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LEGAL LIABILITY OF SOCIAL SERVICES AGENCIES, OFFICIALS, AND EMPLOYEES

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State and county social services agencies, officials, and employees often are concerned about their potential legal liability.

The expense and the trouble of lawsuits are unavoidable costs of doing [the] ... government's business. [Eventually, a government agency, official, or employee will, in the course of the government's activities,] ... cause damage to something or somebody. Indeed, even without any legitimate basis, a ... government [agency] and its employees may still be made defendants to a ... lawsuit. The challenge for [government agencies] ... is therefore not the impossible task of eliminating lawsuits. Rather, the challenge is the difficult task of providing [public] services while minimizing the cost and disruption that lawsuits bring. The first step in accomplishing that task is learning the basic legal principles that [govern] ... the liability of [government agencies] ... and ... public servants.¹

This *Social Services Law Bulletin* summarizes the legal principles that govern the liability of state and county social services agencies, officials, and employees in lawsuits brought under North Carolina's tort law and under 42 U.S.C. § 1983.

What Does "Liability" Mean?

In the law, the term "liability" generally refers to

- an obligation, sanction, or responsibility (for example, the obligation to pay damages to compensate a person for injury to his or her person or property)

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¹ Anita R. Brown-Graham, "Civil Liability of the Local Government and Its Officials and Employees," Article 12 in David M. Lawrence (ed.) *County and Municipal Government in North Carolina* (Chapel Hill: Institute of Government, The University of North Carolina at Chapel Hill, 2007), 2 (available at: www.sog.unc.edu/pubs/cmgs/cmgl2.pdf).

- that is imposed pursuant to federal, state, or local law (including the federal and state constitutions; federal and state statutes, administrative rules, and regulations; local ordinances; and the common law)²
- by a court or quasi-judicial agency
- in a civil, criminal, or administrative proceeding or lawsuit
- on a person (including a local government official or employee) or other legal entity (including a local government or local government agency)
- in connection that person's or entity's actions or omissions or the acts or omissions of persons acting on behalf of that person or entity.³

Establishing Liability: Legal Proceedings

The person or entity against whom liability is asserted in a legal proceeding generally is referred to as the "defendant" or "respondent." In a civil or administrative proceeding, the person who brings the proceeding and seeks to impose liability on the defendant generally is referred to as the "plaintiff" or "petitioner." Criminal proceedings against defendants are brought by the State.

In order to bring a legal proceeding against a defendant, the plaintiff must have "standing," that is, legal authority to assert a particular legal claim or to seek a particular legal remedy. "Standing" generally requires that the plaintiff have been injured in some way by the defendant. In addition, to impose liability on a defendant, a court must have "jurisdiction," that is, legal authority to hear and decide the case.

A plaintiff who brings a lawsuit against a defendant has the burden of proving the plaintiff's

² Liability also be imposed with respect to legal obligations that are voluntarily assumed under a contract or other legal agreement.

³ The legal liability of North Carolina local governments and local government officials and employees is discussed in detail in Anita R. Brown-Graham, *A Practical Guide to the Liability of North Carolina Cities and Towns* (Chapel Hill: Institute of Government: The University of North Carolina at Chapel Hill, 1999) and Brown-Graham, "Civil Liability of the Local Government and Its Officials and Employees." See also Thomas H. Thornburg, *An Introduction to Law for North Carolinians* (Chapel Hill: Institute of Government, The University of North Carolina at Chapel Hill, 2nd ed. 2000).

legal claim against the defendant. This means that the plaintiff must present sufficient, legally-admissible evidence to establish a factual basis for each element of the plaintiff's legal claim. In a civil lawsuit or administrative proceeding, the plaintiff's burden generally is to prove facts to support his or her claim by a preponderance of the evidence. In a criminal proceeding, the State's burden is to prove the elements of the offense beyond a reasonable doubt. A defendant may avoid liability by asserting a valid legal defense or claiming legal immunity from liability.

Civil and Criminal Liability

Liability may be imposed in connection with several different types of legal claims. Criminal liability, for example, results from a defendant's violation of federal or state criminal laws.⁴ Civil liability may result from a defendant's breach of a contract between the defendant and the plaintiff.⁵ Civil liability also may result from a defendant's violation of civil statutes or rules.⁶

Tort Liability

Civil liability also may be imposed in connection with a defendant's "tortious" conduct.⁷ A "tort" is a wrongful act or omission, other than a criminal act or breach of contract, that causes personal injury or damage to

⁴ A defendant who is found criminally liable may be incarcerated in jail or prison, placed on probation, or ordered to pay a fine. State and county social services officials and employees may be held criminally liable if they violate federal or state criminal laws (for example, by embezzling public funds, misusing public property, disclosing confidential information, or engaging in conflicts of interest) in connection with their public duties.

⁵ If a defendant is found liable for breaching a contract, the court may enter a judgment against the defendant requiring him or her to compensate the plaintiff for the plaintiff's losses resulting from the breach. The State or a county may be held civilly liable if a state or county social services agency enters into a valid, legal contract and the agency or an official or employee of the agency breaches the contract.

