks omitted)).

When it comes to intentional torts and public official immunity, the case law abounds with inconsistencies and ambiguities. In one 1990 decision, for example, the North Carolina Supreme Court ruled that public official immunity would not protect members of the Parole Commission from personal liability for false imprisonment—the intentional and illegal restraint of another individual against his or her will—if the evidence showed that they had deliberately disregarded statutory provisions mandating the plaintiff's release from prison on parole.[21] The decision did nothing to clarify the relationship between public official immunity and intentional torts because the court did not explain the basis for its holding. It did not, for instance, expressly limit public official immunity to negligence claims, nor did it assert that evidence of deliberate disregard would prove malice or conduct beyond the scope of authority.

Confusion about public official immunity and intentional torts increased in 1995 when the North Carolina Court of Appeals stated categorically in *Hawkins v. State* that public official immunity is not a defense against intentional tort claims.[22] The plaintiff in *Hawkins* lost his job with the state's Department of Human Resources (DHR) for refusing to submit a urine sample during a workplace investigation into missing valium. The lawsuit sought damages from the DHR Secretary and individuals in the plaintiff's division for the intentional infliction of emotional distress (IIED), a tort that occurs when a person experiences severe emotional distress due to another's extreme and outrageous conduct.[23] The defendants argued that public official immunity barred the IIED claims, but the court of appeals disagreed. Observing that public official immunity does not cover malicious actions, the court reasoned that the immunity does not extend to intentional torts because "malice encompasses intent."[24] In other words, the court seemed to assume that malice is an inherent aspect of every intentional tort.

It is unclear whether the judges who handed down *Hawkins* really meant to say that public official immunity can *never* be a defense to intentional tort claims. The immunity had been held to bar intentional tort claims in some prior cases.[25] Just six months later two of the three judges who had decided *Hawkins* ruled in another case that public official immunity foreclosed the plaintiffs' intentional tort claims because there was no evidence that the defendant officials had acted maliciously or corruptly.[26] Nonetheless the court has said several times since *Hawkins* that public official immunity is simply not a defense against intentional tort claims.[27] It has done

21. Harwood v. Johnson, 326 N.C. 231, 242 (1990). *See also* Daye & Morris, *supra* note 14, § 4.20, at 29 (setting out the elements of false imprisonment).

22. 117 N.C. App. 615, 630 (1995).

23. *See* Daye & Morris, *supra* note 14, § 5.20, at 48 (setting out the elements of an IIED claim).

24. *Hawkins*, 117 N.C. App. at 630.

25. In *Jacobs v. Sherard*, the court of appeals affirmed the use of public official immunity to bar wrongful ejectment claims against law enforcement officers who had acted pursuant to a court order later held to exceed the trial court's authority. 36 N.C. App. 60, 65–66 (1978). The court reasoned that public official immunity applied because "officers cannot be deemed to act maliciously when they enforce a court order that is valid on its face." *Id.* at 65. In another pre-*Hawkins* case, the plaintiff, who had been detained by the defendant police officer on suspicion of shoplifting, alleged a false imprisonment claim against the defendant police officer. Mullins v. Friend, 116 N.C. App. 676, 681 (1994). The court of appeals held that public official immunity barred the claim inasmuch as the officer's actions "were not corrupt, malicious, or outside and beyond the scope of his duties." *Id.*

26. Barnett v. Karpinos, 119 N.C. App. 719, 729 (1995).

27. *See e.g.,* Wells v. N.C. Dep't of Corrections, 152 N.C. App. 307, 320 (2002) ("[I]f the plaintiff alleges an intentional tort claim, a determination [of public official immunity] is unnecessary since, in such cases, neither a public official nor a public employee is immunized from suit in his individual capacity.").

so in response to immunity defenses raised in motions to dismiss and in motions for summary judgment.[28] Some federal court decisions issued after *Hawkins* also interpret North Carolina precedents to eliminate public official immunity as a defense to intentional tort claims.[29]

Other post-*Hawkins* cases from the court of appeals recognize that intentional tort claims can be barred by public official immunity.[30] Like *Hawkins* and its progeny, these cases have guided some federal court decisions in lawsuits where state law claims have been alleged against public officials.[31] Most of the cases in this second group share two characteristics.

- ***The defendants are law enforcement officers.***[32] Such officers frequently have no choice but to use force in the performance of their duties, a reality that can expose them to intentional tort claims such as false imprisonment, assault (the intentional placing of a person in reasonable apprehension of imminent harmful or offensive contact),[33] and battery (intentional harmful or offensive contact with the person of another without the person's consent).[34] Although law enforcement officers may be more likely than other public officials to face intentional tort claims, the nature of their duties makes the courts more inclined to find that the conduct underlying the claims against them falls within the scope of the officers' duties.

In *Wells* the court held that public official immunity did not defeat the plaintiff's IIED claims against her former supervisors because IIED is an intentional tort but that the defendants were nonetheless entitled to summary judgment inasmuch as their alleged actions did not rise to the level of "extreme and outrageous" conduct. *Id.* at 321–22. *See also* Beck v. City of Durham, 154 N.C. App. 221, 230–32 (2002) (holding that public official immunity could not be a defense to the plaintiff's intentional tort claims but affirming the dismissal of the plaintiff's claims against the defendant police officers on other grounds).

28. *See Beck,* 154 N.C. App. at 230–32; *Wells*, 152 N.C. App. at 320.

29. Blackburn v. Town of Kernersville, 2016 WL 756535, at *10 (M.D.N.C. Feb. 25, 2016); Bradley v. Ramsey, 329 F. Supp. 2d 617, 626 (W.D.N.C. 2004) (remarking that public official immunity is no defense to intentional torts in North Carolina); Mandsager v. Univ. of N.C. at Greensboro, 269 F. Supp. 2d 662, 681 (M.D.N.C. 2003) (same).

30. *See e.g.*, Brown v. Town of Chapel Hill, 233 N.C. App. 257 (2014); Beeson v. Palombo, 220 N.C. App. 274 (2012); Campbell v. Anderson, 156 N.C. App. 371 (2003); *Barnett*, 119 N.C. App. at 729; Marlowe v. Piner, 119 N.C. 125 (1995); Jensen v. Jessamy, ____ N.C. App. ____, 776 S.E.2d 364 (2015) (unpublished); DeBaun v. Kuszaj, 228 N.C. App. 567 (2013) (unpublished); Lowder v. Payne, 226 N.C. App. 201 (2013); Jackson v. Daniels, 196 N.C. App. 517 (2009) (unpublished).

31. *See e.g.*, Ayala v. Wolfe, 546 F. App'x 197, 199 (4th Cir. 2013) (unpublished) (holding that public official immunity barred the plaintiff's claims against a police officer for negligence, battery, and IIED); Maney v. Fealy, 69 F. Supp. 3d 553, 565 (2014) (holding that public official immunity defeated the plaintiff's battery claim against a police officer), *appeal filed*, No. 14-7791 (4th Cir. Dec. 8, 2014).

32. *Ayala*, 546 F. App'x at 199; *Maney*, 69 F. Supp. 3d at 557; *Brown*, 233 N.C. App. at 258; *Beeson*, 220 N.C. App. at 275; *Campbell*, 156 N.C. App. at 373; *Marlowe*, 119 N.C. App. at 126; *Jensen*, ____ N.C. App. ____, 776 S.E.2d 364, at *1; *DeBaun*, 228 N.C. App. 567, at *1; *Lowder*, 226 N.C. App. 201, at *1; *Jackson*, 196 N.C. App. 517, at *1. *But see* Barnett v. Karpinos, 119 N.C. App. 719, 729 (1995) (holding that public official immunity barred the plaintiffs' intentional tort claims against the town attorney for his role in approving a drug raid); Jetton v. Caldwell Cty. Bd. of Educ., 185 N.C. App. 159 (2007) (unpublished) (upholding use of public official immunity to defeat defamation and IIED claims against a superintendent, principal, and assistant principal).

