Chapter 1

Governmental Immunity Overview

Public and private employers commonly face lawsuits over injuries allegedly inflicted through the on-the-job carelessness or deliberate misconduct of their personnel. Unlike private employers, however, cities, counties, school districts, and other units of local government in North Carolina enjoy liability protection in the form of *governmental immunity*.[1] The judicial decisions on governmental immunity constitute a large and, in many respects, confusing body of case law. This book surveys that case law, highlighting its major problems and attempting, where feasible, to resolve apparent inconsistencies. It begins with an outline of the immunity's main features, including the immunity's origin. Although the primary concern throughout is the immunity of cities and counties, the book also considers the immunity of other units at various points.

1. Under the legal doctrine of *respondeat superior*—Latin for "Let the master answer"—employers are liable for torts committed by their employees, but only if the employees acted within the scope of their employment. Charles E. Daye & Mark W. Morris, North Carolina Law of Torts § 23.20, at 554 (3d ed. 2012). Many cases have recognized that *respondeat superior* principles apply to tort claims against local government units. *E.g.*, Rogers v. Town of Black Mountain, 224 N.C. 119, 121–22 (1944) (applying doctrine of *respondeat superior* to wrongful death claim against defendant town). Accordingly, the negligence or deliberate wrongdoing of a local government employee does not expose a unit to tort liability when the employee's conduct falls outside the scope of the employee's duties. *See id.* at 122 (town was not liable for death of 15-year-old boy who fell from a town truck negligently driven by a town employee acting outside the scope of employment); Daye & Morris, *supra*, § 19.40[2][c][v], at 465 ("In order for the plaintiff to recover against a city, the injury must have arisen from a tort committed by a city employee within the scope of employment."). It follows that, if a court finds that a unit's employee acted outside the scope of employment in causing the plaintiff's injury, there is no need to reach the issue of governmental immunity because no legal basis exists for imposing liability on the unit. This last principle is sometimes muddled in the case law. *See* Childs v. Johnson, 155 N.C. App. 381, 389 (2002) (county was not entitled to governmental immunity inasmuch as its emergency medical services director was not acting within the scope of employment when the county vehicle he was driving collided with plaintiffs' automobile).

1.1 "Governmental Immunity" Defined

In North Carolina, governmental immunity is a legal doctrine that bars negligence and other tort claims against local government units when (1) the claims arise from the performance of governmental functions, not proprietary functions (these terms are discussed more fully in Section 1.4, *infra*), and (2) the units have not waived their immunity.

1.2 Relationship to Sovereign Immunity

The doctrine of sovereign immunity protects the state from liability for tort claims premised on the negligence or intentional wrongdoing of its officers, employees, or agents, except to the extent that the state has waived this immunity by statute.[2] Governmental immunity is that portion of the state's sovereign immunity that extends to local governments. It is not as robust as sovereign immunity, which can apply to claims against the state regardless of whether they stem from governmental or proprietary activities. Although some appellate decisions refer to "sovereign immunity" when discussing the immunity of local governments to lawsuits, the North Carolina Supreme Court has said that "governmental immunity" is the more accurate term.[3]

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2. Great Am. Ins. Co. v. Gold, 254 N.C. 168, 173 (1961) ("The State is immune from suit unless and until it has expressly consented to be sued. It is for the General Assembly to determine when and under what circumstances the State may be sued."); Prudential Ins. Co. of Am. v. N.C. Unemployment Comp. Comm'n, 217 N.C. 495, 499 (1940) ("Except in a limited class of cases the State is immune against any suit unless and until it has expressly consented to such action.").

