

# LITIGATING TORT CLAIMS AGAINST OTHER STATE AGENCIES

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## I. INTRODUCTION

This manuscript will present a concise overview of the theories of liability for a claim under the State Tort Claims Act.<sup>1</sup> The manuscript will also summarize the practice and procedure for litigating a State Tort Claims Act case. An appendix containing sample documents is attached to this manuscript. The documents in the appendix are divided into the following categories: (1) pleadings, (2) discovery, (3) discovery motions and orders, (4) hearing before Deputy Commissioner, and (5) settlement documents.

## II. THEORIES OF LIABILITY.

The North Carolina State Tort Claims Act (STCA) partially waives the State's sovereign immunity for tort claims. N.C. Gen. Stat. § 143-291, *et seq.* The STCA allows an injured party to hold the State liable for claims of

negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, which was the proximate cause of the injury, and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted....

N.C. Gen. Stat. § 143-291(a) (2007).

The State's liability is to be determined under the same principles applicable to a private person under the laws of North Carolina. *Id.* The STCA does not permit recovery for intentional injuries. *Fennell v. North Carolina Dep't of Crime Control and Pub. Safety*, 145 N.C. App. 584, 592, 551 S.E.2d 486, 492 (2001). Rather, it applies to all acts of negligence including claims for willful, wanton, and reckless conduct. *Collins v. North Carolina Parole Comm'n*, 344 N.C. 179, 183, 473 S.E.2d 1, 2 (1996). Permissible causes of action under the STCA include:

- Negligent discharge of a firearm, *Lowe v. Dep't of Motor Vehicles*, 244 N.C. 353, 93 S.E.2d 448 (1956) (officer tripped while approaching a motorist with his gun drawn); *Braswell v. N.C. A&T State Univ.*, 5 N.C. App. 1, 168 S.E.2d 24 (1969)

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<sup>1</sup> School bus negligence claims and claims against the Department of Transportation will not be addressed. Appeals will also not be addressed.

(security officer fired his gun downward in order to disperse a crowd);

- Unintentional use of excessive force, *Jackson v. N.C. Dep't of Crime Control and Pub. Safety*, 97 N.C. App. 425, 388 S.E.2d 770 (1990) (during an arrest); *Burt v. North Carolina Dep't of Corrections*, No. COA04-60, 2004 WL 2940893 (2004, unpublished) (while restraining an inmate);
- Gross negligence during a police chase, *Bray v. North Carolina Dep't of Crime Control and Public Safety*, 151 N.C. App. 281, 564 S.E.2d 910 (2002);
- Medical malpractice at a state hospital, *Alt v. John Umstead Hosp.*, 183 N.C. App. 177, 644 S.E.2d 369 (2007);
- Failure by a mental health institution to exercise reasonable care in its control over a patient who has been involuntarily committed for a mental illness so as to prevent harm to third parties, *Davis v. North Carolina Dep't of Human Res.*, 121 N.C. App. 105, 465 S.E.2d 2 (1995) (holding that this type of claim is not subject to the medical malpractice laws);
- Failure to properly respond to allegations of sexual harassment by a state employee, *Gonzales v. North Carolina State Univ.*, \_\_\_, N.C. App. \_\_\_, 659 S.E.2d 9 (2008);
- Failure by a prison to use reasonable care to protect an inmate from reasonably foreseeable harm, *Taylor v. North Carolina Dep't of Correction*, 88 N.C. App. 446, 363 S.E.2d 868 (1988);<sup>2</sup>
- Premises liability at a state facility, *Cherney v. North Carolina Zoological Park*, 362 N.C. 223, 657 S.E.2d 352 (2008) (a ficus tree fell in a state zoo); *Hummel v. University of North Carolina*, 156 N.C. App. 108, 576 S.E.2d 124 (2003) (a cable on a weight machine came loose at the UNC student recreation center);
- Failure by state agency to properly inspect county jail for compliance with minimum standards for fire safety, *Multiple Claimants v. North Carolina Dep't of Health and Human Servs.*, 361 N.C. 372, 646 S.E.2d 356 (2007) (observing that DHHS had a statutory duty to inspect the jail for the protection of the inmates).