33. Daye & Morris, *supra* note 14, § 2.20, at 5.

34. *Id.* § 3.20, at 18.

- ***The decisions come in appeals from summary judgment orders.***[35] Courts that take up defenses of public official immunity on summary judgment have actual evidence on which to base their rulings. This often puts them in a better position to assess the validity of an immunity defense than judges asked to rule on public official immunity at earlier stages of litigation based solely on the plaintiff's allegations or the parties' pleadings. In many of the cases in which the court of appeals has approved the use of public official immunity to bar intentional tort claims, the evidence available at summary judgment has clarified that the plaintiff's allegations of malice were unfounded.

The court of appeals decision in *Beeson v. Palombo* is representative of appellate opinions holding that public official immunity can apply to intentional tort claims.[36] The plaintiff, a public school teacher, sued two police officers in their individual capacities, alleging that they had wrongfully obtained and executed arrest warrants against him for touching the breasts of two female students. In addition to alleging IIED and false imprisonment, the plaintiff sought damages for malicious prosecution, a claim for which exists when a criminal or civil proceeding instituted against an individual with malice and without probable cause terminates in the individual's favor.[37] The defendant officers requested summary judgment, arguing that public official immunity precluded the plaintiff's tort claims. When the trial court denied the motion, the defendants appealed.

The court of appeals conceded that the complaint was "rife" with cursory allegations of maliciousness.[38] Beyond the buzzwords, however, the court detected nothing more than a claim that the defendants had acted without probable cause. Inasmuch as the evidence showed the presence of probable cause in the form of the students' accusations against the plaintiff, the court held that the defendants were immune to the plaintiff's tort claims.[39]

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35. *Ayala*, 546 F. App'x at 202; *Maney*, 69 F. Supp. 3d at 556–57; *Brown*, 233 N.C. App. at 258; *Beeson*, 220 N.C. App. at 285; *Campbell*, 156 N.C. App. at 377; *Marlowe*, 119 N.C. App. at 127; *Jensen*, ____ N.C. App. ____, 776 S.E.2d 364, at *2; *DeBaun*, 228 N.C. App. 567, at *7; *Lowder*, 226 N.C. App. 201, at *5; *Jackson*, 196 N.C. App. 517, at *7.

36. 220 N.C. App. 274 (2012).

37. Daye & Morris, *supra* note 14, § 9.40, at 99 (defining malicious prosecution).

38. *Beeson*, 220 N.C. at 277.

39. In *Beeson* and similar cases, the court's willingness to allow public official immunity to bar intentional tort claims seems closely connected to the court's assessment of the merits of those claims. The plaintiff in *Beeson* would not have won his malicious prosecution claim, even had the defendants failed to assert public official immunity, because he could not show a lack of probable cause. Moreover the law of privilege provided the defendants with an alternative means of attacking the plaintiff's IIED and false imprisonment claims. (Whereas an immunity defense protects a defendant from liability based on his status, a privilege defense precludes liability so long as the defendant acts within prescribed boundaries.) With important limitations, both subsection (d) of N.C. Gen. Stat. (hereinafter G.S.) § 15A-401 and case law bar tort claims against officers over their use of reasonable force during an arrest. Daye & Morris, *supra* note 14, § 15.30[4][b], at 181 (citing G.S. 15A-401 and discussing the privilege of law enforcement officers to use reasonable force in the discharge of their duties). *See also* Myrick v. Cooley, 91 N.C. App. 209, 215 (1988) ("Under the common law, a law enforcement officer has the right, in making an arrest and securing control of an offender, to use only such force as may be reasonably necessary to overcome any resistance and properly discharge his duties."). The case law also generally holds that officers who act on probable cause are privileged against false imprisonment claims. Daye & Morris, *supra* note 14, § 4.50, at 43. Given the absence of unreasonable force and the presence of probable cause in *Beeson*, the plaintiff's IIED and false imprisonment claims could not have overcome a privilege defense. The court

Whatever unifying characteristics mark the decisions in which public official immunity has been held to block intentional tort claims, the case law remains divided over whether intentional tort claims are ever subject to that immunity. The split originates in a disagreement over whether malice is an essential component of all intentional tort claims, a question that must be answered if the conflict is to be resolved.

III. Intent and Malice Distinguished

Obviously, if intent and malice are synonymous, the malice exception to public official immunity will be triggered whenever an intentional tort is alleged. The concepts are not identical, however, at least not in all circumstances.

One way of describing the difference between intent and malice is with the purpose/motive distinction. It may be said with some accuracy that intent focuses on the defendant's purpose, whereas malice concerns the defendant's motive. As used here, the term "purpose" refers to the defendant's wish to achieve a specific outcome or consequence (more on that below), while "motive" denotes the defendant's reason for desiring the consequence.[40] Suppose that Bill hits Jeff with a baseball bat, and Jeff sues Bill for battery. To determine whether Bill had the intent necessary for a battery claim, we have to examine whether Bill moved for the purpose of swinging the bat at Jeff. If he did, then he possessed the requisite intent for battery. On the other hand, if Bill swung the bat without knowing that anyone was near him, he may have lacked the intent required for a battery claim (though Jeff could still have a claim for negligence). To determine whether Bill acted maliciously, we have to look at why Bill hit Jeff. A finding of malice may be justified if the law deems Bill's motivation objectionable. For example, if Bill acted out of a desire to kill Jeff, then—absent mitigating circumstances—he may be said to have acted maliciously.

Too much should not be made of the purpose/motive distinction's value as a tool for separating intent and malice, in part because North Carolina law divides both intent and malice into actual and constructive categories. As we will see, the courts have defined constructive intent and constructive malice—also called legal malice—in nearly identical terms, a fact that makes the purpose/motive distinction largely, if not wholly, irrelevant insofar as they go.

Another way to distinguish between intent and malice is by their various functions in tort law. Though intent has other uses, its most important function, of course, is as an element every plaintiff must prove to prevail on any intentional tort claim. Malice plays a number of significant roles in tort cases. In addition to defeating public official immunity, for instance, evidence of malice can furnish grounds for punitive damages.[41] The kind of malice required varies by circumstance. When malice is an element of a tort claim, as with malicious prosecution, legal

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therefore took the opportunity presented by the defendants' immunity defense to bring meritless claims against police officers to an early end.

40. W. Page Keeton et al., Prosser and Keeton on The Law of Torts § 8, at 35 (5th ed. 1984) ("'Intent' is the word commonly used to describe the purpose to bring about stated physical consequences; the more remote objective which inspires the act and the intent is called 'motive.' . . . Intent is concerned with the consequences of [the defendant's] movement; motive, with reasons for desiring certain consequences.").

41. G.S. 1D-15(a) (providing that punitive damages may be awarded upon a showing of fraud, malice, or willful or wanton conduct).

malice will usually suffice.[42] When a plaintiff asserts malice as a basis for punitive damages, proof of actual malice must be introduced.[43] Like the purpose/motive distinction, the functions method of separating intent from malice has its limitations. It is not very helpful when, as with malicious prosecution, the law expressly makes malice one of the elements of the tort being alleged.

Because intent and malice are not exactly the same thing, the concepts must be examined in greater detail before it can be determined whether the malice exception to public official immunity applies anytime a public official commits an intentional tort. The law's division of intent and malice into actual and constructive categories, especially the uses to which those categories have been put in immunity cases, is particularly important in this context.