The North Carolina General Assembly has enacted several limited waivers of the state's sovereign immunity, the most important being the Tort Claims Act (TCA), which exposes the state to liability for injuries caused by the negligence of its officers, employees, or agents acting within the scope of their duties under circumstances that would expose the state to liability if it were a private individual. Chapter 143, Section 291(a) of the North Carolina General Statutes (hereinafter G.S.). The TCA does not waive the state's immunity to tort claims arising from intentional misconduct. Moreover, the TCA places a $1,000,000 cap on what the state may be required to pay for harm to an individual resulting from a single incident. G.S. 143-299.2. For the most part, actions brought under the TCA must be litigated in the North Carolina Industrial Commission, not in superior or district court. Guthrie v. N.C. Ports Auth., 307 N.C. 522, 536 (1983). The state may be brought into a tort action in superior or district court as a third party or third-party defendant pursuant to Rule 14(e) of the North Carolina Rules of Civil Procedure.

3. Irving v. Charlotte-Mecklenburg Bd. of Educ., 368 N.C. 609, 611 (2016) ("Here '[defendant] is a county agency. As such, the immunity it possesses is more precisely identified as governmental immunity, while sovereign immunity applies to the State and its agencies.'"); Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334, 335 n.3 (2009) ("The [New Hanover County] Board [of Education] is a county agency. As such,

1.3 Common Law Origin

Sovereign immunity is a common law doctrine, that is, a judicial creation.[4] It originated in England and appears to have been based on the concept that, as a matter of law, "the king can do no wrong."[5] It was thought that the king's status as sovereign prevented the bringing of lawsuits against the king in his own courts.[6]

In North Carolina, the state takes the place of the king for purposes of sovereign immunity.[7] Like sovereign immunity, governmental immunity is a creature of the common law.[8] The judiciary may therefore modify or even abolish it.[9] Moreover, since legislative enactments generally trump the

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the immunity it possesses is more precisely identified as governmental immunity, while sovereign immunity applies to the State and its agencies.").

For a case that uses the term *sovereign immunity* in reference to local governments, see *Bullard v. Wake County*, 221 N.C. App. 522, 525 (2012) ("Under North Carolina law, counties are entitled to sovereign immunity unless the county waives immunity or otherwise consents to be sued."). There are quite a few cases in which the terms *sovereign immunity* and *governmental immunity* are treated as interchangeable. *E.g.*, Lucas v. Swain Cty. Bd. of Educ., 154 N.C. App. 357, 361 (2002) ("'As a general rule, the doctrine of governmental, or sovereign immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity.'").

4. Corum v. Univ. of N.C., 330 N.C. 761, 785 (1992).

5. Osborne M. Reynolds, Jr., Local Government Law § 26.1, at 686 (4th ed. 2015). *See also* Steelman v. City of New Bern, 279 N.C. 589, 592 (1971) ("In feudal England the monarchy was sovereign and could not be liable for damage to its subjects. This was based on the theory that "the king could do no wrong.").

6. Reynolds, *supra* note 5, § 26.1, at 686. *See also* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 131, at 1033 (5th ed. 1984) ("Though the modern state gradually replaced the individual sovereign, the idea [that the king can do no wrong] was carried over, partly on the ground that it seemed illogical to enforce a claim against the very authority that created the claim in the first place.").

7. *See Corum*, 330 N.C. at 785 (linking the state's sovereign immunity to "the feudal concept that the king could do no wrong"). *See also* Reynolds, *supra* note 5, § 26.1, at 686 ("[R]ather mystifyingly, [the concept that the king can do no wrong] became the basis of the American doctrine of immunity of the state and federal government.").

8. It seems that governmental immunity was first applied to bar tort claims against a local government in the English case of *Russell v. Men of Devon*, 100 Eng. Rep. 359 (1788). Governmental immunity was not initially part of the common law of North Carolina. *Corum*, 330 N.C. at 785; *Steelman*, 279 N.C. at 592. As a newly independent state, North Carolina adopted the common law of England as it stood in 1776. *Corum*, 330 N.C. at 785; *Steelman*, 279 N.C. at 592. The *Russell* case was not part of the English common law at that time. The North Carolina Supreme Court did not recognize governmental immunity as a valid defense until *Moffitt v. City of Asheville*, 103 N.C. 237 (1885).

