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# The American Recovery and Reinvestment Act of 2009—Imputed Governmental Tort Liability Immunity

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The American Recovery and Reinvestment Act of 2009 (hereinafter “the Recovery Act”) has its proponents and detractors. At a time when the United States was facing its worst recession in more than fifty years, the 111<sup>th</sup> session of the United States Congress (“Congress”) passed the *Recovery Act* to stimulate and stabilize the United States economy. The intention of the *Recovery Act* was to create jobs, promote additional capital investment, increase

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consumer spending, and minimize or avoid reductions in state and local government services. In total, more than \$700 billion was allocated to the *Recovery Act* via federal tax cuts, expansion of unemployment benefits and domestic spending for education, health care, and infrastructure. More than a third of the money was slated for projects and activities, including construction and certain research projects. To implement a project using the allocated federal funds, agencies and funding recipients must comply with federal laws and regulations.<sup>1</sup> This article will address whether governmental immunity to tort liability has been imputed to infrastructure projects funded via the *Recovery Act*. This article will summarize the *Recovery Act* and the background and history of governmental tort immunity while addressing the possibility that immunity at the federal and

state levels has been imputed to government contractors based upon the *Recovery Act*. While this article highlights the potential implications, final determination is beyond its scope and may not be fully resolved until federal and/or state courts address the matter directly.

## **The Recovery Act**

The *Recovery Act* received bipartisan support during the transition from one administration to the next. The newly elected President stated the *Recovery Act*

will create or save 3.5 million jobs over the next two years. It’s that we’re putting Americans to work doing the work that America needs done, in critical areas that have been neglected for too long; work that will bring real and lasting change for generations to come.

Because we know we can't build our economic future on the transportation and information networks of the past, we are remaking the American landscape with the largest new investment in our nation's infrastructure since Eisenhower built an Interstate Highway System in the 1950s. Because of this investment, nearly 400,000 men and women will go to work rebuilding our crumbling roads and bridges, repairing our faulty dams and levees, bringing critical broadband connections to businesses and homes in nearly every community in America, upgrading mass transit, building high-speed rail lines that will improve travel and commerce throughout our nation.<sup>2</sup>

The *Recovery Act* was a direct response to the economic crisis, with three immediate goals:

- Create new jobs and save existing ones;
- Spur economic activity and invest in long-term growth; and

- Foster unprecedented levels of accountability and transparency in government spending.

The *Recovery Act* intends to achieve those goals by

- Providing \$288 billion in tax cuts and benefits for millions of working families and businesses;
- Increasing federal funds for education and health care as well as entitlement programs (such as extending unemployment benefits) by \$224 billion;
- Making \$275 billion available for federal contracts (over \$100 billion for infrastructure projects), grants and loans; and
- Requiring recipients of Recovery funds to report quarterly on how they are using the money.

More than \$100 billion is targeted for infrastructure development and enhancement. Of the \$100 billion, more than \$48 billion is slated for transportation infrastructure improvements including more than \$27 billion for highway and bridge construction, \$8 billion for intercity passenger rail projects, \$2 billion for commercial rail infrastructure, \$750 million for public transportation system maintenance, \$200

million for upgrades to air traffic control centers, facilities and equipment as well as \$100 million for shipyard improvements. Another \$18 billion is earmarked for water, sewage, environment, and public lands infrastructure including more than \$4 billion for environmental restoration, flood protection, hydropower, and navigation infrastructure projects and \$4 billion for wastewater treatment facility infrastructure improvements. Furthermore, more than \$7 billion is designated for government building and facility improvements.<sup>3</sup>

While many *Recovery Act* projects are focused more immediately on jump starting the economy, others, especially those involving infrastructure improvements, are expected to contribute to economic growth for many years by creating a multitude of employment opportunities. Twenty-eight different agencies—such as the Departments of Education; Health and Human Services; and Energy—have been allocated a portion of the \$787 billion in Recovery funds. Each agency developed specific plans for how it would spend its *Recovery Act* funds. The agencies then awarded grants and contracts to state governments or, in some cases, directly to schools, hospitals, contractors, or other

organizations. The agencies are required to file weekly financial reports on how they are spending the money and their specific activities related to Recovery funds.

Due to the pressing nature of the economy, Congress intended to award stimulus infrastructure funds to projects that could be authorized in a short timeframe (120 days of appropriation). In recognition of the urgency to select and execute projects expeditiously, selection of proposed projects was based upon the overriding objective of job creation. Congress established unified priorities and formulated guidance to lead the project selection process. The guidance prescribed the following framework to assess a project's suitability for *Recovery Act* funding:

- Expediency of implementation;
- Address high priority needs;
- Job creation potential; and
- Long-term value.