IV. Actual Intent and the Malice Exception to Public Official Immunity

A. Actual Intent Defined

Actual intent consists of the "desire to bring about a consequence *or a belief that the consequence is substantially certain to result*."[44] The "consequence" referred to here is not the precise injury suffered by the plaintiff but instead the invasion of a right that tort law protects. As one prominent treatise on tort law puts it:

> The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids. The defendant may be liable although intending nothing more than a good-natured practical joke, or honestly believing that the act would not injure the plaintiff or even though seeking the plaintiff's own good.[45]

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42. Taylor v. Hodge, 229 N.C. 558, 560 (1948) (holding that the "constructive malice" necessary for malicious prosecution "may be inferred from want of probable cause and reckless disregard of plaintiff's rights under reasonable notice thereof . . . ."), *cited in* Daye & Morris, *supra* note 14, § 9.40[3], at 107 n.81.

43. *Compare* G.S. 1D-5(5) (defining "malice" for punitive damages purposes as "a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant") *and* Shugar v. Hill, 304 N.C. 332, 338–39 (1981) (defining actual malice as "a sense of personal ill will toward the plaintiff which activated or incited a defendant to commit the alleged assault and battery").

Because Chapter 1D also allows a punitive damages award to rest on a finding of willful or wanton conduct, and actual malice is usually more difficult to prove than willful or wanton conduct, plaintiffs who seek punitive damages under Chapter 1D have little incentive to attempt to establish actual malice. *See* Brian Timothy Beasley, Survey of Developments, *North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?*, 74 N.C. L. Rev. 2174, 2197 (1996).

44. Daye & Morris, *supra* note 14, § 2.30[1], at 6 (emphasis added). *See also* 1 Dan B. Dobbs et al., The Law of Torts § 29, at 73 (2d ed. 2011) ("What is the state of mind required for [an intentional tort]? The defendant has an intent to achieve a specified result when the defendant either (1) has a purpose to accomplish that result or (2) lacks such a purpose but knows to a substantial certainty that the defendant's actions will bring about the result.").

45. Keeton, *supra* note 40, § 8, at 36–37.

Two cases illustrate these points well. In the first, the plaintiff stumbled and tore cartilage in her knee upon being startled by a fake mongoose—in reality a foxtail spring-loaded inside a box opened by the defendant's son.[46] The court held that the defendant, who had taken part in the prank, could be held liable because the plaintiff's reaction was foreseeable. In another case, the court ruled that a defendant who had caused the plaintiff to fall by deliberately tapping the back of her right knee with the front of his right knee could be held liable for battery.[47] According to the court, the defendant's physical invasion of the plaintiff's reasonable sense of dignity "easily qualifie[d]" as an offensive touching and therefore constituted a battery.[48] That the defendant had been joking was irrelevant. In both of these cases, despite the absence of any wish to do harm, the defendants' deliberate invasion of protected interests—such as a person's interest in avoiding offensive contact—demonstrated the existence of actual intent.

B. Actual Intent and Malice: Non-Immunity Cases

While the defendants in the two cases just summarized had actual intent, may they truly be said to have acted maliciously? To say that a person who was merely trying to be funny acted maliciously seems contradictory. And indeed a number of cases outside the context of public official immunity hold that some intentional torts can occur without malice. In *Shugar v. Hill*, the defendant appealed a jury's decision to award punitive damages to the plaintiff, whose assault and battery claims stemmed from his fight with the defendant at the defendant's restaurant.[49] The altercation occurred after the plaintiff told the defendant to charge a cup of coffee against what the plaintiff believed the defendant owed him for a piece of formica. The defendant responded by ordering the plaintiff to leave his restaurant. When the plaintiff replied, "Make me," the defendant picked him up and headed towards the door. The two came to blows after the plaintiff managed to free himself, and the plaintiff's nose was badly broken.

The North Carolina Supreme Court overturned the punitive damages award. Conceding that courts in other states had held that malice may be inferred from any assault or battery, North Carolina's highest court rejected that position, holding instead that punitive damages are not available for assault or battery without a showing of aggravating circumstances such as malice or willful and wanton conduct. The court provided examples of the kinds of assaults and batteries that will support punitive damages awards in assault and battery cases: unprovoked humiliating attacks, attacks on children, attacks on weaker persons, and attacks with deadly weapons. The court further observed that, although verbal provocation will not excuse an assault or battery, it can militate against awarding punitive damages. Turning to the evidence introduced at trial, the court concluded that the case consisted of nothing more than "two adults acting as adolescents engag[ing] in an affray . . . precipitated by [the] plaintiff's 'baiting' of [the] defendant and . . . invitation that he be ejected from [the] defendant's premises."[50] In light of the plaintiff's

46. Langford v. Shu, 258 N.C. 135 (1962). The court begins the *Langford* decision with a discussion of the elements of assault but then moves to a discussion of negligence. Nonetheless the conduct at issue "plainly . . . constituted an assault." Daye & Morris, *supra* note 14, § 2.30[1][a], at 10 n.12.

47. Andrews v. Peters, 75 N.C. App. 252 (1985), *cited in* Daye & Morris, *supra* note 14, § 3.30[1][a], at 22 n.15.

48. *Peters*, 75 N.C. App. at 256. The tort of battery encompasses intentional contact that is harmful *or* offensive. The plaintiff suffered a dislocated knee as a result of the fall, so arguably the defendant's contact with her was both offensive and harmful.

49. 304 N.C. 332 (1981).

50. *Id.* at 340.

provocative speech, and the utter absence of aggravating circumstances, the plaintiff was not entitled to punitive damages.

Roughly seven years later, the court of appeals in *Myrick v. Cooley* considered whether the trial court should have allowed the plaintiff's battery claims against a group of police officers to go to the jury.[51] The claims arose from the officers' arrest of the plaintiff for disorderly conduct.[52] In ruling for the plaintiff on his claim against one of the officers, the appellate court noted that arresting officers may employ only that force reasonably necessary to overcome resistance and properly discharge their duties. Echoing *Shugar*, the court then remarked that "an assault and battery need not necessarily be perpetuated with maliciousness, willfulness, or wantonness."[53] The apparent point of this last statement was that it is possible for force to be excessive even when an arresting officer's actions fall short of malicious or willful and wanton conduct.

The opinion of the court of appeals in *Robinson v. Winston Salem* marks false imprisonment as another intentional tort that can occur without malice.[54] There the court held that a police officer with a valid arrest warrant who mistakenly arrests the wrong individual may not be held liable for false imprisonment unless the officer fails to use reasonable diligence to determine that the arrestee is the person described in the warrant. Yet even in the absence of reasonable diligence, the court continued, an officer who has mistakenly arrested the wrong individual may not be ordered to pay punitive damages without "a showing of malice or of conduct demonstrating reckless disregard of the rights of others."[55]

The *Shugar*, *Myrick*, and *Robinson* cases plainly indicate that not all intentional torts necessarily encompass malice, but public official immunity was not at issue in any of them. To analyze the implications of *Shugar*, *Myrick*, and *Robinson* for public official immunity, we have to know whether they refer to the kind of malice that will defeat public official immunity.