9. *See Steelman*, 279 N.C. at 594 (acknowledging that the North Carolina Supreme Court made governmental immunity part of the state's law but declining plaintiff's request that the court abolish the doctrine). *See also* Keeton et al., *supra* note 6,

common law, the North Carolina General Assembly may narrow the immunity's scope or eliminate the immunity altogether.[10]

1.4 Governmental Functions vs. Proprietary Functions

Because governmental immunity covers governmental functions but not proprietary functions, many of the cases focus on distinguishing between the two categories. The classic formulation is that governmental functions are discretionary, political, legislative, or public in nature and performed for the public good, while proprietary functions are chiefly commercial or undertaken for the private advantage of the compact community.[11]

Some local government activities are readily identifiable as governmental (law enforcement) or proprietary (operation of public arena to generate revenue).[12] Yet judges have struggled in many cases to apply the classic formulation to specific activities. The result has been "irreconcilable splits of authority" and a "tradition of confusion" as to "what functions are governmental and what functions are proprietary."[13] In an effort to provide lower courts with a more workable test, the North Carolina Supreme Court in 2012 restated in *Estate of Williams v. Pasquotank County Parks & Recreation Department* the criteria to be used in classifying undertakings as either governmental or proprietary.[14] Chapter 2 looks closely at the *Williams* test, while Chapter 3 catalogues many of the governmental/proprietary distinctions made by the appellate courts since governmental immunity became part of the state's common law.

1.5 Waiver of Governmental Immunity

As Sections 1.1 and 1.4, *supra*, make clear, local governments step out from under the umbrella of governmental immunity anytime they undertake proprietary functions. Assorted statutes authorize cities, counties, and certain

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§ 3, at 18 ("From a very early point in the history of the common law . . . it was assumed that a court could and should occasionally overrule a precedent.").

10. *See Steelman*, 279 N.C at 595 ("[A]ny further modification or the repeal of the doctrine of sovereign immunity should come from the General Assembly . . . ."). *See also* Keeton et al., *supra* note 6, § 3, at 19 ("In tort law as in other fields, courts are obliged, with exceptions founded in constitutional law, to follow statutory mandates.").

11. Millar v. Town of Wilson, 222 N.C. 340, 341 (1942).

12. Young v. Woodall, 119 N.C. App. 132, 135 (1995) (law enforcement is a governmental function), *rev'd on other grounds*, 343 N.C. 459 (1996); Aaser v. City of Charlotte, 265 N.C. 494, 497 (1965) (operation of public area to generate revenue is a proprietary function).

13. Koontz v. City of Winston-Salem, 280 N.C. 513, 528 (1972).

14. 366 N.C. 195 (2012).

other units to waive their immunity for governmental functions by purchasing liability insurance, though any such waiver is restricted to the extent of coverage.[15] Additionally, by entering into valid contracts, units implicitly agree to be sued for alleged breaches of those contracts. Chapter 4 explores the mechanisms of waiver in more detail.

1.6 Covered Entities

Governmental immunity applies to cities, counties, and public school districts when they carry out governmental functions. It can also protect special purpose local governments such as sanitary districts, rural fire protection districts, housing authorities, water and sewer authorities, and mental health area authorities when they act governmentally rather than proprietarily. The courts have recognized, for instance, that governmental immunity can bar tort claims against mental health area authorities and city housing authorities.[16]

Incorporated nonprofit fire departments have successfully asserted governmental immunity in some circumstances. Governmental immunity shielded an incorporated fire department from liability for an automobile pileup allegedly caused by one of its employees.[17] Major factors in the outcome were that the department had contracted to provide emergency medical services for the county and that the employee was responding to an emergency call at the time of the accident.