⁶ The civil liability of state and county social services agencies, officials, and employees under one federal statute, 42 U.S.C. §1983, is discussed in the penultimate section of this bulletin.

⁷ This bulletin focuses primarily on the tort liability of state and county social services agencies, officials, and employees.

property and with respect to which the law provides a legal cause of action and a legal remedy.

Tort law serves to protect a person's interest in his or her bodily security, tangible property, financial resources, or reputation. Unlike contract law, in which the appropriate standard of conduct is set by specific promises made between two parties, in tort law the defendant is being held to a standard of conduct (or duty) that is imposed by law. To succeed in the lawsuit, the plaintiff must demonstrate that the defendant violated that duty and that the violation caused an injury.

Compensation is the primary concern of tort law. This area of law is premised on the belief that individuals who [have been harmed by the wrongful conduct of others] ... should not be required to bear the loss; instead, the person whose wrongful act caused the harm must pay to restore the injured party to where [he or she] ... was before the harm. Another purpose of tort law is to deter people from engaging in conduct likely to cause personal injury or property damage. Tort law assumes that people will be more careful in conducting their day-to-day activities if they have to pay for any harm that results.⁸

There are two broad categories of torts:

1. intentional torts, and
2. unintentional torts or negligence.

"Intentional torts are deliberate wrongful acts that cause personal injury or property damage."⁹ A defendant may be held liable for an intentional tort if he or she "deliberately engaged in the wrongful act" regardless of whether he or she "intended the consequences of the act [or] ... the particular damages caused."¹⁰ The tort of "battery," which the law defines as the "intentional touching or striking of another person without ... that person's consent or a legally recognized authorization," is one example of an intentional tort.¹¹ Defamation (slander or libel) is another.

By contrast, a defendant may be held civilly liable for negligence if

⁸ Brown-Graham, "Civil Liability of the Local Government and Its Officials and Employees," 2.

⁹ Brown-Graham, "Civil Liability of the Local Government and Its Officials and Employees," 3.

¹⁰ Brown-Graham, "Civil Liability of the Local Government and Its Officials and Employees," 3.

¹¹ Brown-Graham, "Civil Liability of the Local Government and Its Officials and Employees," 3.

1. the defendant breaches his or her legal duty to exercise reasonable care in connection with his or her activities;
2. the defendant's failure to exercise reasonable care results in injury to another person or that person's property; *and*
3. the injury was a reasonably foreseeable result of the defendant's lack of care.¹²

One example of a negligent tort is an automobile accident that is caused by a driver's inattention and results in injury to another driver or the other driver's car.

If a defendant is found liable for an intentional tort or for negligence, a judgment for monetary damages may be entered against him or her. In most cases, the damages awarded in tort claims are "compensatory" damages (damages that are awarded to compensate the plaintiff for his or her physical injury, the damage to his or her property, incurred medical expenses, lost future earnings, pain and suffering, or other losses). Courts sometimes award "punitive" damages against a defendant in order to "punish [the] defendant for especially culpable conduct and to deter such conduct in the future."¹³ Punitive damages, however, "generally are not recoverable from a governmental body or agency," though they may be assessed against a "public employee or official in an 'individual-capacity' lawsuit."¹⁴

Tort Liability of Social Services Agencies, Officials, and Employees

State and county social services agencies, officials, and employees may be sued, and sometimes held liable, for intentional torts or negligence. For example, they might be sued by:

- the mother of a deceased child who alleges that her child died as a result of a social worker's failure to promptly and thoroughly investigate a report regarding the child's abuse or neglect by the child's father and

¹² Brown-Graham, "Civil Liability of the Local Government and Its Officials and Employees," 4. In North Carolina, a defendant may avoid liability for his or her negligent acts or omissions by proving that the plaintiff's injuries were caused, in part, by the plaintiff's "contributory negligence."

¹³ Brown-Graham, *A Practical Guide to the Liability of North Carolina Cities and Counties*, 5-5, citing *Jones v. McCaskill*, 99 N.C. App. 764, 394 S.E.2d 254 (1990).

¹⁴ Brown-Graham, *A Practical Guide to the Liability of North Carolina Cities and Counties*, 5-6.

failure to take action to protect the child from that abuse or neglect;¹⁵

- by foster parents who allege that a foster child sexually abused their daughter and that the child's injuries resulted from a social worker's negligence in failing to inform the foster parents that the foster child had lived in an environment of sexual abuse and was likely to reenact that abuse on younger, more vulnerable children;¹⁶
- a child who was placed in a foster home by the county social services department and was injured by the foster parent's alleged negligence;¹⁷
- a parent who claims that he or she was falsely accused of child abuse or neglect by a county social services department;¹⁸
- the estate of a deceased, incompetent adult who allegedly died as a result of a social worker's failure to discharge his or her responsibilities as the adult's guardian;¹⁹
- a person who is injured by slipping on a wet floor at the county social services office;
- a social services employee who gets into an argument with another social services employee and is assaulted by the other employee at work;
- a client of a social services agency who claims that the agency unlawfully disclosed confidential information about the client; or
- an individual who is injured in a traffic accident involving an automobile driven by a social services employee during the course of the employee's official duties.