Each applicant requesting an allotment of *Recovery Act* funds was done internally within the specific agency. Each applicant was responsible for the creation of the proposed pipeline based upon *Recovery Act*

criteria, and the allotment of *Recovery Act* funds was merit based upon infrastructure projects submitted by each applicant.

### **Governmental Tort Immunity**

This article will address tort negligence as it relates to infrastructure projects funded via the *Recovery Act*. A tort (meaning "wrong" from the Latin term *tortum*) is a wrong that involves a breach of a civil duty owed to another party.<sup>4</sup> A tort is differentiated from criminal wrongdoing, which involves a breach of a duty owed to society. A person who suffers legal injury may be able to use tort law to receive damages (usually monetary compensation) from the party responsible or liable for those injuries. Federal and State jurisdictions generally define what is a deemed tort activity for which parties may seek redress for damages. In the United States, tort law generally falls into one of three categories: intentional torts, negligence, and strict liability torts.

The most common tort action in the United States is negligence. Negligence is generally defined by four elements: duty, breach of duty, causation and damages. That is, but for the negligent party's act or omission, the damages to the other party (the plaintiff)

would not have been incurred, and the damages were a reasonably foreseeable consequence of the tortious conduct.<sup>5</sup>

Certain individuals and entities are granted immunity from both damage awards and assessments of liability in tort. Immunity is a defense to a legal action in which public policy demands special protection for an entity or a class of persons participating in a particular field or activity.<sup>6</sup> Historically, immunity from tort litigation has been granted to government units, public officials, charities, educational institutions, spouses, parents, and children.

Government immunity, also known as sovereign immunity, insulates federal, state, and local governments from liability for torts that an employee commits within the scope of his or her official duties.<sup>7</sup> Public policy, as reflected by legislation, common-law precedent, and popular opinion, has required courts to protect the government from unnecessary disruptions that invariably result from civil litigation. Similarly, educational institutions generally have been immunized from tort actions to protect students and faculty from distraction. Over the last quarter century, nearly every jurisdiction has curtailed tort immunity in some fashion. The movement to restrict tort immunity has

been based, in part, upon the rule of law which requires all persons, organizations, and government officials to be treated equally under the law.<sup>8</sup> Despite the efforts of this movement, tort immunity persists in various forms at the federal, state, and local levels.

Throughout the history of the United States, the federal government has invoked sovereign immunity and declared the federal government may not be sued unless it has waived its immunity or consented to suit. In *Gibbons v. United States*,<sup>9</sup> the United States Supreme Court (the “Supreme Court”) held that the federal government could not be sued without the consent of Congress. Congress has waived sovereign immunity to a limited extent via specific Congressional acts such as the *Federal Torts Claims Act (FTCA)* and *Tucker Act*.<sup>10</sup> The *FTCA* provides a limited waiver of the federal government’s sovereign immunity, the common law doctrine that a government cannot be sued in its own courts without its consent. By enacting the *FTCA*, Congress waived sovereign immunity for certain tort suits.<sup>11</sup> The *Tucker Act* waives immunity over claims arising out of contracts to which the federal government is a party.

The Supreme Court, in *Hans v. Louisiana*,<sup>12</sup> held

that the Eleventh Amendment of the United States Constitution affirmed states possess sovereign immunity and are, therefore, immune from being sued in federal court without their consent because states entered the federal system with their sovereignty intact. Article III of the United States Constitution is limited by this sovereignty and a state, therefore, may not be subject to suit in federal court unless it has consented to such.<sup>13</sup>

Most states either expressly created via their respective state constitution, or via judicial decree, that the state was immune from suit. In some circumstances, states waive in whole or part their immunity. Over time, many states have narrowed the immunity through statutes and judicial decisions.