C. Legal Malice and Public Official Immunity

Actual malice has been defined as a sense of personal ill will toward the plaintiff that led the defendant to commit the act(s) that produced the plaintiff's injury.[56] *Legal malice*, on the other hand, is inferred from a defendant's reckless indifference to the rights or safety of others.[57]

Three cases from the North Carolina Supreme Court clearly demonstrate that legal malice is enough to overcome public official immunity. In *Betts v. Jones*, a 1935 case, the plaintiff sought to hold members of a township school committee personally liable for the death of a student who had been fatally injured when the school bus in which she was riding ran into a canal.[58] The evidence showed that the bus driver's speeding had caused the accident and that

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51. 91 N.C. App. 209 (1988).

52. The officers had gone to the plaintiff's residence after receiving a report of a disturbance. The plaintiff argued loudly with the officers, told them to "go to hell," and turned to go back into his home, whereupon one of the officers "jumped on [the plaintiff's] back, threw him to the floor, jerked him up by the throat, knocked his glasses off, and pinned him against the wall." *Id.* at 211.

53. *Id.* at 215.

54. 34 N.C. App. 401 (1977).

55. *Id*. at 407.

56. *See supra* note 43.

57. *See, e.g.,* Kirschbaum v. McLaurin Parking Co., 188 N.C. App. 782, 789 (2008) (observing that, in a malicious prosecution case, implied—or legal—malice "may be inferred from want of probable cause in reckless disregard of the plaintiff's rights").

58. 208 N.C. 410 (1935). At the time, state law provided for townships to have popularly elected school committees with duties resembling those entrusted to today's local boards of education. Laurie L.

committee members had hired the driver—a committee member's son—despite his reputation for recklessness and objections from school patrons. After ruling that the members could face personal liability upon a finding of malice, the supreme court explained that such a finding did not require evidence that the members had acted from "a spiteful, malignant, or revengeful disposition"—that is, with an actual desire to injure.[59] Rather, said the court, the law would infer malice from injurious conduct attributable to "an ill-regulated mind not sufficiently cautious before it occasion[ed] injury to another."[60] Put more succinctly, reckless disregard on the part of the members for the rights or safety of others—legal malice—could justify the imposition of personal liability.[61]

Thirty-three years later, in *Givens v. Sellars*, the court considered whether State Highway Commission workers could be held personally liable for the destruction of a large outdoor advertising sign on the plaintiff's property.[62] On the way to ruling that the plaintiff could proceed with his lawsuit, the court stated that, "when a person goes outside of his line of duty and acts corruptly or with malice[,] he becomes personally liable for consequent damages."[63] In this context, the court remarked, a defendant acts maliciously who behaves "wantonly, doing what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another."[64] The court then defined *wanton conduct* as behavior "manifesting a reckless indifference to the rights of others."[65]

This definition of malice is puzzling. It characterizes a malicious act as one done wantonly—or recklessly—but with the intent to harm another, arguably a contradiction in terms. The court clarified, though, that by "malice" it meant legal malice.[66] The court also further defined legal malice to include not only wantonness but willfulness as well. *Willful conduct* (or willful negligence), the court explained, exists when (1) a defendant intentionally fails to carry out a legal duty necessary for the safety of the person or property to which it is owed and (2) the injury to the plaintiff is negligently inflicted.[67] The *intentional* failure to execute a legal duty separates willful negligence from ordinary negligence, which consists of the careless, forgetful,

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Mesibov, *Elementary and Secondary Education*, *in* County Government in North Carolina 811, 815 (4th ed. 1999).

59. *Betts*, 208 N.C. at 411–12.

60. *Id.* at 412.

61. *See* Brown v. Brown, 124 N.C. 19, 23 (1899) (explaining that the ill-regulated mind standard pertains to legal malice).

62. 273 N.C. 44 (1968). When it decided *Givens*, the court was still formulating the vocabulary we now use to discuss public official immunity. Although the term "public official immunity" does not appear in *Givens*, the applicability of that immunity to the plaintiff's claims is plainly what was at issue.

63. *Id.* at 49.

64. *Id*.

65. *Id.* at 50 (internal quotation marks omitted).

66. *Id.* ("This form of malice is also sometimes referred to as malice in law, or legal malice." (internal quotation marks omitted)).

67. *Id*. at 49–50. *See also* Foster v. Hyman, 197 N.C. 189, 191 (1929) ("The true conception of wilful [sic] negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract or which is imposed on the person by operation of law." (internal quotation marks omitted)).

If the defendant acts not only for the purpose of intentionally failing to carry out a duty but also with the actual intent to inflict injury, then actual intent is present, and "the idea of negligence is eliminated." *Givens*, 273 N.C. at 50.

or inattentive breach of such a duty.[68] As *Givens* demonstrates, evidence of willful conduct will almost always establish wantonness and vice versa, even though the case law often treats the concepts as distinct. In sum, then, *Givens* holds that the malice exception to public official immunity applies when the defendant, acting contrary to duty, behaved willfully and wantonly.

In 1984 the court again took up the relationship between malice and public official immunity in *Grad v. Kaasa*.[69] The plaintiff alleged a claim for wrongful autopsy against the defendant county medical examiner over the latter's autopsy of the plaintiff's husband, who had died of a heart attack. The defendant asserted public official immunity, while the plaintiff directed the court's attention to evidence that, according to her, supported a finding of malice. In evaluating the defendant's immunity defense, the court described the kind of malice that will pierce public official immunity:

> As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability. A defendant acts with malice when he *wantonly* does that which a man of reasonable intelligence would know to be contrary to his duty *and which he intends to be prejudicial or injurious to another.* An act is wanton when it is done of wicked purpose, *or when done needlessly, manifesting a reckless indifference to the rights of others*.[70]

Once again, as it had in *Givens*, the court rather confusingly characterized malice as including both an intent to harm *and* reckless indifference. Beyond doubt, however, the court had legal, not actual, malice in mind. The *Grad* decision takes its definitions for malice and wantonness straight out of *Givens*, citing that earlier case.[71]

Yet the capacity of public official immunity to bar some tort claims premised on actual intent does not necessarily translate into the ability to defeat such claims when the defendant's intent is constructive. Whether public official immunity should be understood to bar tort claims involving constructive intent turns on whether, unlike actual intent, constructive intent always entails malice.

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68. *See* Bailey v. N.C. R.R. Co., 149 N.C. 169, 174 (1908) (noting that "mere forgetfulness, however grievous the consequences, does not constitute willful or wanton neglect of duty" and that "[w]illful or intentional negligence is something distinct from mere carelessness and inattention, however gross").

69. 312 N.C. 310 (1984).

70. *Id.* at 313 (emphases added) (quotation marks omitted) (citations omitted).

71. *Compare Grad*, 312 N.C. at 313 ("A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another."), *with* Givens v. Sellars, 273 N.C. 44, 49 (1968) ("[I]f [the defendant] acted wantonly, doing what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another, the law will imply malice."). *See also Grad*, 312 N.C. at 313 (citing *Givens*, 273 N.C. at 50).

V. Constructive Intent and Public Official Immunity

A. Constructive Intent Defined

In 1985 the North Carolina Supreme Court announced in *Pleasant v. Johnson* that "constructive intent to injure may also provide the mental state necessary for an intentional tort."[72] The plaintiff suffered serious injuries to his right knee when a co-worker drove a truck into him as he walked across the parking lot toward their job site. Although the plaintiff filed suit against the co-worker, his complaint admitted that the incident was a prank gone bad: the co-worker had merely wanted to scare the plaintiff, not run into him. The issue on appeal was whether the plaintiff's lawsuit was preempted by the Workers' Compensation Act (WCA), which guarantees compensation to employees who have been injured in the course of employment but eliminates their right to sue employers or co-workers for on-the-job negligence.[73] The supreme court had ruled in prior cases that the WCA does not stop employees from suing employers or co-workers for intentional torts, but the defendant in *Pleasant* argued that the plaintiff had failed to allege an intentional tort.[74]

The supreme court disagreed with the defendant and held that his alleged actions sufficed for a finding of constructive intent. According to the court, "[c]onstructive intent to injure exists where the conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified."[75] The court defined willful and wanton conduct using the very same language that it had used in earlier cases such as *Givens* to describe legal malice.[76]

In adopting the constructive intent doctrine for intentional tort claims, the court was influenced in *Pleasant* by its previous acceptance of the doctrine in other contexts, both civil and criminal. The court pointed out, for instance, that its precedents allowed the wanton conduct of a defendant who kills another motorist when driving while intoxicated to support a conviction for second-degree murder.[77]

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72. 312 N.C. 710, 715 (1985).