Although many of the legal rules that apply to tort lawsuits against private individuals, employers, and other legal entities also apply to tort lawsuits involving

¹⁵ See *Whitaker v. Clark*, 109 N.C. App. 379, 427 S.E.2d 142 (1993); see also *Gammons v. N.C. Dept. of Human Resources*, 344 N.C. 51, 472 S.E.2d 722 (1996) and *Coleman v. Cooper*, 102 N.C. App. 650, 402 S.E.2d 577 (1991).

¹⁶ See *Hobbs v. N.C. Dept. of Human Resources*, 135 N.C. App. 412, 520 S.E.2d 595 (1999); see also *Vaughn v. N.C. Dept. of Human Resources*, 296 N.C. 683, 252 S.E.2d 792 (1979).

¹⁷ See *Creel v. N.C. Dept. of Health and Human Services*, 152 N.C. App. 200, 566 S.E.2d 832 (2002).

¹⁸ See *Hare v. Butler*, 99 N.C. App. 693, 394 S.E.2d 231 (1990).

¹⁹ See *Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997).

state and county agencies, officials, or employees, there are also a number of special legal rules that apply to the tort liability of state and county agencies, officials, and employees, including those associated with social services.

Tort Liability of the State and State Social Services Agencies

"Sovereign immunity" is a legal principle that protects the State of North Carolina and its agencies, including the state Department of Health and Human Services, from tort claims unless the State waives its immunity.²⁰ This means that even if a person has been injured by the negligence of a state employee in connection with that employee's official duties, the person cannot sue the State and the State cannot be held liable for the employee's negligence unless the State waives its sovereign immunity and allows itself to be sued and held liable.²¹

The State of North Carolina has *partially* waived its sovereign immunity with respect to certain tort claims. Under the State Tort Claims Act, a person who has been injured by the negligence of any state officer, employee, or agent acting within the scope of the officer's, employee's, or agent's scope of office, employment, agency, or authority may file a lawsuit against the State or the state department, institution, or agency under those authority the officer, employee, or agent was acting.²²

Lawsuits filed under the State Tort Claims Act are heard and decided by the North Carolina Industrial Commission.²³ If the Industrial Commission finds that the plaintiff's injuries were proximately caused by a state employee's negligence, that the plaintiff was not contributorily negligent, and that the State of North Carolina would be liable to the plaintiff if the State

²⁰ See *Zimmer v. N.C. Dept. of Transportation*, 87 N.C. App. 132, 134, 360 S.E.2d 115, 117 (1987).

²¹ The doctrine of sovereign immunity, however, does not protect a state employee from being sued and held liable for a tort committed in connection with the employee's official duties. See *Wirth v. Bracey*, 258 N.C. 505, 508, 128 S.E.2d 810, 813 (1963).

²² G.S. 143-291. The State Tort Claims Act does not apply to intentional torts committed by state officials, employees, or agents. See *Frazier v. Murray*, 135 N.C. App. 43, 48, 519 S.E.2d 525, 528 (1999).

²³ North Carolina's superior courts do not have jurisdiction to hear and decide tort claims against the State under the State Tort Claims Act.

were a private person, the Industrial Commission may enter an order requiring the State to pay up to \$500,000 in compensatory damages.²⁴

The state Department of Health and Human Services (DHHS), therefore, may be held liable under the State Tort Claims Act for the negligence of DHHS officials or employees. Furthermore, DHHS may be held liable under the State Tort Claims Act for the negligence of a *county* social services director or employee if the county social services director or employee was acting as an “agent of the State” when the negligent act or omission occurred.²⁵

Tort Liability of the County and the County Social Services Department

As noted above, the State Tort Claims Act applies only to the State and to *state* government agencies. A county or county social services department may not be sued under the State Tort Claims Act for the negligence of a county social services employee even if the employee was acting as an “agent of the State” at the time the alleged tort occurred.²⁶ A county, however, may be sued in superior court for a county employee’s tortious conduct.

Respondeat Superior: County Liability for Torts Committed by County Employees

The doctrine of *respondeat superior*, when applied to a county, means that a county (assuming it cannot claim governmental immunity, which is discussed below) is liable for the tortious conduct of its officials and employees if that conduct

1. occurs within the scope of the official’s office or the employee’s employment and in furtherance of the county’s business, *or*
2. is ratified or approved by the county.²⁷

Although committing intentional torts is not within the scope of employment of county employees, a county may be held liable for an intentional tort committed by a county employee if the employee’s act

²⁴ G.S. 143-291; G.S. 143-299.2.

²⁵ Vaughn v. N.C. Dept. of Human Resources, 296 N.C. 683, 252 S.E.2d 792 (1979); Gammons v. N.C. Dept. of Human Resources, 344 N.C. 51, 472 S.E.2d 722 (1996).

²⁶ Meyer v. Walls, 347 N.C. at 105, 489 S.E.2d at 884 (overruling *sub silentio* Coleman v. Cooper, 102 N.C. App. 650, 403 S.E.2d 577 (1991)).

²⁷ See Brown-Graham, *A Practical Guide to Liability for North Carolina Cities and Counties*, 3-3 through 3-4.

