



July 22, 2024

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# Liability Problems

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Dear Reader:

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

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# Liability Problems

Reference Number: CTAS-765

Liability exposure, particularly personal liability exposure, and also (because of the rapid rise in the cost of insurance) county liability exposure, is one of the most important subjects for county executives and county commissioners to understand. Tort reform has been a popular topic in recent years, but non-tort liability can in many instances be more costly to counties. This Section will discuss both tort and non-tort liability, including certain immunity provisions of law. Liability associated with personnel, one of the fastest growing areas of the law, will be mentioned only briefly in this section.

What is a tort? A tort is a civil action based on a violation of a duty imposed by law. A tort can be the result of an intentional act or a negligent act. An action can be both a tort and a crime, for instance, an assault could result in both criminal liability and civil liability. The plaintiff who claims to have suffered a tort must show an act, intentional or negligent, which violates a duty imposed by law, generally the standard of care an ordinary person would exercise in the circumstances, and damages resulting from the breach of duty. The violation of duty can be through misfeasance (the improper doing of an act), or by nonfeasance (omitting to do an act).

## Tennessee Governmental Tort Liability Act

Reference Number: CTAS-766

Prior to 1973, Tennessee counties were subject to the state's sovereign immunity for governmental acts, but were liable for damages resulting from proprietary activities. Governmental acts were those activities that were peculiar to governments, or activities only governments could provide, such as police protection, fire protection, education or tax collection. Proprietary activities were those that could be provided by private as well as governmental entities, such as water and sewer service, electrical services and mass transit.

In 1973, the Tennessee General Assembly enacted the Tennessee Governmental Tort Liability Act (T.C.A. § 29-20-101 et seq.), which provides that counties are immune under state law from all suits arising out of their activities, either governmental or proprietary, unless immunity is specifically removed by the law. It is important to remember that this immunity does not extend to liability under federal law.

In cases where the county is immune, county officials and employees may be individually liable, but only up to the liability limits established in the Tennessee Governmental Tort Liability Act. T.C.A. § 29-20-310(c). When the case is one where the county can be liable, the official or employee is immune. T.C.A. § 29-20-310(b). Willful, malicious or criminal acts, or acts committed for personal gain, do not fall under the personal liability protective provisions of the Tennessee Governmental Tort Liability Act (nor do medical malpractice actions brought against a health care provider).

Members of all county boards, commissions, agencies, authorities and other governing bodies created by public or private act, whether compensated or not, are absolutely immune from suit under state law arising from the conduct of the entity's affairs. This immunity is removed when the conduct is willful, wanton or grossly negligent. T.C.A. § 29-20-201.

Areas in which the Tennessee Governmental Tort Liability Act removes governmental immunity (i.e., kinds of actions for which the county can be sued) are:

1. Claims arising from the negligent operation of motor vehicles;
2. Claims arising from negligently constructing or maintaining streets, alleys or sidewalks;
3. Claims arising from the negligent construction or maintenance of public improvements; and
4. Claims arising from the negligence of county employees. T.C.A. §§ 29-20-202 through 29-20-205).

In 2022, the Tennessee Supreme Court held that the waiver of immunity in T.C.A. § 29-20-205 for "negligent" acts includes only ordinary negligence, not gross negligence or recklessness. *Lawson v. Hawkins County*, --- S.W.3d ---- 2023 WL 2033336 (Tenn. May 25, 2022).

There are exceptions to these areas where immunity is removed. These activities, for which the county is immune under state law, but for which an officer or employee may be liable, include claims arising from:

1. The exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
2. False imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of

process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of privacy or civil rights;

3. Issuing, denying, suspending, or revoking, or the failure to refuse to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization;
4. Failing to inspect or negligently inspecting any property;
5. Instituting or prosecuting any judicial or administrative proceeding;
6. Negligent or intentional misrepresentation;
7. Riots, unlawful assemblies, public demonstrations, mob violence and civil disturbances; or
8. Assessing, levying or collecting taxes. T.C.A. § 29-20-205.

Persons other than elected or appointed officials and members of boards, agencies and commissions are not considered county employees for purposes of the Governmental Tort Liability Act unless the court specifically finds that all of the following elements exist:

1. The county selected and engaged the person in question to perform services;
2. The county is liable for the compensation for the performance of such services and the person receives all compensation directly from the county's payroll department;
3. The person receives the same benefits as all other county employees, including retirement benefits and eligibility to participate in insurance programs;
4. The person acts under the control and direction of the county not only as to the result to be accomplished but as to the means and details by which the result is accomplished; and
5. The person is entitled to the same job protection system and rules, such as civil service or grievance procedures, as other county employees. T.C.A. § 29-20-107.

A regular member of the county voluntary or auxiliary fire fighting, police or emergency assistance organization is considered to be a county employee without regard to the elements listed above. 29-20-107(d). The county cannot extend immunity to independent contractors or other persons or entities by contract. T.C.A. § 29-20-107(c).