If the federal and state governments have a form of immunity that shields each from suit and liability, can that governmental immunity be legally imputed to a contractor or subcontractor working under the supervision of government agents? If yes, the small umbrella of tort liability protection for government agents may be enlarged to protect hundreds of independent contractors from a storm of potential tort claims. The Supreme Court addressed this issue in *Boyle v. United Technologies*.<sup>14</sup>

In *Boyle*, the Supreme Court reversed a lower court jury award in favor of the family of David Boyle.<sup>15</sup> Mr. Boyle was a United States Marine killed when the helicopter he was co-piloting crashed off the coast of Virginia during a training exercise. While Mr. Boyle survived the crash, he was unable to escape the helicopter and drowned. Unlike the helicopter pilot’s door that opened inward, the co-pilot door of the helicopter was designed to open outward with the access hatch handle being obstructed by other equipment. As such, Mr. Boyle was unable to push the door open under water and unable to escape the helicopter. The legal issue before the Supreme Court was whether Sikorsky Helicopters, a military defense contractor who manufactured the helicopter via military contract, could be held liable under state tort law involving an injury resulting from a defective door/hatch design.

First, the “Petitioner’s broadest contention was that in the absence of legislation specifically immunizing government contractors from liability for design defects, there is no basis for judicial recognition of such a defense.”<sup>16</sup> The Supreme Court disagreed and held that

In most fields of activity, to be sure, [the] Court has refused to find federal pre-emption

of State law in the absence of either a clear statutory prescription or a direct conflict between federal and State law. But we have held that a few areas, involving “uniquely federal interests,” are so committed by the Constitution and laws of the United States to federal control that State law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called “federal common law.”<sup>17</sup>

The Supreme Court further examined the dispute in *Boyle* to be the crux between two areas that involve “uniquely federal interests” that generally require the obligations and rights of the United States and its agencies within a contractual setting to be governed solely and exclusively by federal law; however, in the *Boyle* case, the United States was not under scrutiny for its contractual responsibilities. The Supreme Court, here, was determining the liability of the United States to third persons if

that liability may be styled one in tort, but it arises out of performance of the contract—and

traditionally has been regarded as sufficiently related to the contract that until 1962 Virginia would generally allow design defect suits only by the purchaser and those in privity with the seller.<sup>18</sup>

Conversely, another area of particular concern addressed in *Boyle* warranting the displacement of state law is “the civil liability of federal officials for actions taken in the course of their duty.”<sup>19</sup> In the *Boyle* case, an independent contractor performed its duties under a “procurement contract, rather than an official performing his duty as a federal employee, but there is implicated the same interest in getting the government’s work done.”<sup>20</sup>

Throughout the course of history, the Government’s interest in the procurement of equipment has tangentially been included even though the litigation was only between private parties. And it is well established law that “litigation ... purely between private parties and does not touch the rights and duties of the United States” is governed by state law; rather than federal law;<sup>21</sup> however, when the interests of the United States will be directly affected, federal law does displace the controlling authority of state or local law. The procurement of equipment by the United

States is an area specifically unique to the United States government that establishes a necessary condition for displacement though not an over-reaching concept for the displacement of all local and state laws.

As a general rule, displacement of state laws or regulations by federal regulators or law will occur only where a “significant conflict”<sup>22</sup> exists between an identifiable “federal policy or interest and the operation of state law” or the application of state law would frustrate specific objectives of federal legislation. The Supreme Court reasoned the *FTCA* is a statutory provision that suggests the outline for “significant conflict” between federal interests and state law in the context of United States government procurement. The *FTCA* includes an exception to the consent to sue the government or its employees when a claim is based upon the exercise or failure to exercise or perform a discretionary function or duty. The selection of the appropriate design for military equipment to be used by the Armed Forces is assuredly a discretionary function. Therefore, in processing government projects, such as designing a military helicopter, the federal government has a duty to protect those within the scope of danger or risk. Merely passing that project to an independent contractor to manufacture

the product does not allow the federal government to escape liability; it may, however, expand that government immunity to the independent government contractor.

Thus, the authors' proposition is that the imposition of liability on government contractors will directly affect the terms of government contracts with either the contractor declining to manufacture the design or being forced to raise the price. Regardless of the result upon contractors, the interests of the United States will be directly affected, in that a state law that holds government contractors liable for design defects in military equipment presents in some circumstances, a "significant conflict" with federal policy and must be displaced.

Clearly established by the Supreme Court decision in *Boyle*, liability for design defects in military equipment cannot be imposed pursuant to state law, when 1) the United States approved reasonable precise specifications; 2) the equipment conformed to those specifications; and 3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The third condition is necessary because in its absence the displacement of state law would create some incentive for the manufacturer to

withhold knowledge of risks.<sup>23</sup> The plaintiffs in *Boyle* argued that, in the absence of legislation specifically immunizing the government contractors from liability for design defects, there is no basis for judicial recognition of such a defense. The defendants (Sikorsky and United Technologies) successfully argued government contractors are shielded (imputed sovereign immunity) from state tort liability as an employee of the United States government exercising discretionary functions.