“was a means or method of doing that which he was employed to do.”²⁸ The doctrine of *respondeat superior*, however, does not extend to tortious acts committed by someone who is an independent contractor, rather than an employee of a county or county agency.²⁹

If a person has been injured by the tortious conduct of a county social services official or employee, he or she may file a lawsuit against the county,³⁰ the county social services department,³¹ one or more social services officials or employees in their “official capacities,”³² or all or some combination of those. A lawsuit that names a county social services official or employee in his or her “official capacity” is “in all respects other than name an action against the [local government or local government agency] ... for which he or she works,”³³ and any liability that is

²⁸ See Hogan v. Forsyth Country Club, 79 N.C. App. 483, 491, 340 S.E.2d 116, 122 (1986). The “mere fact that the act was unlawful and unauthorized will not preclude the employer’s liability.” Brown-Graham, *A Practical Guide to Liability for North Carolina Cities and Counties*, 3-5.

²⁹ See Creel v. N.C. Dept. of Health and Human Services, 152 N.C. App. at 202, 566 S.E.2d at 833. See also Brown-Graham, *A Practical Guide to Liability for North Carolina Cities and Counties*, 3-6 through 3-7.

³⁰ North Carolina counties are political subdivisions of the State and corporate entities that have the legal capacity to “sue and be sued” in their own names and in their own right. G.S. 153A-11; O’Neal v. Wake County, 196 N.C. 184, 145 S.E.2d 28 (1928); Johnson v. Marrow, 228 N.C. 58, 44 S.E.2d 468 (1947).

³¹ The county department of social services is an agency of the county government, not a separate or independent public, corporate, or legal entity that has the legal capacity to be sued in its own name. See Malloy v. Durham County Dept. of Social Services, 58 N.C. App. 61, 66–68, 293 S.E.2d 285, 288–90 (1993); Meyer v. Walls, 347 N.C. at 104, 489 S.E.2d at 884; Craig v. Chatham County, 143 N.C. App. 30, 31, 545 S.E.2d 455, 456 (2001). A lawsuit that names the county department of social services as a defendant, therefore, is, in essence, a lawsuit against the county, not a lawsuit against the social services department *per se*.

³² The lawsuit also might name as a defendant one or more county social services officials or employees in their “individual capacities.” Lawsuits against county social services officials or employees in their “individual capacity” are discussed in the following section of this bulletin.

³³ Brown-Graham, *A Practical Guide to Liability for North Carolina Cities and Counties*, 4-3, citing Whitaker v. Clark, 109 N.C. App. 379, 427 S.E.2d 142 (1993). See also

imposed against a county official or employee in his or her official capacity is imposed against the county rather than the official or employee personally.

Governmental Immunity of Counties

A county may not be sued or held liable for the tortious act of a county social services agency, official, or employee if the doctrine of “governmental immunity” applies and the county has not waived its governmental immunity.³⁴

North Carolina’s Supreme Court recognized the doctrine of governmental immunity in 1889.³⁵ Under this doctrine, counties are shielded from tort liability in connection with their performance of “governmental” activities or functions, but not from liability with respect to their “proprietary” activities or functions.³⁶ Applying the rules that distinguish “governmental” and “proprietary” functions to specific activities performed by local governments and their employees is not always easy.³⁷ It seems clear, though, that most, if not all, of the activities performed by county social services agencies and employees in connection with

Hobbs v. N.C. Dept. of Human Resources, 135 N.C. at 420, 520 S.E.2d at 601.

³⁴ A lawsuit against a county must specifically allege that the county is not entitled to governmental immunity or has waived its governmental immunity by obtaining liability insurance. *See* Whitaker v. Clark, 109 N.C. App. at 384, 427 S.E.2d at 145.

³⁵ *Moffitt v. City of Asheville*, 103 N.C. 237, 9 S.E. 695 (1889). The governmental immunity of North Carolina counties and municipalities is similar to, but different from, the State’s sovereign immunity.

³⁶ The tests for determining whether a function or activity is “governmental” or “proprietary” are discussed in detail in Brown-Graham, *A Practical Guide to Liability for North Carolina Cities and Counties*, 3-8 through 3-18 and 3-20 through 3-21. Governmental immunity applies with respect to *all* activities that are reasonably related to the performance of a governmental function. For example, it would protect a county social services agency from liability with respect to a social worker’s alleged negligence in driving a car while investigating a report of suspected child abuse or neglect as well as the social worker’s alleged negligence in making a determination with respect to whether a child has been abused or neglected and needs protection. *See* Lewis v. Hunter, 212 N.C. 504, 193 S.E. 814 (1937).

³⁷ *See* Millar v. Town of Wilson, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942) and Koontz v. City of Winston-Salem, 280 N.C. 513, 528, 186 S.E.2d 897, 907 (1972).

the administration of public assistance and social services programs are “governmental” in nature and that governmental immunity, therefore, shields the county from liability in connection with allegedly tortious conduct by county social services employees who are engaged in the administration of those programs.³⁸

A county, however, may waive its governmental immunity and, if it does, may be sued and held liable for torts committed by county social services employees in connection with their employment.