1.7 Claims against Individuals

When a plaintiff sues a local government officer or employee in the person's official capacity, the plaintiff is really suing the unit.[18] For this reason, governmental immunity can be a defense to the plaintiff's tort claims.[19] Under current case law, governmental immunity is not a defense to tort claims

15. G.S. 115C-42 (local school boards); 122-152 (area authorities); 153A-435 (counties); 160A-485 (cities).

16. Evans v. Hous. Auth. of City of Raleigh, 359 N.C. 50, 55 (2004) (housing authority); Warren v. Guilford Cty., 129 N.C. App. 836, 838–89 (1998) (area authority).

17. Pruett v. Bingham, 238 N.C. App. 78, 85 (2014).

18. *E.g.*, Meyer v. Walls, 347 N.C. 97, 110 (1997) ("A suit against a defendant in his individual capacity means that the plaintiff seeks recovery from the defendant directly; a suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent.").

19. *E.g.*, Mullis v. Sechrest, 347 N.C. 548, 555 (1998) (teacher sued in his official capacity was entitled to governmental immunity to the same extent as local school board).

alleged against officers or employees sued in their individual capacities.[20] Public official immunity, a derivative form of governmental immunity, can shield public officers such as police officers and building inspectors from personal liability for conduct within the scope of their duties, except when they act maliciously or corruptly.[21] On the other hand, public employees who do not qualify as "public officials"—teachers and emergency medical technicians are examples—remain personally liable for their negligence or intentional wrongdoing, except when a statutory immunity applies.[22] For instance, G.S. 166A-19.60(a) provides liability protection to city and county emergency management workers who injure others or damage property while undertaking emergency management activities, "except in cases of willful misconduct, gross negligence, or bad faith."

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20. *E.g.*, Wright v. Gaston Cty., 205 N.C. App. 600, 602 (2010) ("Plaintiffs' complaint also alleges claims against the 911 operators in their individual capacities, for which governmental immunity is not applicable.").

21. "The doctrine of public official immunity is a derivative form of governmental immunity. Public official immunity precludes suits against public officials in their individual capacities and protects them from liability [a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption." Hart v. Brienza, ___ N.C. App. ___, ___, 784 S.E.2d 211, 215 (2016) (internal quotation marks omitted) (citations omitted).

22. *E.g.*, Murray v. Cty. of Person, 191 N.C. App. 575, 579 (2008) ("It is well established that [p]ublic officers are shielded from liability unless their actions are corrupt or malicious[;] however, public employees can be held personally liable for mere negligence.").

Much of the case law on public official immunity is occupied with distinguishing between public officers and public employees. In deciding whether an individual qualifies as public officer for purposes of public official immunity, the courts examine whether (1) the individual's position originates in state law, (2) the person's duties require the use of discretion, and (3) the individual exercises a portion of the state's sovereign power. Isenhour v. Hutto, 350 N.C. 601, 610 (1999). For lists of positions that the courts have classified as either eligible or ineligible for public official immunity, see the appendices in Trey Allen, *Do Intentional Tort Claims Always Defeat Public Official Immunity?*, Local Gov't L. Bull. No. 139 (UNC School of Government, Sept. 2016), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/2016-09-21%2020160844%20LGLB%20139%20TORTs.pdf.

One example of a statutory immunity that can protect public employees from personal liability is G.S. 115C-390.3, which exempts school personnel from civil liability for using reasonable force in conformity with state law, as when necessary to correct students or to quell a disturbance threatening injury to others.

2.6 The *Williams* Test

In *Williams*, the estate of Erik Williams filed suit against Pasquotank County and its parks and recreation department alleging that the county's negligence had led to Mr. Williams's drowning in the Swimming Hole, an area rented to private parties in Fun Junktion, a county park open to the public. The county argued that governmental immunity barred the estate's claims because Chapter 160A, Section 351 of the North Carolina General Statutes (hereinafter G.S.) "asserts that 'the operation of public parks is a proper governmental function.'"[94] Both the trial court and the North Carolina Court of Appeals ruled that governmental immunity did not protect the county.[95] The county appealed to the North Carolina Supreme Court.