### **Imputed Federal Tort Immunity – *Boyle v. United Technologies***

Due to the inherent nature of how the federal government approved project submissions as well as each states' submission for project approval, have contractors/subcontractors been afforded a form of imputed sovereign immunity for *Recovery Act* infrastructure projects?

Though federal law may not broadly displace state and local laws dealing with governmental liability to third parties prior to the *Recovery Act*, it may have inadvertently done so with this profound legislation. As previously discussed, Congress has legislated "significant conflicts" between federal interests and state law in the context of Government procurement by and through the *FTCA*.

Under the *FTCA*,

Congress authorized damages to be recovered against the United States for harm caused by the negligent or wrongful conduct of Government employees, to the extent that a private person would be liable under the law of the place where the conduct occurred. It exempted from this consent to suit, however, "[a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."<sup>24</sup>

Ironically, projects authorized for *Recovery Act* funds go through an extensive approval and bidding process which have been stripped of any discretion from the contractor. Linking the minimal discretion in government procurement contracts in which, for example,

the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of [the above provision], often involves not merely engineering

analysis but judgment as to the balancing of many technical, military and even social considerations, including specifically the tradeoff between greater safety and greater combat effectiveness.<sup>25</sup>

Infrastructure projects allocated funding under the *Recovery Act* require particular guidelines and specifications for the safety of the general public, as well as traffic management, security concerns and various other purposes. As the US Supreme Court stated in *Boyle*,

It makes little sense to insulate the government against financial liability for the judgment that a particular feature of military equipment is necessary when the government produces the equipment itself, but not when it contracts for the production. In sum, [the court found] that state law which holds government contractors liable for design defects in military equipment present a 'significant conflict' with federal policy and must be displaced.<sup>26</sup>

Would infrastructure projects governed to a higher level of specificity not warrant a similar, if not

heightened, extension of immunity than that of mere equipment?

Analogous to the funds presented under the *Recovery Act* for infrastructure projects, in 1992, Congress enacted the *Federally Supported Health Centers Assistance Act*

to provide *FTCA* medical malpractice coverage to the Health Center Program for a 3-year period. This coverage was made permanent by the Federally Supported Health Centers Assistance Act of 1995.<sup>27</sup> *FTCA* coverage only applies to Health Centers that receive funding under Section 330 of the Public Health Service Act and to the employees, board members, and contractors who are deemed "employees" of the Public Health Service under the Federally Supported Health Centers Assistance Act. The Health Center Program includes community health centers, health centers for homeless and migrant populations, and health centers in public housing complexes.

Similar to government employees (i.e., military, agency workers, etc.), those employees under the Health Center Program are

excluded from liability for medical malpractice under the *FTCA*. Interestingly enough more than 1,100 Health Centers have coverage under the *FTCA*, but this federal protection against liability does not extend to health care providers considered volunteers at approximately 78 of the Health Centers using volunteers.<sup>28</sup> Though volunteers engage in substantially similar activities as those protected under the *FTCA*, they are at risk for medical malpractice because they do not fall under the umbrella of protection provided by the *FTCA* explicitly.

The federal government is very aware of this situation and has made two efforts to protect volunteer health care providers. In 1996, the *Health Insurance Portability and Accountability Act* was enacted to extend *FTCA* medical malpractice coverage to volunteers at free clinics. The second enactment was the *Volunteer Protection Act*, in which some general protection may be afforded to volunteers who assist government entities and non-profit organizations from ordinary negligence occurring during the course of their volunteer work, with some exceptions.<sup>29</sup> In many ways, independent contractors working for the federal government are very similar to these volunteers being afforded extended protection by the federal

government. For example, independent contractors work for and under the guidance of government employees, which is very similar to the volunteers at Health Centers. Conversely though, independent contractors have little discretion in how their work is carried out, due to the extreme approval process in project selection. Assuming *arguendo*, volunteers are probably allowed some discretion in how they proceed in treating a patient. The supervening causes of negligence do not seem to outweigh the benefit of the *FTCA* coverage for volunteers. Therefore, the argument for extended coverage to those independent contractors completing projects under the direct supervision and approval of the government (i.e., infrastructure projects under the *Recovery Act*) is stronger for extended protection of the *FTCA* since they are merely the hand of the extended arm of government work.