Under state law, a county waives its governmental immunity by obtaining liability insurance.³⁹ Governmental immunity, however, is waived only to the extent of the county’s insurance coverage.⁴⁰ Thus, if a plaintiff’s damages exceed the amount of the county’s insurance coverage, the plaintiff “may not recover damages for injuries in excess of the policy amount”⁴¹ And similarly, if a county’s insurance policy has a deductible or does not cover claims below a certain amount, the county “retains governmental

³⁸ *See* Hare v. Butler, 99 N.C. App. at 698, 394 S.E.2d at 235; Whitaker v. Clark, 109 N.C. App. at 381, 427 S.E.2d at 143.

³⁹ G.S. 153A-435. “There are three basic ways that a local government can waive its governmental immunity through insurance coverage. First, insurance includes liability coverage provided by companies licensed to [issue] ... [liability] insurance [policies] in [North Carolina] Second, participation in a local government risk pool [as defined in G.S. 58-23-1 through G.S. 58-23-45] is considered to be the equivalent of purchasing insurance. Third, a local government may [“self insure” by] explicitly [setting aside money] ... to pay claims against it.” Brown-Graham, “Civil Liability of the Local Government and Its Officials and Employees,” 9. Many, if not most, North Carolina counties have purchased liability insurance, participate in a local government risk pool, or established a “self insurance” fund. Some of the reasons that counties may decide to waive their governmental immunity through the purchase of liability insurance are discussed in Brown-Graham, “Civil Liability of the Local Government and Its Officials and Employees,” 8-9.

⁴⁰ If a county obtains liability insurance, the county has the authority to determine what torts it will choose to cover or exclude under its insurance, the maximum amount of claims that will be covered through the insurance, and any deductible. A county, however, may not obtain liability insurance that purports to cover only claims arising from the performance of “proprietary,” rather than “governmental,” functions.

⁴¹ Brown-Graham, *A Practical Guide to Liability for North Carolina Cities and Counties*, 3-19.

immunity for damages that fall within the amount of the deductible” or below the coverage threshold.⁴²

The “Public Duty” Defense

A defendant may not be held liable for negligence unless he or she has breached a legal duty of care that he or she owed to the plaintiff. The “public duty” defense allows some government agencies to avoid liability for negligence because their legal duties of care are owed to the general public rather than to any particular person who may have been injured as a result of their breach of those duties.

The public duty doctrine holds that certain ... government activities do not create liability to individual members of the public. Under the public duty doctrine, there are circumstances in which [government agencies and employees have] ... no legal duty to protect an individual citizen from harm caused by a third person. Although the government may undertake a duty to protect the public at large, that duty does not extend to any specific individual.⁴³

In a 1999 decision, the North Carolina Court of Appeals held that the county could raise the “public duty” doctrine as a defense in a case involving the alleged negligence of a county social services department in connection with an investigation of reported child abuse or neglect, but that the “special relationship” and “special duty” exceptions to the public duty doctrine might apply.⁴⁴ But in a different case decided a year later, the North Carolina Supreme Court held that, in lawsuits against *local* governments, the “public duty” defense applies only to “law enforcement departments when they are exercising their general duty to protect the public.”⁴⁵ Counties, therefore, may not use the “public duty” doctrine as a defense in lawsuits involving the alleged negligence of county social services employees.

⁴² Brown-Graham, *A Practical Guide to Liability for North Carolina Cities and Counties*, 3-22.

⁴³ Brown-Graham, “Civil Liability of the Local Government and Its Officials and Employees,” 10.

⁴⁴ *Hobbs v. N.C. Dept. of Human Resources*, 135 N.C. App. at 418-19, 520 S.E.2d at 600-01 (1999).

⁴⁵ *Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000).

Personal Tort Liability of County Social Services Directors and Employees

A person who has been injured by the tortious conduct of a social services director or employee who was engaging in official duties may sue the director or employee in the director’s or employee’s “individual capacity.”⁴⁶ A lawsuit that is filed against a social services director or employee in his or her individual capacity seeks to hold the director or employee *personally* liable for the damages the plaintiff has suffered.⁴⁷

It is not always easy to determine, however, whether a public official or employee is being sued in his or her official capacity, in his or her individual capacity, or in both capacities.

The crucial question for determining whether a [public official or employee] ... is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a government power, the defendant is [sued] ... in an official capacity. If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities.⁴⁸

In ascertaining the capacity in which the plaintiff seeks to sue [a public official or employee] ..., the court will typically look first to the caption of the complaint [which should indicate the capacity or capacities in which the defendant is being sued]. If the [caption doesn’t clearly indicate the capacity in which the defendant is being sued] ..., the court will look to the allegations of the complaint and

⁴⁶ See *Meyer v. Walls*, 347 N.C. at 110, 489 S.E.2d at 887. Cf. *McCarn v. Beach*, 128 N.C. App. 435, 496 S.E.2d 402 (1998). A county social services director or employee also may be sued in his or her official capacity or in his or her official *and* individual capacities. Lawsuits against county social services officials and employees in their official capacities are, in essence, lawsuits against the county and are discussed in the preceding sections of this bulletin.

⁴⁷ See *Hare v. Butler*, 99 N.C. App. at 700, 394 S.E.2d at 236; *Meyer v. Walls*, 347 N.C. at 110, 489 S.E.2d at 887.