2.6.1 Overview of the *Williams* Test

The state supreme court vacated the decision of the court of appeals. It rejected the lower court's identification of the most important factor in governmental/proprietary determinations: whether a nongovernmental actor could perform the activity that led to the plaintiff's injury. The supreme court stated that henceforth judicial efforts to classify particular undertakings as governmental or proprietary for immunity purposes must be guided by a three-part inquiry:

1. whether, and to what degree, the legislature has designated the specific activity that caused the plaintiff's injury as governmental or proprietary;
2. whether the activity is one that only a governmental entity could undertake; and
3. whether additional factors reveal the undertaking to be either governmental or proprietary. In particular, a court must examine whether the activity is one traditionally undertaken by local governments, whether the defendant local government charged a substantial fee as part of the activity, and whether any such fee generated a profit.

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94. *Id.* at 201. The statute reads:

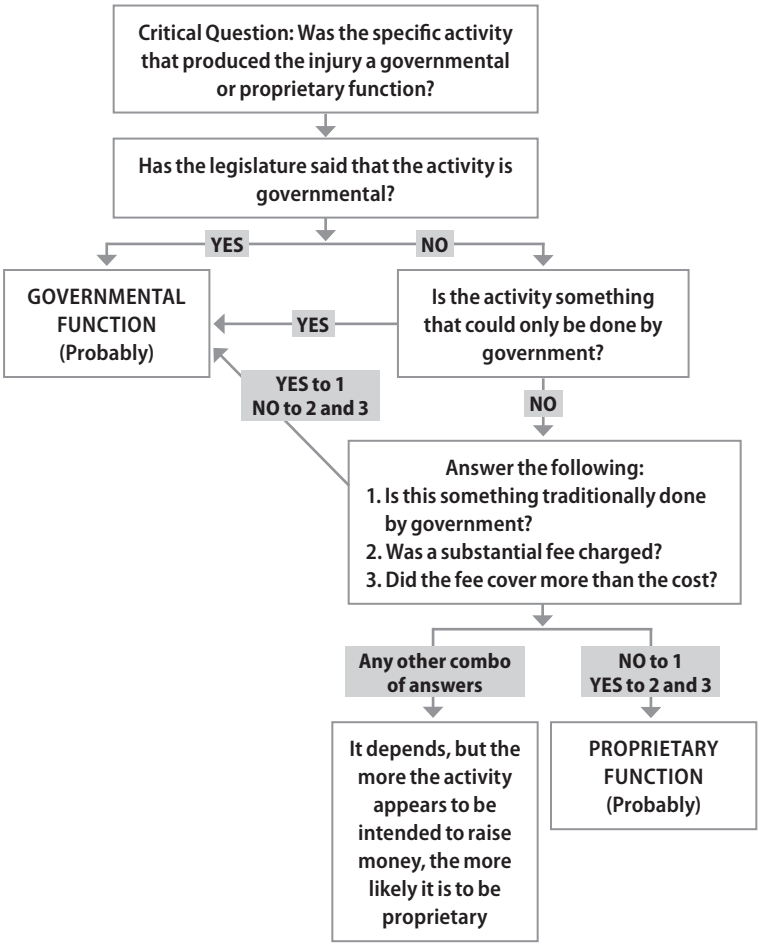
> The lack of adequate recreational programs and facilities is a menace to the morals, happiness, and welfare of the people of this State. Making available recreational opportunities for citizens of all ages is a subject of general interest and concern, and a function requiring appropriate action by both State and local government. The General Assembly therefore declares that the public good and the general welfare of the citizens of this State require adequate recreation programs, that *the creation, establishment, and operation of parks and recreation programs is a proper governmental function*, and that it is the policy of North Carolina to forever encourage, foster, and provide these facilities and programs for all its citizens.

G.S. 160A-351 (emphasis added).

95. *Williams*, 211 N.C. App. 627, 632, *vacated and remanded*, 366 N.C. 195 (2012).