### **North Carolina Tort Claims Act**

Long standing North Carolina common law established that “the doctrine of sovereign immunity protected the state from any liability for negligence or tortious conduct on the part of the state or its agents—this immunity, or freedom from suit, reflected the ancient notion that the King could

do no wrong.”<sup>30</sup> North Carolina continues to protect state actors from liability except where waived explicitly by statute. In 1951, the North Carolina General Assembly (the “General Assembly”) waived a portion of the State’s immunity by enacting the North Carolina Tort Claims Act (the “NCTCA”), which allows tort claims to be brought against State agencies under in certain situations.<sup>31</sup>

Under the NCTCA, the General Assembly directed all tort claims against the State arising under this act to the North Carolina Industrial Commission (the “Commission”) for review.<sup>32</sup> Once the Commission receives the case, it must “determine whether the claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person would be liable to the claimant in accordance with the laws of North Carolina.”<sup>33</sup> If the Commission finds that a State officer, employee or agent while acting within the scope of his office, employment, or agency was the proximate cause of the claimant’s injuries it may award damages, so long as there was no contributory negligence on behalf of the

claimant.<sup>34</sup> Though the State may be held liable for any negligent acts committed, just as a private party may be liable, the NCTCA may protect the actor from personal liability.

Conversely, an employer in North Carolina is generally not liable for the torts of an independent contractor because the doctrine of respondeat superior imposes liability only for conduct of employees;<sup>35</sup> however, if the employer has the right to control the manner and method of the work being done, the worker will be considered an employee or agent and not an independent contractor.<sup>36</sup> Under North Carolina law, state agencies may be liable for the torts of independent contractors. First, state agencies may be liable for the actions of independent contractors performing non-delegable duties<sup>37</sup> or engaging in inherently dangerous activities.<sup>38</sup> Additionally, contractors may be considered agents of the state under the NCTCA, and liability may be premised on the negligence of the employer choosing the contractor to do the work.<sup>39</sup> In sum, under the NCTCA, a claimant may proceed with a negligence claim against the state agency with the Commission rather than an individual actor so long as the negligent behavior qualifies under the immunity exceptions.

In North Carolina, for infrastructure projects, such as road construction,

extensive long-term planning goes into the building of each North Carolina highway. As the first major step in the process, the North Carolina Department of Transportation (“NCDOT”) Planning Branch assists Metropolitan Planning Organizations, small urban areas and counties across North Carolina in the development of comprehensive transportation plans, which outline transportation priorities for the next 20-25 years based upon future land use, employment and population changes in an area.<sup>40</sup>

Before any road construction can begin, the Project Development and Environmental Analysis Branch, or PDEA, is responsible for the development and preparation of planning and environmental documents for all highway projects (according to state and federal guidelines, PDEA staff evaluates all proposed North Carolina highway projects). The process includes specialized environmental studies

and coordination with the environmental regulatory agencies to ensure appropriate consideration is given to environmental matters. Specialists in such fields as noise and air quality, archaeology, architectural history, biology, land-use planning and sociology provide evaluations regarding the environmental impacts of proposed highway projects. The process also involves design and traffic engineering studies, which provide an analysis of highway alternatives to safely, efficiently and economically meet future travel demands.<sup>41</sup>

The next step is for “design engineers to prepare detailed plans for the highway within the selected location. These plans define the type of highway cross-section (two-lane or multi-lane), the width of right-of-way required, and the type of intersections and interchanges, as well as bridges, culverts and other drainage features.”<sup>42</sup> Each of the plans must “identify the type of materials to be used and estimate the quantity of each material required to construct the highway. These technical plans allow preparation of contract documents and advertisements for contractors wishing to place

bids. Contractors must meet criteria specified by NCDOT to be eligible to bid.<sup>43</sup>

When North Carolina is ready to bring life to the plans, “bids are received for construction on the identified date and are publicly disclosed. NCDOT awards the contract to the lowest responsible bidder. The bidder (private contractor) is then obligated to construct the project in accordance with plan requirements and specifications upon which the bid was received.<sup>44</sup> Continuously, the

NCDOT staff in the Division of Highways administers the contract and provides inspection and testing functions to assure the project is properly constructed. A NCDOT resident engineer and his/her staff interpret plan details and contract requirements, test for quality, check for conformity with contractual requirements and document the quantity of work performed so the contractor can be paid on a monthly basis. The resident engineer and staff also make certain the environment is protected, manage traffic flow along the project, work with adjacent property owners, observe work zone safety and oversee

coordination with state and federal agencies.<sup>45</sup>

The last step before a road is open for travel is “a final inspection made by an engineer not involved in the project’s construction to verify it has been completed properly.”<sup>46</sup>