⁴⁸ *Meyer v. Walls*, 347 N.C. at 110, 489 S.E.2d at 887.

then to the course of the proceedings. Absent some clear indication in the allegations or the procedural history of the case, the court will not presume that the plaintiff sought to impose personal liability on the defendant. Instead the presumption will operate in favor of finding only official-capacity liability.⁴⁹

Public Official Immunity

Local government officials and employees are not entitled to governmental immunity when they are sued in their individual, rather than official, capacities.⁵⁰

Public officials, however, are protected by a limited immunity when they are sued in their individual capacities for alleged negligence.⁵¹ This “public official immunity” protects a public official from liability for his or her alleged negligence in “the exercise of a discretionary act while engaged in a governmental activity, unless the officer acted with malice, for corrupt reasons, or outside the scope of his or her official duties.”⁵² A “discretionary” act is one that requires personal deliberation, decision, and judgment, contrasted with a “ministerial” act that is “absolute, certain, and imperative, and involve[s] merely the execution of a specific duty arising from fixed and designated facts.”⁵³

Unlike public officials, public employees are not entitled to public official immunity.⁵⁴ North Carolina’s courts generally have employed a four-factor test to

determine whether a government defendant is a public official or a public employee:

- whether the defendant’s position was created by statute (if it was, the defendant is more likely to be considered a public official rather than a public employee);
- whether the defendant’s position required the defendant to take an oath of office (if it did, the defendant is more likely to be considered a public official rather than a public employee);
- whether the defendant performs legally imposed public duties (if he or she does, he or she is more likely to be considered a public official rather than a public employee);
- whether the defendant exercises a certain amount of discretion in performing his or her job (if he or she does, he or she is more likely to be considered a public official rather than a public employee).⁵⁵

It is clear that the county social services director is a public official.⁵⁶ Before 1999, a number of appellate court decisions held that assistant social services directors, social services supervisors, social workers, and other county social services staff were public employees, not public officials, and therefore were not entitled to public official immunity.⁵⁷ In 1999, however, the North Carolina Court of Appeals decided that when a county social services employee is performing a discretionary activity pursuant to a delegation of legal authority from the county social services director, the employee acts as a public official, not as a public employee, and is therefore entitled to “public official immunity.”⁵⁸

⁴⁹ Brown-Graham, *A Practical Guide to Liability for North Carolina Cities and Counties*, 4-5.

⁵⁰ Brown-Graham, *A Practical Guide to Liability for North Carolina Cities and Counties*, 4-7. Cf. *Cherry v. Harris*, 110 N.C. App. 478, 480, 429 S.E.2d 771, 772 (1993).

⁵¹ This immunity does not apply when a public official is sued for an intentional tort. A public official or employee, however, may assert a separate, limited immunity if he or she is sued for the intentional tort of defamation in connection with conduct that was not malicious. See Brown-Graham, “Civil Liability of the Local Government and Its Officials and Employees,” 4.

⁵² Brown-Graham, *A Practical Guide to Liability for North Carolina Cities and Counties*, 4-8, citing *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985).

⁵³ Brown-Graham, *A Practical Guide to Liability for North Carolina Cities and Counties*, 4-8, citing *Hare v. Butler*, 99 N.C. App. at 700, 394 S.E.2d at 236.

⁵⁴ Brown-Graham, *A Practical Guide to Liability for North Carolina Cities and Counties*, 4-10. See also *Meyer v. Walls*, 347 N.C. at 112, 489 S.E.2d at 888.

⁵⁵ *Piggott v. City of Wilmington*, 50 N.C. App. 401, 403-04, 273 S.E.2d 752, 754 (1981). Public employees, by contrast, generally act at the direction of others and their duties are “more administrative or ministerial than discretionary in nature.” Brown-Graham, *A Practical Guide to Liability for North Carolina Cities and Counties*, 4-10.

⁵⁶ *Hare v. Butler*, 99 N.C. App. at 700, 394 S.E.2d at 236.

⁵⁷ *Hare v. Butler*, 99 N.C. App. at 700, 394 S.E.2d at 236; *Coleman v. Cooper*, 89 N.C. App. 188, 197, 366 S.E.2d 2, 8 (1988); *Meyer v. Walls*, 347 N.C. at 114, 489 S.E.2d at 889.

⁵⁸ *Hobbs v. N.C. Dept. of Human Resources*, 135 N.C. App. at 421-23, 520 S.E.2d at 602-03. See also *Dalenko v. Wake County Dept. of Human Services*, 157 N.C. App. 49, 55-56, 578 S.E.2d 599, 603 (2003).

Personal Tort Liability of County Social Services Board Members

County social services board members are public officials and, therefore, are entitled to “public official immunity” to the same extent and under the same circumstances as the county social services director. In addition, county social services board members may be immune from tort liability with respect to any “quasi-legislative” or “quasi-judicial” functions of the social services board.⁵⁹

Personal Tort Liability of Social Services Volunteers

The federal Volunteer Protection Act (VPA) of 1997 protects volunteers from liability for injuries caused by their negligent acts or omissions while working with state or county social services agencies.⁶⁰ The VPA, however, does not protect volunteers from liability for criminal, intentional, or reckless conduct; gross negligence; activities that are not within the scope of their volunteer duties; injuries caused by their operation of vehicles for which the State requires a license or insurance; injuries caused while they are under the influence of alcohol or drugs; or misconduct that violates federal or state civil rights laws.