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<sup>2</sup> An inmate who is injured while working for the State cannot bring a lawsuit against the State under the STCA. The inmate's remedy is limited to the North Carolina Workers' Compensation Act. *Richardson v. North Carolina Dep't of Correction*, 345 N.C. 128, 478 S.E.2d 501 (1996). This principle also applies to a wrongful death suit filed by an inmate's estate. *Blackmon v. North Carolina Dep't of Correction*, 343 N.C. 259, 470 S.E.2d 8 (1996).

The STCA applies to tort claims against “the State Board of Education, the Board of Transportation, and all other departments, institutions, and agencies of the State.” N.C. Gen. Stat. § 143-291(a). The STCA also applies to tort claims against community colleges, technical colleges, and the North Carolina High School Athletic Association, Inc. N.C. Gen. Stat. § 143-291(c). North Carolina case law has further expanded the scope of the STCA to include:

- Medical malpractice claims against physicians working as independent contractors at state prisons, *Medley v. North Carolina Dep’t of Correction*, 330 N.C. 837, 412 S.E.2d 654 (1992) (observing that the State has a nondelegable duty to provide adequate medical services to inmates);
- Vicarious liability assessed against the Department of Health and Human Services as a result of the:
  - a. Negligent placement of children in foster homes by a county department of social services, *Vaughan v. North Carolina Dep’t of Human Res.*, 296 N.C. 683, 252 S.E.2d 792 (1979);<sup>3</sup>
  - b. Failure by a county department of social services to investigate reports of child abuse and to take affirmative steps to protect the abused child, *Gammons v. North Carolina Dep’t of Human Res.*, 344 N.C. 51, 472 S.E.2d 722 (1996), *Whitaker v. N.C. Dep’t of Human Res.*, 121 N.C. App. 602, 468 S.E.2d 404 (1996);
- Vicarious liability assessed against the Department of Environment and Natural Resources as a result of the negligent inspection of soil conditions by a county health department prior to the issuance of an improvement permit, *Watts v. North Carolina Dep’t of Environment and Natural Res.*, 182 N.C. App. 178, 641 S.E.2d 811 (2007).

The North Carolina Industrial Commission generally has jurisdiction over claims subject to the STCA. N.C. Gen. Stat. § 143-291(a). However, the General Court of Justice has jurisdiction over the State of North Carolina when the State is impleaded as a third-party under Rule 14 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. §1A-1, Rule 14(c); *see Haas v. Caldwell Systems, Inc.*, 98 N.C. App. 679, 392 S.E.2d 110 (1990). The General Court of Justice also has jurisdiction over claims asserted against State employees or agents in their

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<sup>3</sup> The negligence of a foster parent cannot be imputed to the State. *Creel v. North Carolina Dep’t of Health and Human Servs.* 152 N.C. App. 200, 566 S.E.2d 832 (2002).

individual capacity.<sup>4</sup> *Meyers v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997). As a result a claim may be filed in the Industrial Commission against the State as the principal and in the General Court of Justice against the State's agent. *Id.*, 347 N.C. at 108, 489 S.E.2d at 886 (citing *Wirth v. Bracey*, 258 N.C. 505, 507-08, 128 S.E.2d 810, 813 (1963)).

Although public official immunity may apply to a claim against a State employee or agent in his individual capacity, it will not apply to a claim against the State under the STCA. *Patrick v. North Carolina Dep't of Health and Human Servs.*, \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 171 (2008).

### III. PRACTICE AND PROCEDURE.

#### A. Pleadings.

A claim under the STCA is commenced by filing with the Industrial Commission a Form T-1 Affidavit, entitled "Claim for Damages Under Tort Claims Act," plus the appropriate filing fee. N.C. Gen. Stat. § 143-297; Rule T202 of the Tort Claim Rules. A Form T-1 Affidavit may either incorporate or be substituted by a traditional complaint. However, the complaint must be verified by the claimant. Rule T103(2). A civil summons is not required.