The high court explained that when the legislature has designated a particular activity as governmental or proprietary, the judiciary will usually defer to its determination, making consideration of the remaining two prongs unnecessary. Similarly, when an activity is one that only the government can undertake, it is *ipso facto* a governmental function, and the third part of the *Williams* test will not be in play.[96] When the third prong is applied, the additional factors listed therein suggest that a nontraditional—or even a traditional—local government undertaking will likely be categorized as proprietary if it produces significant revenue.

The *Williams* test can be represented graphically as follows:



96. 366 N.C. at 202 ("When the legislature has not directly resolved whether a specific activity is governmental or proprietary in nature, other factors are relevant. We have repeatedly held that if the undertaking is one in which *only* a governmental agency could engage, it is perforce governmental in nature.").

However coherent the *Williams* test seems on the surface, a closer look at each of its components provides reason to believe that it will prove significantly easier to articulate than to apply in practice.

2.6.2 The *Williams* Test's First Prong: Statutory Designations of Activities as Governmental or Proprietary

There is more than one way for the General Assembly to designate an activity as governmental or proprietary. The most obvious method is for the legislature to include the term "governmental" or "proprietary" in the statutory provision authorizing the activity, as it did in G.S. 160A-351, the statute at issue in *Williams*. The state supreme court has also treated statutes that *require* local government units to undertake specific activities as legislative declarations that those compulsory activities are governmental functions. Thus, for example, in *Bynum v. Wilson County*, the court held that G.S. 153A-169 classifies the maintenance of at least some county buildings as a governmental function.[97] Although the statute omits the term "governmental," it mandates that boards of county commissioners "supervise the maintenance, repair, and use of all county property."

Statements of legislative intent can influence a court's classification of an activity as governmental or proprietary, even when they neither use the term "governmental function" nor require action on the part of local governments. In one case, the supreme court turned to the statement of purpose in the Housing Authorities Law (HAL) for "useful direction" as it analyzed whether cities act governmentally by exercising their discretionary power under the HAL to provide affordable housing to tenants of low and moderate incomes.[98] According to the statement, the legislature enacted the HAL with a view toward addressing "unsanitary or unsafe dwelling accommodations . . . in urban and rural areas throughout the State . . . that . . . cannot be remedied by the ordinary operation of public enterprise[.]"[99] The court characterized the statement as a "statutory indication that the provision of low and moderate income housing is a governmental function."[100] Pointing to similar language in the Urban Redevelopment Law and the Municipal Service District Act of 1973, the North Carolina Supreme Court in the post-*Williams* case of *Meinck v. City of Gastonia* spotted "statutory indications" that urban redevelopment projects can be governmental undertakings.[101]

97. 367 N.C. 355, 360 (2014).

98. Evans v. Hous. Auth. of City of Raleigh, 359 N.C. 50, 55 (2004).

99. *Id.* (quoting G.S. 157-2(a)).

100. *Id.*

101. Meinck v. City of Gastonia, No. 130PA17, 2018 WL 5310160, at *9 (N.C. Oct. 26, 2018) (comparing provisions in the HAL with similar provisions in G.S. 160A-501, -502, and -536).

2.6.2.1 Legislative Designations Not Always Determinative

The first prong of the *Williams* test is unlikely to resolve many cases. In the first place, very few statutes expressly designate local government functions as governmental, and none classify any as proprietary. Furthermore, even when the legislature has classified an activity as governmental, the matter is not necessarily closed. Prior cases demonstrate that judicial deference to such legislative declarations is not absolute. In *Rhodes v. City of Asheville*, the defendant local governments were sued for the wrongful death of a man who had been fatally shot by a security guard at the Asheville-Henderson Airport.[102] The units argued that governmental immunity barred the wrongful death claims. In particular, they asserted that they could not be liable for the man's death because G.S. 63-50 describes the construction, maintenance, and operation of municipal airports as "governmental and municipal functions exercised for a public purpose and matters of public necessity."[103]

The supreme court ruled that G.S. 63-50 did not bar the wrongful death claims against the defendants, offering three reasons for its holding.