Liability of Social Services Agencies and Employees Under Federal Law

State and county social services agencies are subject to a number of federal laws, including but not limited to the “due process” provisions of the U.S. Constitution; the nondiscrimination requirements of Title VI of the Civil Rights Act of 1964; the prohibitions on employment discrimination in Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973; the compensation requirements of the Fair Labor Standards Act and the Equal Pay Act; and the requirements of the Americans with Disabilities Act of 1990 and the Family and Medical Leave Act. In some instances, these or other federal statutes authorize a person to sue a social services agency or employee for injunctive relief or monetary damages based on the agency’s or employee’s alleged violation of federal law.

⁵⁹ See Vereen v. Holden, 121 N.C. App. 779, 468 S.E.2d 471 (1996); Fugual Springs v. Rowland, 234 N.C. 299, 79 S.E.2d 774 (1954).

⁶⁰ 42 U.S.C. §§ 14501–14505. See also G.S. 1-539.10.

Liability Under 42 U.S.C. § 1983

Another federal statute, 42 U.S.C. § 1983, authorizes a person to sue and recover damages from a local government or local government employee if the government’s or employee’s official conduct violates the person’s legal rights under the U.S. Constitution or a federal statute.⁶¹

Liability under section 1983 is distinct from liability under North Carolina’s tort law. Section 1983, therefore, may allow for a finding of liability in some cases in which there is none under state law and, in other cases, an official action may result in liability under both state law and section 1983.

Although some of the section 1983 lawsuits filed against state or county social services agencies involve alleged violations of a person’s constitutional rights, most claim that a social services agency has violated a person’s legal rights under a federal statute.⁶²

State and county social services agencies were sued frequently under section 1983 during the 1960s, 1970s, and 1980s by persons who had applied for or were receiving public assistance or social services and alleged that the agencies had violated the plaintiffs’ legal rights by failing to comply with the requirements of the federal Social Security Act or other federal social services statutes.⁶³ Recent decisions of the U.S.

⁶¹ The liability of local governments and local government employees under this statute (“section 1983”) is discussed in detail in chapters 6, 7, 8, and 10 of Brown-Graham, *A Practical Guide to Liability for North Carolina Cities and Counties*, and in Brown-Graham, “Civil Liability of the Local Government and Its Officials and Employees,” 14–18.

⁶² See *Maine v. Thiboutot*, 448 U.S. 1 (1980). Section 1983, however, may not be used in cases in which the federal statute in question does not create a legal right that is enforceable by the plaintiff or if the statute provides an exclusive remedy for its own enforcement. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981); *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981).

⁶³ See *King v. Smith*, 392 U.S. 309 (1968); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Rosado v. Wyman*, 397 U.S. 397 (1970); *Lewis v. Martin*, 397 U.S. 552 (1970); *Wyman v. James*, 400 U.S. 309 (1971); *Townsend v. Swank*, 404 U.S. 282 (1971); *Jefferson v. Hackney*, 406 U.S. 525 (1972); *Carleson v. Remillard*, 406 U.S. 598 (1972); *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Maine v. Thiboutot*, 448 U.S. 1 (1980). Legal aid attorneys have filed a number of section 1983 lawsuits

Supreme Court, however, have limited somewhat the ability of social services clients and others to bring section 1983 lawsuits against state and county social services agencies for alleged violations of federal social services statutes.⁶⁴

State and county social services agencies, officials, and employees may be sued for prospective injunctive relief under section 1983. The State of North Carolina and state social services agencies, however, are not liable for monetary damages in lawsuits brought under section 1983 unless the State has waived its sovereign immunity or Congress has abrogated the State's immunity from suit.⁶⁵ By contrast, county social services agencies (or, more precisely, the counties of which social services departments are a part) may be held liable for monetary damages in section 1983 lawsuits.⁶⁶

The doctrine of governmental immunity does not protect a county from liability under section 1983. Instead, a county may be held liable for monetary damages under section 1983 if

1. the county or a county agency, acting through its public officials, officially adopts an ordinance, policy, rule, or decision that violates a person's federal constitutional or statutory rights, *or*
2. a person's federal constitutional or statutory rights are violated by the persistent and widespread practices or customs of the county's officials or employees that are so

against North Carolina social services agencies. *See Carter v. Morrow*, 526 F.Supp. 1225 (W.D.N.C. 1981) (denial of child support enforcement services); *Alexander v. Hill*, 549 F.Supp. 1355 (W.D.N.C. 1982) (failure to process Medicaid applications in a timely manner); *Morris v. Morrow*, 783 F.2d 454 (4th Cir. 1986) (Medicaid eligibility rules); *Wilson v. Lyng*, 662 F.Supp. 1391 (1987) (food stamp eligibility rules); *Warren v. N.C. Dept. of Human Resources*, 65 F.3d 385 (4th Cir. 1995) (food stamp eligibility rules).