The county may now insure, either by self-insurance or purchasing insurance, or indemnify (up to the new limits set in the Tennessee Governmental Tort Liability Act) its employees and officials for their liability exposure under the Tennessee Governmental Tort Liability Act. T.C.A. § 29-20-310(c).

The following liability limits under the Tennessee Governmental Tort Liability Act (T.C.A. § 29-20-403) are for occurrences or accidents occurring on or after July 1, 2007 and are as follows:

Type of Claim	Limit
Bodily injury or death of any one person in any one accident, occurrence or act	\$300,000
Bodily injury or death of all persons in any one accident, occurrence or act	\$700,000
Injury to or destruction of property of others in any one accident	\$100,000

It is very important to know that these limits do not apply to federal civil rights actions in state or federal courts.

Actions under the Governmental Tort Liability Act must be commenced within 12 months after the cause of action arises (T.C.A. § 29-20-305), like other tort claims. This one-year statute of limitations can be extended when claims involve persons under legal disabilities (incompetents, minors, etc.) or when the injured party has reasonably failed to discover the existence of his or her cause of action against the county, county officials or employees

## Liability for Personnel Matters

Reference Number: CTAS-767

Important employment law considerations include hiring, compensation, benefits, termination, retirement, the federal Fair Labor Standards Act ("FLSA"), right-to-know statutes, military and reserve service, jury service, the Occupational Safety and Health Act, the Equal Pay Act, the Immigration Control Act, the insurance provisions of the Consolidated Omnibus Budget Reduction Act ("COBRA"), FICA and FIT withholdings and the Family and Medical Leave Act ("FMLA").

As employers, county officials must refrain from retaliating or firing based on the employee's exercise of a protected constitutional right (e.g., freedom of speech), or a statutory right (e.g., filing a workers' compensation claim). Discrimination must be avoided in every aspect of employment. Under state and federal law, an employer cannot discriminate against an employee or a potential employee based upon race, color, sex, religion, national origin, age or disability (including infectious, contagious or similarly transmittable diseases). Further, any form of sexual harassment is illegal. An individual may file a

discrimination complaint with the Equal Employment Opportunity Commission ("EEOC") or the Tennessee Human Rights Commission ("THRC").

An employer cannot fire an employee solely for: (1) refusing to participate or remain silent about illegal activities; or (2) using an agricultural product not regulated by the alcoholic beverage commission that is not otherwise prohibited by law (i.e., smoking) if the employee follows the employer's guidelines regarding the use of the product while at work. T.C.A. § 50-1-304).

Finally, the First Amendment to the United States Constitution applied to the states through the Fourteenth Amendment prohibits patronage dismissals of certain types of governmental employees. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 64 (1990). Patronage dismissals are those based upon political activity or affiliation.

## Other Non-Tort Liability

Reference Number: CTAS-768

The Tennessee Governmental Tort Liability Act does not apply to many types of actions filed in both state and federal courts. In state court, for example, compensation, breach of contract, inverse condemnation and many other types of common law and statutory causes of action can be the basis of a non-tort action. The limits of the Tennessee Governmental Tort Liability Act do not apply to these non-tort actions.

## Breach of Contract

Reference Number: CTAS-769

Counties are responsible for the breach of a contract entered into by the county. The extent of liability in such a contract action depends upon the terms of the contract and the damages suffered by the parties. The county could be required by the courts to perform a contract according to its terms in an action for specific performance.

When an official attempts to enter into a contract on behalf of the county without actual authority to enter into such a contract, the official may then be held personally liable for the performance of the contract.

## Other Actions

Reference Number: CTAS-770

There are numerous areas, including search and seizure, voting rights, improper arrest, discriminatory enforcement of statutes and the use of unlawful force, which may result in lawsuits against the county based on the actions of law enforcement and other court personnel. These claims can result in lawsuits in federal court under the federal civil rights act (42 U.S.C. § 1983) or in state court under the same federal statutes or as common law actions. *Poling v. Goins*, 713 S.W.2d 305 (Tenn.1986). A negligent action, unless it rises to the level of gross negligence, will not give rise to an action under (42 U.S.C. § 1983). *Daniels v. Williams*, 106 S.Ct.662 (1986); *Nishiyama v. Dickson County, Tennessee*, 814 F.2d 277 (6th Cir. 1987).

The federal antitrust laws (15 U.S.C. § 1 et seq.) provide that counties will not be held responsible for damages in antitrust actions, but the county can still be enjoined from doing, or mandated to do, certain acts. In general, county officials must take care in actions which restrict competition, such as granting of exclusive franchises, referring the public to particular attorneys or lending institutions, or giving different persons different access to records.

There is an extensive framework of other laws, both state and federal, applicable to counties. Consult your county attorney when you are uncertain about the legal implications of any action you are preparing to take.

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