73. *Id.* at 712–13 (citing G.S. 97-9 and 97-10.1).

74. *See id.* (citing, *inter alia*, Warner v. Leder, 234 N.C. 727 (1952) and Wesley v. Lea, 252 N.C. 540 (1960).

75. *Pleasant*, 312 N.C. at 715. The court's description of constructive intent in *Pleasant* echoes descriptions found in earlier cases. Foster v. Hyman, 197 N.C. 189, 192 (1929) ("[T]he intention to inflict injury may be constructive as well as actual. It is constructive where the wrongdoer's conduct is so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of willfulness and wantonness equivalent in spirit to an actual intent.").

76. *Compare Pleasant*, 312 N.C. at 714 (defining *wanton conduct* as "an act manifesting a reckless disregard for the rights and safety of others" and *willful negligence* as "the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed"), *with Givens*, 273 N.C. at 49–50 (defining a wanton act as one "'done of wicked purpose, or . . . done needlessly, manifesting a reckless indifference to the rights of others'" and willful negligence as conduct involving "'a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed on the person by operation of law.'"). *See also Grad*, 312 N.C. at 313 (defining wanton conduct as an act "'done of wicked purpose, or . . . done needlessly, manifesting a reckless indifference to the rights of others'").

The actual phrase used by the court in *Pleasant* was "willful, reckless and wanton negligence." 312 N.C. at 714. This bulletin substitutes the phrase "willful and wanton conduct" because of its widespread use in other cases and because, as the court concedes in *Pleasant*, "reckless" and "wanton" are essentially synonymous.

77. *Pleasant*, 312 N.C. at 715 (citing State v. Snyder, 311 N.C. 391 (1984)).

B. The Degree of Willful and Wanton Conduct

The *Pleasant* decision might seem at first glance to suggest that willful and wanton conduct is not always enough for constructive intent. After all, the decision specifies that constructive intent is present when a defendant's behavior is "*so reckless or manifestly indifferent* to the consequences that a finding of willfulness and wantonness *equivalent in spirit to actual intent* is justified."[78] Does this wording dictate that only willful and wanton negligence of the highest degree will sustain a finding of constructive intent? Here are three reasons why this last question should probably be answered in the negative:

- The *Pleasant* decision includes straightforward declarations that constructive intent exists whenever willful and wanton conduct leads to injury. In one place, for instance, it says: "We conclude that injury to another resulting from willful [and] wanton . . . negligence should . . . be treated as an intentional injury for purposes of [the WCA]."[79]
- It is difficult, if not impossible, to conceive of behavior less reckless than the *Pleasant* defendant's alleged conduct that would still qualify as willful and wanton, yet the supreme court deemed the defendant's behavior sufficient to show constructive intent. Compare, for instance, the *Pleasant* defendant's actions with those of the decedent in *Pearce v. Barham*, who was also held to have acted willfully and wantonly.[80] The decedent drove a car with slick tires past a stop sign and through an intersection at a speed of 90 miles per hour or more in drizzling rain and, as a result, lost control of the car, which overturned, killing the decedent and injuring the plaintiff and another passenger. The *Pleasant* defendant drove a truck too close to the plaintiff as a prank. Reckless, yes, but hardly equivalent in degree to the *Pearce* decedent's utter disregard for stop signs, speed limits, bad weather, passengers, and fellow motorists.
- Despite the obvious difference in degree between the *Pleasant* defendant's actions and those of the *Pearce* defendant, judges could find it challenging in many cases to distinguish among degrees of willfulness and wantonness. This view is bolstered by the *Pleasant* decision's statement that willful and wanton conduct inhabits a "twilight zone" somewhere between ordinary negligence and actual intent.[81] Determining that behavior falls within the twilight zone is one thing; fixing its location within the zone relative to other instances of willful and wanton conduct is something else.

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78. Pleasant v. Johnson, 312 N.C. 710, 715 (1985) (emphases added).

79. *Id*. It might be argued that the constructive intent doctrine articulated in *Pleasant* does not apply to tort law generally but only when the issue is whether the WCA bars a personal injury claim directly against a co-worker for an on-the-job injury. Nothing in *Pleasant* indicates that the court wished to restrict the constructive intent doctrine to worker's compensation cases. On the contrary, one of the court's justifications for applying the doctrine in *Pleasant* was its acceptance of the doctrine in so many other situations. In any event, the North Carolina Court of Appeals has applied the doctrine in personal injury cases that did not arise in the employment context, including cases in which public official immunity was at issue. Hart v. Brienza, ____ N.C. App. ____, ____, 784 S.E.2d 211, 215–16 (2016); Brown v. Town of Chapel Hill, 233 N.C. App. 257, 269–71 (2014); Wilcox v. City of Asheville, 222 N.C. App. 285, 289–90 (2012); Lynn v. Burnette, 138 N.C. App. 435, 441–43 (2000).

80. 271 N.C. 285, 287 (1967) ("There was evidence sufficient to support a finding that Calvin's conduct was both wilful and wanton.").

81. *Pleasant*, 312 N.C. at 714.

The *Pleasant* decision, then, appears to hold that an individual who willfully and wantonly harms another's person or property may be regarded as having acted intentionally for purposes of tort liability.

C. Constructive Intent in Battery Cases

The North Carolina Court of Appeals and several federal courts have interpreted North Carolina law to allow gross negligence to supply the intent necessary for a battery claim.[82] The opinion of the court of appeals in *Lynn v. Burnette* could create the erroneous impression that, when it comes to battery, gross negligence and willful and wanton conduct are different standards.[83] The plaintiff in *Lynn* was struck by a bullet when the defendant—angry at finding him and her love interest in the company of two other women—fired a pistol at a tire on the plaintiff's automobile. Asked to decide whether the defendant's actions could sustain both an intentional tort claim and a claim of negligence, the court made the following observation: "Battery need not necessarily be perpetrated with malice, willfulness or wantonness. Indeed, the intent required for battery may be supplied by grossly or culpably negligent conduct."[84]

At first glance, these two sentences seem to imply that the gross negligence that will support a finding of constructive intent on a battery claim is something less than willful and wanton conduct.[85] Reading the sentences in that way, however, is probably a mistake.

