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# TRIAL BRIEFS

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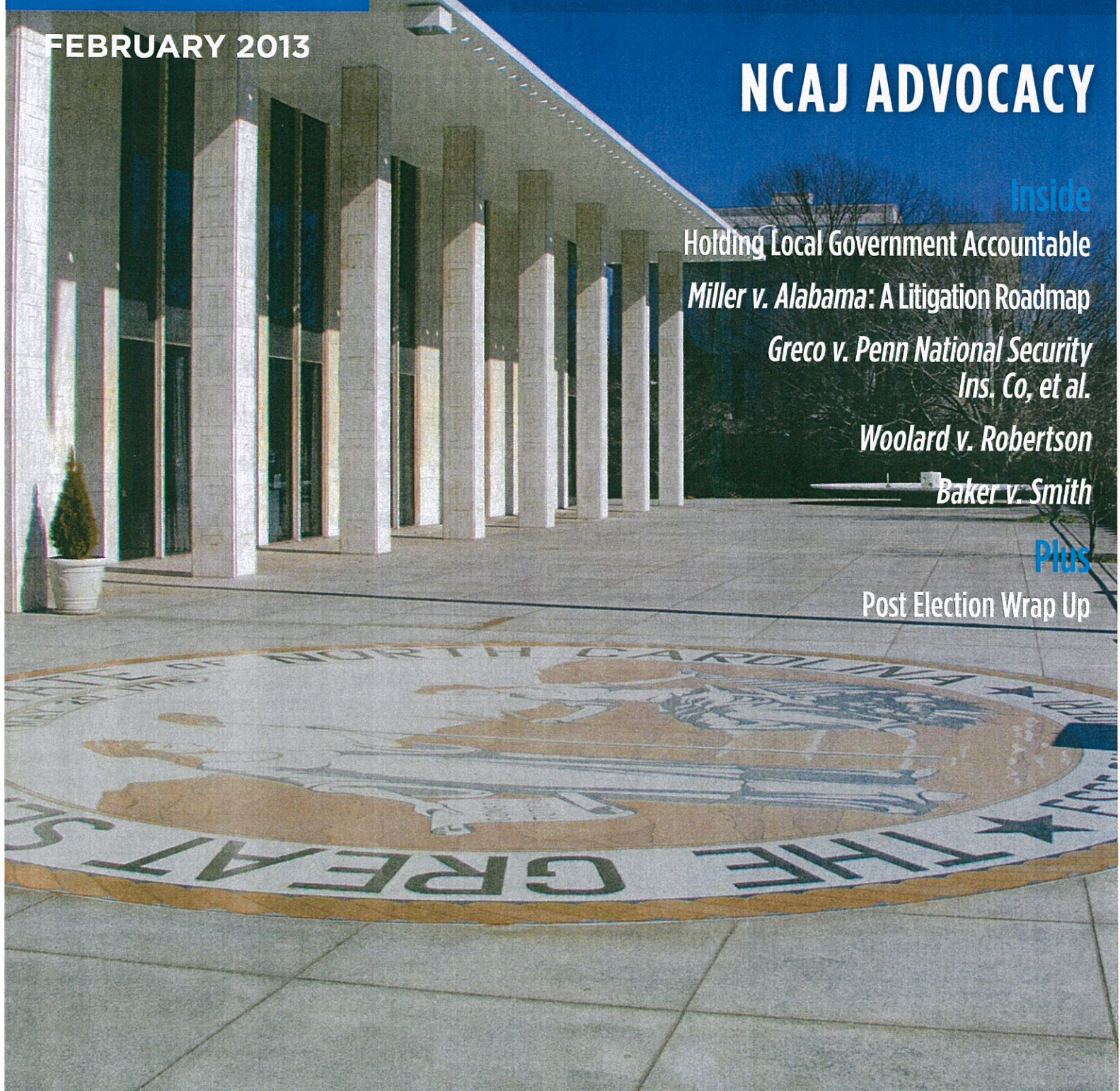
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# Holding Local Government Accountable

by Burton Craige and Danny R. Glover, Jr.

In 1951, the North Carolina General Assembly adopted the State Tort Claims Act (STCA), partially waiving the state's sovereign immunity.<sup>1</sup> Under the STCA, a person injured by the negligence of a state officer or employee acting in the course and scope of employment may file a claim for damages with the Industrial Commission. The Commission has authority to award damages, within the statutory limit of \$1,000,000.<sup>2</sup>

While the State long ago eliminated its sovereign immunity, the doctrine of governmental immunity still protects cities, counties, and school boards.<sup>3</sup> As a general rule, a unit of local government waives its immunity only to the extent that it purchases liability insurance. In the absence of a statutory waiver of immunity, a complicated and haphazard patchwork has evolved, leaving many injured North Carolinians with no effective remedy.