The Form T-1 Affidavit requires the plaintiff to name the State agency against which the claim is asserted and the State employee whose negligence gives rise to the claim. In practice, the plaintiff may not know the name of the agency or employee. In order to accommodate claimants, Rule T205(7) states that:

Motions to dismiss or for summary judgment for the defendant on the ground that plaintiff has failed to specifically name the individual officer, agent, employee or involuntary servant whose alleged negligence gave rise to the claim, or failure to properly name the department or agency of the State with whom such person was employed, *shall be ruled upon following discovery.*

If the Form T-1 Affidavit was deficient at the time of filing, it should be amended once the name of the agency and/or the name of the negligent employee (s) are learned during discovery.

After the claim has been docketed, the Industrial Commission will send a copy of the Form T-1 Affidavit to the Attorney General's Office. The State agency must then file an answer or other pleading within 30 days of receiving the Affidavit and must allege all affirmative defenses. N.C. Gen. Stat. § 143-297.

If the State fails to answer or otherwise plead, then an entry of default may be issued.

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<sup>4</sup> An individual capacity claim may be subject to N.C. Gen. Stat. § 143-300.2, *et seq.* ("Defense of State Employees, Medical Contractors, and Local Sanitarians").

Although the State may not counter the plaintiff's evidence after a default has been issued, the plaintiff must establish "his claim or right to relief by the evidence." N.C. Gen. Stat. § 1A-1, Rule 55(f). The plaintiff must present sufficient evidence to establish the State's liability and the Deputy Commission must make findings of fact and conclusions of law based upon the proffered evidence. *Parker v. Dep't of Trans.*, 122 N.C. App. 279, 468 S.E.2d 589 (1996).

A sample Form T-1 Affidavit and complaint, an acknowledgment of docketing, a motion to amend Form T-1 Affidavit and complaint, and an order granting the motion are included in the appendix.

## **B. Discovery.**

The North Carolina Rules of Civil Procedure apply to claims under the STCA, to the extent that the Rules are consistent with the STCA. In the event of an inconsistency, the STCA and Tort Claim Rules control. Rule T201. Rule 9(j) certifications are required in STCA cases. If the State files a motion to dismiss a medical malpractice case involving a prisoner, all discovery is stayed until the Deputy Commissioner issues a decision. In order to issue a decision the Deputy Commissioner must:

- (a) Hold a recorded telephonic hearing for the purpose of determining
  - (1) whether a claim for medical malpractice has been stated;
  - (2) whether expert testimony is necessary for the plaintiff to prevail;
  - (3) if expert testimony is deemed necessary, whether the plaintiff will be able to produce testimony on the applicable standard of care.
- (b) Issue an order requiring the parties, within 30 days, to submit medical records applicable to the claim.

Rule T201(2).

Discovery disputes sometimes arise with the State. Most disputes are resolved through the issuance of protective orders allowing the State to produce documents subject to confidentiality requirements. In the event that a dispute cannot be resolved, the Industrial Commission is a "court" for purposes of ordering the disclosure of records under North Carolina General Statutes. *Jane Doe v. Swannanoa Valley Youth Development*, 163 N.C. App. 136, 592 S.E.2d 715 (2004). In addition, the Commission may impose Rule 37 sanctions upon the State for failing to comply with discovery orders. *Williams v. North Carolina Dep't of Correction*, 120 N.C. App. 356, 462 S.E.2d 545 (1995).

Motions should be sent to the Commissioner or Deputy Commissioner assigned to the case. If an assignment has not been made, a motion should be directed to the Executive Secretary of the Industrial Commission or the person designated by the Chair, if known. Rule T205(1). All motions must state “with particularity the grounds on which it is based, the relief sought, and a brief statement of the opposing party’s position, if known.” Rule T205(2). Upon receiving a motion, the responding party has 10 days to file and serve a response in opposition to the motion. Rule T205(4). The Industrial Commission is authorized to rule upon motions without a hearing. Rule T205(5). Motions may be set for hearing before a Commissioner or Deputy Commission upon request by a party or the Commission’s discretion. Rule T205(8). Hearings may be held by telephone or in person, usually at a local courthouse.

The appendix includes sample discovery in cases involving claims for (1) motor vehicle negligence, (2) police misconduct, (3) prison negligence, and (4) medical malpractice. The appendix also includes a sample motion to compel and various discovery-related orders.