- The authority for *Lynn*'s statement that battery can exist apart from malice, willfulness, and wantonness is *Myrick v. Cooley*, the police battery case discussed in section IV.B.[86] The term "gross negligence" does not appear in *Myrick*, so the court's reference to willful and wanton conduct in that case says nothing whatsoever about the relationship between the two standards.
- The *Lynn* decision cites *Pleasant* as authority for its assertion that gross negligence can supply the intent for a battery.[87] The *Pleasant* decision discusses willful and wanton conduct, not gross negligence. The citation to *Pleasant* thus suggests that the court in *Lynn* understood gross negligence and willful and wanton conduct to be the same thing.
- Even if *Lynn* is rightly interpreted to draw a distinction between willful and wanton conduct and gross negligence, *Lynn* has been superseded by the supreme court's decision in *Yancey v. Lea*.[88] In *Yancey* the high court admitted that it had previously used the terms

82. Jenkins v. Averett, 424 F.2d 1228, 1231 (4th Cir. 1970) (interpreting North Carolina law to permit "gross or culpable" negligence to supply the intent for a battery claim); Maney v. Fealy, 69 F. Supp. 3d 553, 565 (2014) ("Instead, the intent required for a battery claim may be supplied by grossly or culpably negligent conduct." (internal quotation marks omitted)); *Lynn*, 138 N.C. App. at 440 ("Indeed, the intent required for battery may be supplied by grossly or culpably negligent conduct.").

83. 138 N.C. App. 435 (2000).

84. *Id.* at 439–40 (internal citation omitted).

85. At least one federal court appears to have interpreted the sentences to mean just that. *Maney*, 69 F. Supp. 3d at 565 ("[T]he North Carolina Court of Appeals has found that battery, specifically, need not necessarily be perpetrated with malice, willfulness or wantonness . . . Instead, the intent required for a battery claim may be supplied by grossly or culpably negligent conduct." (citations omitted) (internal quotation marks omitted)).

86. 91 N.C. App. 209 (1988), *cited in Lynn*, 138 N.C. at 439–40.

87. 138 N.C. App. at 440 (citing Pleasant v. Johnson, 312 N.C. 710, 715 (1985)).

88. 354 N.C. 48, 51 (2001).

> "willful and wanton conduct" and "gross negligence" interchangeably.[89] It then defined gross negligence in language nearly identical to the description of willful and wanton conduct found in *Givens*.[90] The court of appeals has recently acknowledged that *Yancey* equates gross negligence with willful and wanton conduct.[91]

In sum, to prove constructive intent, a plaintiff must demonstrate that the defendant's conduct rose to the level of willful and wanton conduct, a standard generally synonymous with gross negligence. This leaves the question of whether or when constructive intent may be said to encompass malice to the detriment of public official immunity.

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89. *Id.* at 52 ("In determining or defining gross negligence, this Court has often used the terms 'willful and wanton conduct' and 'gross negligence' interchangeably to describe conduct that falls somewhere between ordinary negligence and intentional conduct.").

90. Specifically, the court defined *gross negligence* as follows:

> [G]ross negligence [is] wanton conduct done with conscious or reckless disregard for the rights and safety of others. An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others . . . The true conception of wilful [sic] negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed on the person by the operation of law.

Id. at 52–53 (internal quotation marks omitted) (citations omitted).

Nearly five years after *Yancey*, in a personal injury case arising from a police pursuit, the supreme court concluded that, "while willful and wanton conduct includes gross negligence, gross negligence may be found even where a party's conduct does not rise to the level of deliberate or conscious action implied in the combined terms of 'willful and wanton.'" Jones v. City of Durham, 360 N.C. 81, 86 (2005). Arguably this statement in *Jones* deviates in some measure from *Yancey*. This apparent inconsistency is of no import, however, because the court later withdrew its *Jones* opinion. 361 N.C. 144, 146 (2006).

91. Needham v. Price, ____ N.C. App. ____, ____, 768 S.E.2d 160, 164 (2015), *rev'd in part on other grounds*, ____ N.C. ____, 780 S.E.2d 549 (2015).

The courts are compelled by statute to treat willful and wanton conduct and gross negligence as separate categories of conduct in one circumstance. Statutory provisions enacted in 1995 permit punitive damages to be awarded in a civil case upon a finding of fraud, malice, or willful and wanton conduct but not upon a finding of gross negligence. G.S. 1D-5(7); 1D-15; 28A-18-2(b)(5). Prior to that time, the wrongful death statute, G.S. 28A-18-2, allowed punitive damages to be awarded in a wrongful death case based on a finding of malice, willful or wanton injury, *or* gross negligence. 1995 N.C. Sess. Laws 1825–828, ch. 514. The court of appeals concluded that, by listing gross negligence as a separate basis for punitive damages, the legislature had intended the term to mean something other than willful and wanton conduct. Cole v. Duke Power Co., 81 N.C. App. 213, 218 (1986). The court struggled, however, to draw a meaningful distinction between the two concepts, ultimately defining gross negligence in the punitive damages context to consist of something greater than ordinary negligence but less than willful and wanton conduct. The court drew this rather unhelpful definition from *Smith v. Stepp*, 257 N.C. 422 (1962), which interestingly enough was decided under Virginia law.

Not surprisingly the courts have resisted distinguishing between gross negligence and willful and wanton conduct in other areas of tort law. *See* Villepigue v. City of Danville, Va., 190 N.C. App. 359, 363 (2008) (rejecting the plaintiff's contention that, in finding the defendant police officer not liable under G.S. 20-145 for injuries inflicted during a vehicular pursuit, the trial court committed reversible error by describing gross negligence as willful and wanton conduct).

D. Constructive Intent/Malice and Public Official Immunity

The supreme court's decisions on the malice exception to public official immunity—*Betts*, *Givens*, and *Grad*—and *Pleasant*'s constructive intent standard refer to willful and wanton conduct. Does it follow that behavior adequate to prove constructive intent will also support a finding of malice sufficient to overcome public official immunity? The North Carolina Court of Appeals took up this very issue in *Wilcox v. City of Asheville*.[92]

The plaintiff in *Wilcox* sued three police officers, alleging their actions constituted negligence, gross negligence, and willful and wanton conduct. According to the evidence, law enforcement began pursuing the automobile in which the plaintiff was a passenger after the driver sped away from a traffic stop. The pursuit lasted about 20 minutes, reaching speeds of not more than 45 miles per hour. The three defendant police officers fired shots at the car. The first officer fired 6 shots as the car approached his location at 25 miles per hour. The other two officers fired a total of 13 shots as the car approached their position at 20 miles per hour with a flat tire. One of the two officers then fired 8 more shots as the vehicle traveled away from him. Of the 27 shots fired, two struck the plaintiff. All three of the officers who fired had been advised over the radio not to join the pursuit.

The officers asserted public official immunity in a motion for summary judgment, but the trial court denied their motion, prompting the officers to appeal. Relying on *Grad*'s definition of malice, the court of appeals explained that a public official's behavior may be classified as malicious if it was (1) done wantonly, (2) contrary to the defendant's duty, and (3) intended to be injurious to another. With regard to the third element—intent to injure—the defendants argued that the plaintiff could not prevail without proving they had actually desired to harm her. The plaintiff maintained that evidence of constructive intent to injure should suffice.

The court sided with the plaintiff, holding that evidence of constructive intent can show the desire to injure necessary for a finding of malice. This conclusion appears to be an accurate statement of the law in light of precedents such as *Betts*, *Givens*, and *Grad*, which describe legal malice and constructive intent in terms of willful and wanton conduct. Moreover the holding seems consistent with the supreme court's "broad acceptance" of the constructive intent doctrine in a variety of civil and criminal contexts.[93]

The court of appeals, however, expressly declined to hold that constructive intent will *always* satisfy the malice exception to public official immunity. The defendants had insisted at oral argument that applying the constructive intent doctrine to public official immunity would erode the immunity by reducing the exception to one for "reckless indifference." In response to this concern, the court tried to narrow the impact of *Wilcox* in two ways.