## Cities and Counties

Historically, many cities and counties in North Carolina chose to waive their immunity by purchasing liability insurance through the League of Municipalities and the Association of County Commissioners. In recent years, however, standard insurance policies for cities and counties have expressly excluded coverage for claims that would be barred by governmental immunity. In 2008, in *Patrick v. Wake County Department of Human Services*,<sup>4</sup> the Court of Appeals held that the following language in an insurance policy effectively preserved the county's immunity:

This policy is not intended by the insured to waive its governmental immunity as allowed by North Carolina General Statutes Sec. 153A-435. Accordingly, . . . this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defenses is asserted, a court of competent ju-

risdiction determines the defense of governmental immunity not to be applicable.

Since *Patrick*, the governmental immunity exclusion has become a standard feature of insurance policies provided by the League of Municipalities and the Association of County Commissioners. As a result, most cities and counties purchase liability insurance policies that provide no coverage for claims by their citizens: taxpayers who pay for the premiums receive no protection when they are injured.

Meanwhile, some of the largest cities and counties retain their immunity by avoiding the purchase of commercial liability insurance. If the city or county negligently injures a citizen, it has the discretion to deny all compensation, or to pay only a fraction of the damages from a self-funded reserve, even if clearly at fault.

## School Boards

The largest school systems, such as Wake County and Charlotte-Mecklenburg, do not purchase liability insurance. Instead, they have sufficient resources to retain their immunity by creating a self-funded reserve that allows them to choose which claims they want to pay, at what price. Without the threat of a legal claim, the injured citizen has no leverage to obtain a fair settlement.

The smaller school systems generally purchase liability coverage up to \$150,000 through the North Carolina School Boards Trust. The courts have ruled that the Trust is not an "insurer" and that participation in the Trust does not waive a school board's immunity.<sup>5</sup> As a result, courts routinely dismiss claims for damages against school boards on the grounds of immunity.

## Public Official Immunity

Barred from bringing suit against the governmental entity, those who are injured are forced to resort to claims against the negligent employee in his individual capacity. Individual capacity suits

face the formidable obstacle of “public official immunity,” which shields the defendant from liability unless the plaintiff can prove that the employee acted with malice. The distinction between “public employees,” who can be sued for ordinary negligence, and “public officials,” who are immune from liability for their negligence, is difficult to grasp for lawyers and judges, and incomprehensible to others.<sup>6</sup>

### Addressing the Problem: A Local Government Tort Claims Act

The gaps and inconsistencies in the current system defy logic and fairness. Governmental immunity is the root of the problem. Local governments should not be allowed to avoid accountability for their negligence when the rest of us — private individuals, businesses, non-profit corporations, and the State — are legally responsible for our conduct. Unless the legislature confronts the problem, North Carolinians will continue to be saddled with an irrational and inequitable system.

Sixty-two years ago, the General Assembly abolished the State’s sovereign immunity when it enacted the State Tort Claims Act. Now, in 2013, it should end local governmental immunity by enacting a Local Government Tort Claims Act (LGTCA). To keep insurance affordable, the LGTCA could limit the amount of damages recoverable by an injured person. The statutory limit should be no less than \$1,000,000, as in the State Tort Claims Act.

Only traditional governmental functions should be subject to the LGTCA. Governmental immunity does not apply to hospitals and other “proprietary functions” of local government that depend on fees for services and compete with private businesses. When a local government undertakes such a function, it should be subject to liability to the same extent as any private enterprise.

### Conclusion

North Carolina citizens reasonably expect that a person injured by the negligence of

a government employee should have the right to receive compensation. Through the State Tort Claims Act, the legislature has provided for the fair resolution of claims when a state employee is at fault. However, when someone employed by a local government negligently causes an injury, cities, counties, and school boards too often use immunity to avoid responsibility. To provide fair and consistent treatment to those who have been injured, the legislature should enact a Local Government Tort Claims Act. ♦

1. N.C.G.S. § 143-291 *et seq.*
2. N.C.G.S. § 143-299.2(a).
3. N.C.G.S. §§ 115C-42 (school boards); 153A-435 (counties); 160A-485 (cities).
4. 188 N.C. App. 592, 655 S.E.2d 920 (2008).
5. See, e.g., *Ripellino v. N.C. School Bds. Assn.*, 158 N.C. App. 423, 428, 581 S.E.2d 88, 92 (2003).
6. Compare *Baker v. Smith*, \_\_\_ N.C. App. \_\_\_ (December 18, 2012) (deputy jailer is a public official) with *Fralely v. Griffin*, 720 S.E.2d 694 (N.C. App. 2011) (emergency medical technician is not a public official).

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