### **C. Hearings before a Deputy Commissioner.**

The Industrial Commission is empowered to order a hearing *sua sponte*. Rule T205(1). In practice, this rarely occurs. A request for hearing may be filed in order to notify the Commission that a case is ready for hearing. The request will then move the case to the active hearing docket which will, hopefully, result in the matter being promptly scheduled.

Before the hearing, the Commission will schedule a pre-trial conference to address: (1) ways to simplify the hearing, (2) the need for additional discovery, (3) settlement prospects, and (4) any outstanding motions. If the case cannot be settled, a hearing will occur.

The Industrial Commission will give the parties at least 30 days’ advance notice of the hearing. The hearing will occur “in a location deemed convenient to witnesses and the Industrial Commission and conducive to an early and just resolution of disputed issues.” Rule T206(2). If the plaintiff is an inmate, the hearing must occur in a prison facility “agreed upon by the Industrial Commission and the Attorney General’s office,” or by telephone or video-teleconference according to Industrial Commission procedures. Rule T206(3).

Prior to the hearing, the attorneys should complete a pretrial agreement. The agreement is similar to a pre-trial order under Rule 7 of the General Rules of Practice. It should contain a list of (1) stipulations, (2) issues, (3) witnesses, (4) and exhibits.

The hearing is very similar to a civil bench trial. An opening statement will be allowed and then the parties will be permitted to call witnesses and offer evidence. At the close of the evidence, the Deputy Commissioner will ask the parties whether they wish to submit additional evidence. If no further evidence is required, the case will be closed and the parties will be ordered to file a brief along with a proposed decision. The Deputy Commissioner will then issue a final decision and order which will be mailed to the parties.

The appendix includes the following samples: (1) a request for hearing and order, (2) pretrial hearing order, (3) pretrial agreement, (4) brief, and (5) proposed decision and order.

#### **D. Settlement or Judgment.**

A judgment against the State may not include pre-judgment interest or post-judgment interest. *McGee v. North Carolina Dep't of Revenue*, 135 N.C. App. 319, 520 S.E.2d 84 (1999). Court costs may be "taxed against the losing party in the same amount and the same manner as costs are taxed in the General Court of Justice." N.C. Gen. Stat. § 143-291.2. Attorney's fees may be awarded to the plaintiff under:

1. N.C. Gen. Stat. § 6-21.1 if the judgment for recovery is \$10,000 or less, *Karp v. University of North Carolina*, 88 N.C. App. 282, 362 S.E.2d 825 (1987); or,
2. N.C. Gen. Stat. § 6-19.1, if the State asserted, without substantial justification or a showing of special circumstances, an unsuccessful counterclaim, *Sprinkle v. N.C. Wildlife Res. Comm'n*, 165 N.C. App. 721, 600 S.E.2d 473 (2004).

A settlement or judgment against the State under the STCA may not exceed \$1,000,000 "to all claimants on account of injury and damage to any one person arising out of any one occurrence...." N.C. Gen. Stat. § 143-299.2. The purchase of insurance in excess of the STCA limits will not further waive the State's sovereign immunity. *Wood v. North Carolina State Univ.*, 147 N.C. App. 336, 556 S.E.2d 38 (2001).

In limited circumstances, the payment of a settlement or judgment may be made by a commercial liability insurance company (i.e. Traveler's Insurance Company insures State motor vehicles). In most circumstances, the payment will come from the State agency liable for the claim. See N.C. Gen. Stat. § 143-299.4. If the amount of the settlement or judgment is substantial, payment may be delayed. Any delays in payment raise a political issue, not a legal one, because a private party may not execute upon State property. In addition, the federal courts cannot force the State to satisfy a settlement or judgment for money. *In re Secretary of the Dep't of Crime Control and Pub. Safety*, 7 F.3d 1140 (4<sup>th</sup> Cir. 1993).

Claims that do not involve minors may be settled by the Attorney General's Office for \$25,000 or less without the approval of the Industrial Commission. Claims involving minors and settlements that exceed \$25,000 require Commission review and approval.

Sample settlement documents are included in the appendix.