- The court specified that any use of constructive intent to defeat public official immunity must accord with the immunity's goals, including its primary goal of enabling officials to serve without excessive fear of personal liability. To analyze whether applying the doctrine in *Wilcox* would frustrate the immunity's goals, the court turned to subsection 15A-401(d) of the North Carolina General Statutes (hereinafter G.S.), which sets out the conditions under which law enforcement officers may employ deadly force without incurring criminal or civil liability. Subsection (d) does not authorize "willful, malicious or criminally negligent conduct . . . which endangers any person or property." To the court, this exclusion reflected the General Assembly's judgment that officers should face the prospect of

92. 222 N.C. App. 285 (2012).
93. *Wilcox*, 222 N.C. App. at 290.

personal liability if they employ deadly force recklessly or with heedless indifference to the rights and safety of others. In light of the legislature's determination, the court felt constrained to conclude that "allowing constructive intent to satisfy the malice exception to public official immunity [in *Wilcox*] . . . would not hinder the achievement of the goals of public official immunity."[94]

- The court emphasized that a plaintiff must prove more than mere reckless indifference to establish that a public official has acted maliciously. Using language that appears in *Pleasant*, the court stated that the plaintiff must show that the official's actions were "'*so reckless or so manifestly indifferent to the consequences* . . . as to justify a finding of [willfulness] and wantonness *equivalent in spirit to an actual intent*.'"[95] The court went on to hold that there was enough evidence of constructive intent in *Wilcox* to warrant the denial of the defendant's summary judgment motion.

The court's efforts to circumscribe the impact of *Wilcox* are problematic. How is a lower court to assess whether applying the constructive intent doctrine in a particular case would undermine the goals of public official immunity? The court of appeals looked to subsection (d) of G.S. 15A-401 in *Wilcox*, but not every attempt by a plaintiff to overcome public official immunity with evidence of constructive intent will implicate a statutory provision.

To the extent that *Wilcox* mandates some form of extraordinary willful and wanton conduct for a finding of constructive intent, it may raise the bar for a finding of constructive intent a bit higher than the level dictated by supreme court precedent. As argued earlier in this bulletin, *Pleasant* should not be construed to require lower courts to distinguish among degrees of willful and wanton conduct when they evaluate the adequacy of constructive intent evidence. Likewise, nothing in *Betts*, *Givens*, or *Grad* indicates that willful and wanton conduct of an exceptionally elevated kind is necessary for an official to waive public official immunity through malicious conduct.

Even if *Wilcox* imperfectly states the law of constructive intent, the court of appeals plainly wished to import the supreme court's constructive intent standard into malice determinations in immunity cases. Taken as a whole, then, *Betts*, *Givens*, *Grad*, and *Wilcox* show that the very same constructive intent that will satisfy the intent element of a tort claim will also support a finding of malice, except when application of the constructive intent doctrine would frustrate the goals of public official immunity.[96]

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94. *Id.* at 291.

95. *Id.* at 292 (quoting Foster v. Hyman, 197 N.C. 189, 192 (1929)) (alterations in *Wilcox*) (emphases in *Wilcox*).

96. *See*, *e.g.*, Mejia v. Bowman, ____ N.C. App. ____, 785 S.E.2d 185, *7 (2016) (unpublished) (noting that, "where appropriate, evidence of a defendant's constructive intent [to injure] may be used" to support a finding that a defendant waived public official immunity through malicious action).

There are a few pre-*Wilcox* cases in which the court of appeals indicated that a plaintiff had to prove more than willful and wanton conduct or gross negligence by a public official to overcome a defense of public official immunity. Schlossberg v. Goins, 141 N.C. App. 436, 446 (2000) (citing *Robinette v. Barriger* for the proposition that allegations of reckless indifference are not enough to defeat public official immunity); Robinette v. Barriger, 116 N.C. App. 197 (1994) (rejecting plaintiff's contention that a finding of malice sufficient to overcome public official immunity could be based on allegations that a public official had acted wrongly and with reckless indifference to harmful consequences), *aff'd per curiam,* 342 N.C. 181 (1995), *overruled on other grounds*, 347 N.C. 97 (1997); Reid v. Roberts, 112 N.C. App. 222, 225 (1993) (concluding that allegations of gross negligence did not adequately allege that defendant public officials

VI. A Framework for Analyzing When the Malice Exception Applies to Public Official Immunity

The malice exception to public official immunity should not be understood to apply automatically whenever a public official faces an intentional tort claim, even though *Hawkins* and the cases that follow it contain overly broad pronouncements to that effect. Sound precedents from North Carolina's appellate courts hold that some intentional torts, including assault and battery, when supported by actual intent, can occur without malice, actual or legal. On the other hand, decisions from those courts establish that constructive intent will usually—though perhaps not always—support a finding of malice when public official immunity is at stake. The following principles, drawn from the case law, can be used to determine whether the presence of malice precludes an official who acted contrary to duty from prevailing on a defense of public official immunity in a particular case.

- ***For tort claims premised on actual intent, the malice exception to public official immunity will apply in the following situations:***
  - *When the plaintiff makes out a tort claim for which malice is an element.* Malicious prosecution is an example of a tort in this category.
  - *When the plaintiff establishes actual malice.* Public official immunity can be waived through conduct that establishes a higher degree of malice than legal malice, the *minimum* showing required to satisfy the malice exception to public official immunity.
  - *When the defendant's intentional conduct is accompanied by willful and wanton conduct.* Conduct that starts out as intentional but not malicious can veer into legal malice. For instance, if a police officer, acting pursuant to a valid warrant, mistakenly arrests the wrong person because he did not exercise reasonable diligence to ascertain whether the arrestee is the individual named in the warrant, the officer's conduct amounts to false imprisonment, but the officer's actions are not necessarily malicious.[97] However, if the officer continues to hold the individual after learning he or she has arrested the wrong person, then, depending on the precise circumstances, the officer's actions might provide grounds for a finding of legal malice, thus depriving the officer of public official immunity.
- ***For tort claims resting on evidence of constructive intent, the malice exception to public official immunity applies, unless a finding of malice would undermine the goals of public official immunity.*** The challenge here will be figuring out when applying the malice

had acted maliciously, corruptly, or beyond the scope of their duties). These cases are plainly incompatible with *Wilcox,* and they were almost certainly at odds with both *Grad* and *Givens* when they were decided. *See* Anita R. Brown-Graham & Jeffrey S. Koeze, *Immunity from Personal Liability under State Law for Public Officials and Employees: An Update*, Local Gov. L. Bull. No. 67, April 1995, at 2 n.10 (observing that under *Robinette* and *Reid* a plaintiff must allege more than gross negligence to overcome public official immunity but acknowledging that *Givens* seems to allow gross negligence to support a finding that a public official acted maliciously). They are also inconsistent with earlier decisions in which the court of appeals had acknowledged that gross negligence could pierce public official immunity. *See, e.g.*, Thompson Cadillac–Oldsmobile, Inc., v. Silk Hope Auto., Inc., 87 N.C. App. 467, 469 (1987) ("Plaintiff's allegations against defendants . . . allege nothing more than mere negligence. There are no allegations of corrupt or malicious actions, actions outside the scope of defendants' duties, or gross negligence. Thus, if defendants . . . are public officers or officials rather than employees, the complaint has failed to state a claim for which relief can be granted.").

97. *See supra* note 54.

exception would be inconsistent with the immunity's goals. The appellate courts have yet to provide much practical guidance on the subject.