As the process outlined above demonstrates, various state agencies provide direction, supervision, pointed guidance, and oversight of the independent contractors for road and infrastructure projects. Little discretion is allowed by the contract to deviate from the state’s plans. Given the current standing of North Carolina tort law, independent contractors working pursuant to the process outlined by NCDOT would not be considered an “independent contractor” for the purposes of tort liability. Rather under *respondeat superior*, the state agencies should be found liable for any negligent actions committed rather than the independent contractors privately. These independent contractors are mere agents of state agencies; thereby protected as a group from tort liability for potential design and construction defects in projects.

### Conclusion

The traditional format of federal road and infrastructure contribution funds grant each state

discretion for disbursement of funds to projects; however, under the stipulations of the *Recovery Act*, federal funds were provided and restricted to projects which the federal government reviewed and approved. Funds flow from federal coffers to the respective state for earmarked projects with zero discretion given to the state for disbursement. In addition, contractors lack the ability to modify or vary project parameters set by federal and state agencies. Therefore, the federal government’s haste to jump start the economy and place *Recovery Act* funds into service as quickly as possible coupled with the state’s rush for project approval, contractors and subcontractors may have the unintended effect of governmental tort immunity imputed to them.

### Endnotes

1. Public Law No. 111-5 (2009).

2. **2009 U.S.C.C.A.N. S6** P.L. 110-, AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 STATEMENT BY PRESIDENT OF THE UNITED STATES February 17, 2009.

3. Id.

4. Dobbs, Dan B. “The Law of Torts” West Group, St. Paul, Minn. 2000 (2010 Supplement).

5. Id.

6. Id.

7. Id.

8. Id.

9. 75 U.S. 269 (1868).

10. 28 U.S.C. § 1346; 28 U.S.C. § 1491.

11. Congressional Committee “Federal Torts Claims Act: Information Related to implications of Extending Coverage to Volunteer at HRSA-Funded Health Centers” United States Government Accountability Office, June 2009, available at <http://www.gao.gov/new.items/d09693r.pdf>.

12. 134 U.S. 1 (1890).

13. Id.

14. 487 U.S. 500 (1988).

15. Id.

16. Id.

17. Id at 504.

18. Id at 505.

19. Id at 505.

20. Id at 505.

21. Bank of America Nat. Turst & Sav. Assn. v. Parnell, 352 U.S. 29, 33, 77 S. Ct. 119, 121, 1 L.Ed.2d 93 (1956).

22. Id.
23. Id.
24. 28 U.S.C. § 1346(b).
25. *United States v. Varig Airlines*, 467 U.S. 797, 814, 104 S.Ct. 2755, 2765, 81 L.Ed.2d 660 (1984).
26. *Supra*, *Boyle* at 512.
27. (Pub. L. No. 104-73, 109 Stat. 777, codified at 42 U.S.C. § 233(g)-(n)).
28. *Supra*, Congressional Committee Report, June 2009.
29. Id.
30. *Moody v. State Prison*, 128 N.C. 12, 38 S.E. 131 (1901).
31. N.C. Gen. Stat. 143-291 (West 2010).
32. Id.
33. Id.
34. Daye, Charles E. and Mark W. Morris, "North Carolina Law of Torts," 2<sup>nd</sup> Edition, Lexis Law Publishing, Charlottesville, Virginia (1999 with 2010 Supplement).
35. *Willoughby v. Wilkins*, 65 N.C. App. 626, 310 S.E.2d 90 (1983).
36. *Little v. Poole*, 11 N.C. App. 597, 182 S.E. 2d 206 (1971).
37. *Hendricks v. Leslie Fay, Inc.*, 273 N.C. 59, 159 S.E.2d 362 (1968).
38. *Docker v. World of Mirth Shows, Inc.* 264 N.C. 406, 142 S.E.2d 29 (1965).
39. *Page v. Sloan*, 12 N.C. App. 433, 183 S.E. 2d 813, 817 (1971) "An employer is subject to liability for physical harm to third person caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons."
40. NCDOT "How a Road Gets Built" <http://www.ncdot.org/projects/roadbuilt/>.
41. Id.
42. Id.
43. Id.
44. Id.
45. Id.
46. Id.

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