⁶⁴ *See Deshaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989); *Suter v. Artist M.*, 503 U.S. 347 (1992) (child welfare services); *Blessing v. Freestone*, 520 U.S. 329 (1997) (child support enforcement services).

⁶⁵ *See Anita R. Brown-Graham*, "When You Can't Sue the State: State Sovereign Immunity," *Popular Government* 65(4): 2-14 (2000).

⁶⁶ *See Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Local governments are not liable for punitive damages in section 1983 lawsuits. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

permanent and well-settled that they have the force and effect of law.⁶⁷

The doctrine of *respondeat superior* does not apply in section 1983 lawsuits.⁶⁸ A county social services employee's violation of a person's federal civil rights, therefore, will not necessarily make the county liable for monetary damages under section 1983.⁶⁹

State and county social services officials and employees may be held liable for monetary damages under section 1983 when they are sued in their "individual capacities." They are entitled, however, to a "qualified" immunity that protects them from personal liability unless their conduct "violates clearly established statutory or constitutional rights about which a reasonable person in similar circumstances would have known."⁷⁰

State and county social services agencies and employees also may be liable for paying a plaintiff's attorneys fees in a section 1983 lawsuit.⁷¹

Protecting County Social Services Agencies, Officials, and Employees from Civil Liability

Obtaining Liability Insurance for Counties and County Officials and Employees

State law authorizes "counties ... to purchase insurance to protect themselves and any of their

⁶⁷ *Monell v. New York City Dept. of Social Services*, 436 U.S. at 690-92.

⁶⁸ *See Bryan County Board of County Commissioners v. Brown*, 520 U.S. 397 (1997).

⁶⁹ The improper hiring, inadequate training, or inadequate supervision of county social services employees, however, may constitute a county policy or custom if it exhibits a "deliberate indifference" by county policy-makers or administrators to the federal constitutional or statutory rights of individuals. *See Brown-Graham, A Practical Guide to Liability for North Carolina Cities and Counties*, 6-17 through 6-19.

⁷⁰ *Brown-Graham*, "Civil Liability of the Local Government and Its Officials and Employees," 18, *citing Wood v. Strickland*, 420 U.S. 308 (1975) and *Anderson v. Creighton*, 483 U.S. 635 (1987). Punitive damages may be awarded against a county social services employee if he or she is held personally liable under section 1983 and the court finds that his or her conduct was reckless or deliberately indifferent to the plaintiff's legal rights. *Smith v. Wade*, 461 U.S. 30 (1983).

⁷¹ *Brown-Graham, A Practical Guide to Liability for North Carolina Cities and Counties*, 10-5 through 10-6.

officers, agents, or employees from civil liability for damages.”⁷² The board of county commissioners “has absolute discretion in deciding which liabilities and which ... [county officials and employees], if any, will be covered by this insurance” and in deciding whether it will cover claims under federal, as well as state, law and cover claims against officials and employees in their individual, as well as official, capacities.⁷³

Defending Lawsuits Against County Officials and Employees

Counties are “authorized, but not required, to provide for the defense of any civil or criminal action brought against current or former ... [county social services officials or employees] in state or federal court on account of alleged acts or omissions committed in the scope and course of their employment” or office.⁷⁴ The county may defend the official or employee through the county attorney, the attorney who represents the county social services department, an attorney retained by the county, or, if the county has purchased liability insurance that requires the insurer to defend lawsuits brought against county officials or employees, an attorney retained by the county’s liability insurance company.

Paying Judgments Against County Officials and Employees

State law authorizes, but does not require, counties to pay all or part of any settlement or judgment entered in a lawsuit that is brought against a county official or employee in the official’s or employee’s individual capacity for an act committed within the scope of the official’s office or employee’s employment.⁷⁵

No statutory limit is placed on the amount of money that a local government may appropriate

⁷² Brown-Graham, “Civil Liability of the Local Government and Its Officials and Employees,” 18. *See* G.S. 160A-485. As discussed above, a county’s purchase of liability insurance constitutes a waiver of its governmental immunity.

⁷³ Brown-Graham, “Civil Liability of the Local Government and Its Officials and Employees,” 18.

⁷⁴ Brown-Graham, “Civil Liability of the Local Government and Its Officials and Employees,” 19. *See* G.S. 153A-97.

⁷⁵ G.S. 160A-167.

to pay a settlement or judgment [against a local government employee]. However, funds may not be appropriated to pay ... [the] settlement or judgment if the ... [official or employee] acted or failed to act because of fraud, corruption, or malice.⁷⁶

In addition, a county may not pay a settlement or judgment against a county official or employee unless, before the settlement is reached or the judgment is entered, the county has adopted a set of uniform standards under which settlements or judgments against county officials and employees will be paid, and the official or employee gives the county notice of the claim.⁷⁷

Summary

Although lawsuits against state and county social services agencies, officials, and employees are unavoidable, state and federal law provides some legal protection or immunity from liability for social services agencies, officials, and employees.

⁷⁶ Brown-Graham, “Civil Liability of the Local Government and Its Officials and Employees,” 19. *See* G.S. 160A-167.

⁷⁷ G.S. 160A-167.

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