Appendix A—Local Government Positions Eligible for Public Official Immunity

Assistant Jailers
Baker v. Smith, 224 N.C. App. 423, 434 (2012)

Building Inspector (not chief)
Woodard v. Cleveland Cty., 202 N.C. App. 586 (2010) (unpublished)
McCoy v. Coker, 174 N.C. App. 311, 319 (2005)

Chief Building Inspector
Wiggins v. City of Monroe, 73 N.C. App. 44, 49 (1985)
Pigott v. City of Wilmington, 50 N.C. App. 401, 405 (1981)

Chief Jailer
Slade v. Vernon, 110 N.C. App. 422, 429 (1993)

City Council Members
Hope v. Hope, 163 N.C. App. 783 (2004) (unpublished)

City Manager
Morrison-Tiffin v. Hampton, 117 N.C. App. 494, 503 (1995)

City Park Commissioners
Smith v. Hefner, 235 N.C. 1, 7 (1952)

Code Enforcement Officer of County Planning Department
Woodard v. Cleveland Cty., 202 N.C. App. 586 (2010) (unpublished)

Coroners
Gillikin v. U.S. Fid. & Guar. Co. of Baltimore, Md., 254 N.C. 247, 249 (1961)

County Animal Control Lead Officer
Kitchin *ex rel.* Kitchin v. Halifax Cty., 192 N.C. App. 559, 568 (2008)

County DHS Social Worker
Dalenko v. Wake Cty. Dep't of Human Servs., 157 N.C. App. 49, 56 (2003)
Hobbs *ex rel.* Winner v. N. Carolina Dep't of Human Res., 135 N.C. App. 412, 422 (1999)

County DSS Social Worker[1]
Hunter v. Transylvania Cty. Dep't of Soc. Servs., 207 N.C. App. 735, 740 (2010)

County EMS Director
Dempsey v. Halford, 183 N.C. App. 637, 640 (2007)

County EMS Medical Director
Dempsey v. Halford, 183 N.C. App. 637, 640 (2007)

County Manager
Satorre v. New Hanover Cty. Bd. of Comm'rs, 165 N.C. App. 173, 180 (2004)

County Medical Examiner
Green v. Kearney, 203 N.C. App. 260, 268 (2010)
Epps v. Duke Univ., Inc., 116 N.C. App. 305, 309 (1994)
Cherry v. Harris, 110 N.C. App. 478, 480–81 (1993)
In re Grad v. Kaasa, 312 N.C. 310, 313 (1984)

Director of County DSS
Meyer v. Walls, 122 N.C. App. 507, 516 (1996), *aff'd*, 347 N.C. 97 (1997)
Hare v. Butler, 99 N.C. App. 693, 700 (1990)

Director of County Health Department
Kitchin *ex rel.* Kitchin v. Halifax Cty., 192 N.C. App. 559, 568 (2008)
Satorre v. New Hanover Cty. Bd. of Comm'rs, 165 N.C. App. 173, 179 (2004)

1. Social workers can qualify as public officials, but only when exercising significant discretion and performing duties statutorily assigned to the DSS director. *See* Hunter v. Cty. Dep't of Soc. Servs., 207 N.C. App. 735, 740 (2010) (noting that public official immunity protected a social worker in one case from liability for allegedly conducting an inadequate investigation into reports of infant neglect because DSS directors have a statutory duty to investigate cases of abuse and neglect but did not extend to social workers in another case involving the suicide of a mentally incompetent person because DSS directors had no comparable duty regarding incompetent adults).

Director of Federal Programs for County School System
Farrell v. Transylvania Cty. Bd. of Educ., 175 N.C. App. 689, 696 (2006)

Housing Inspectors
Al-Nasra v. Cleveland Cty., 691 S.E.2d 132 (2010) (unpublished)

Law Enforcement Officers Generally
State *ex rel.* Jacobs v. Sherard, 36 N.C. App. 60, 65 (1978)

Police Chief
Wilcox v. City of Asheville, 222 N.C. App. 285, 287 (2012)
Morrison-Tiffin v. Hampton, 117 N.C. App. 494, 503 (1995)

Police Corporal
Schlossberg v. Goins, 141 N.C. App. 436, 446 (2000)

Police Officer
Wilcox v. City of Asheville, 222 N.C. App. 285, 287 (2012)
Campbell v. Anderson, 156 N.C. App. 371, 376 (2003)
Schlossberg v. Goins, 141 N.C. App. 436, 446 (2000)
Shuping v. Barber, 89 N.C. App. 242, 248 (1988)

Probation Officer
Lambert v. Cartwright, 160 N.C. App. 73, 77 (2003)

School Assistant Principal
Jetton v. Caldwell Cty. Bd. of Educ., 185 N.C. App. 159 (2007) (unpublished)

School Principal
Jetton v. Caldwell Cty. Bd. of Educ., 185 N.C. App. 159 (2007) (unpublished)
Webb *ex rel.* Bumgarner v. Nicholson, 178 N.C. App. 362, 366 (2006)
Gunter v. Anders, 114 N.C. App. 61, 68, *on reh'g*, 115 N.C. App. 331 (1994)

School Trustees
Smith v. Hefner, 235 N.C. 1, 7 (1952)

Sheriff
Slade v. Vernon, 110 N.C. App. 422, 429 (1993)
Messick v. Catawba Cty., N.C., 110 N.C. App. 707, 718 (1993)

Sheriff's Deputies
Marlowe v. Piner, 119 N.C. App. 125, 128 (1995)
Messick v. Catawba Cty., N.C., 110 N.C. App. 707, 718 (1993)

Superintendent of County School System
Jetton v. Caldwell Cty. Bd. of Educ., 185 N.C. App. 159 (2007) (unpublished)
Gunter v. Anders, 114 N.C. App. 61, 68, *on reh'g*, 115 N.C. App. 331 (1994)

Town Fire Chief
Willis v. Town of Beaufort, 143 N.C. App. 106, 112 (2001)

Appendix B—Local Government Positions Ineligible for Public Official Immunity

Assistant Director of County DSS
Hare v. Butler, 99 N.C. App. 693, 700 (1990)

County DSS Social Worker
Meyer v. Walls, 122 N.C. App. 507, 516 (1996), *aff'd*, 347 N.C. 97 (1997)

County Emergency Medical Technician
Fraley v. Griffin, 217 N.C. App. 624, 629 (2011)

County Health Department Environmental Health Specialist & Environmental Health Supervisor
Block v. Cty. of Person, 141 N.C. App. 273, 282 (2000)

Director of County Animal Control Facility
Kitchin *ex rel.* Kitchin v. Halifax Cty., 192 N.C. App. 559, 568 (2008)

Employee of County Health Department
Kitchin *ex rel.* Kitchin v. Halifax Cty., 192 N.C. App. 559, 568 (2008)

Program Administrator for Child and Family Services for County DSS
Hare v. Butler, 99 N.C. App. 693, 700 (1990)

Protective Services Investigation Supervisor for County DSS
Hare v. Butler, 99 N.C. App. 693, 700 (1990)

School Bus Driver
Hansley v. Tilton, 234 N.C. 3, 8 (1951)

School Crossing Guard
Isenhour v. Hutto, 350 N.C. 601, 612 (1999)

Staff Members of Elementary School Afternoon Program
Schmidt v. Breeden, 134 N.C. App. 248, 250 (1999)

Supervisor of Adult Protective Services Unit of County DSS
Meyer v. Walls, 122 N.C. App. 507, 516 (1996), aff'd, 347 N.C. 97 (1997)

Teachers
Farrell *ex rel.* Farrell v. Transylvania Cty. Bd. of Educ., 199 N.C. App. 173, 179 (2009)
Harper *ex rel.* Wiggins v. Doll, 168 N.C. App. 728 (2005) (unpublished)
Mullis v. Sechrest, 126 N.C. App. 91, 98 (1997) *rev'd on other grounds*, 347 N.C. 548 (1998)