- Classification of an activity as a governmental function does not necessarily mean that governmental immunity applies. For example, the supreme court had long held that a city may be liable for injuries resulting from its failure to keep its streets in a reasonably safe condition, even though the maintenance of city streets is undoubtedly a governmental function.
- Appellate courts in other states had overwhelmingly viewed the operation of municipal airports as a proprietary function that may result in tort liability for local governments.
- The General Assembly did not enact G.S. 63-50 with governmental immunity in mind. Rather, "the intent of the Legislature [was] to declare that the acquisition, construction, and maintenance of an airport . . . was a governmental function in the sense that it was a public purpose."[104] In other words, the statute expresses the legislature's view that public funds may be spent on municipal airports.

Significantly, although it rejected the defendants' immunity argument, the court remarked that the General Assembly has the power to exempt the operation of airports from tort liability, even though the undertaking is proprietary in nature. It explained that, if the legislature wished to take such action, it had to expressly confer immunity on airport-related activities. The court repeated this point in rejecting the defendants' petition for rehearing, with a sharp reminder that the judiciary, not the legislature, enjoys the last

102. 230 N.C. 134, 135 (1949).
103. *Id.* at 136.
104. *Id.* at 140.

word on whether an undertaking is governmental or proprietary.[105] It reaffirmed this stance in a later case, when it remarked that, notwithstanding G.S. 63-50, an airport authority functions in a proprietary capacity when setting airport landing and rental fees.[106]

2.6.2.2 Degree of Specificity Required

The *Williams* opinion suggests that, even when a statute expressly labels an undertaking as governmental, the designation will not control an immunity determination if the breadth of the statutory text leaves the court unsure about whether the General Assembly intended to capture the precise act or omission alleged to have produced the plaintiff's injury. While describing G.S. 160A-351 as "clearly relevant" to the question of whether the activity that led to Erik Williams's death was governmental or proprietary, the supreme court declined to decide whether the statute ultimately resolved the matter.[107] Instead, it remanded the case with instructions for the trial court to consider the effect, if any, of G.S. 160A-351 on the county's immunity defense.[108] The supreme court noted that, although G.S. 160A-351 generally describes park operations as a governmental function, the statute does not cover every "nuanced action" that could take place in a public park or recreational facility.[109] The precise issue for the trial court was whether, taking the statute into account, "the specific operation of the Swimming Hole component of Fun Junktion, in this case and under these circumstances, [was] a governmental function."[110] Thus, the supreme court left open the possibility that, due to its broad wording, G.S. 160A-351 might not control the outcome of the trial court's immunity ruling.

2.6.2.3 Treatment of Legislative Designations in Governmental/Proprietary Determinations

Read together, *Williams* and *Rhodes* appear to support the following statements about the role of statutes that classify activities as governmental functions in governmental immunity determinations.

- When a statute classifies the specific undertaking that led to a plaintiff's injury as a governmental function, it can be important for

105. *Rhodes*, 230 N.C. 759, 759 (1949) ("Unquestionably the Legislature intended to declare that the operation of the Asheville-Hendersonville Airport should be deemed and held to be in furtherance of a governmental function. But the mere legislative declaration to that effect did not make it so, for that is a judicial and not a legislative question.").

106. Piedmont Aviation v. Raleigh-Durham Airport Auth., 288 N.C. 98, 102–03 (1975).

107. Estate of Williams v. Pasquotank Cty. Parks & Recreation Dep't, 366 N.C. 195, 201 (2012) (emphasis omitted).

108. The lawsuit was settled on remand.

109. *Williams*, 366. N.C. at 202.

110. *Id*. at 201.

a court to identify the reason for the classification. If the purpose of the designation is to assert that public funds may be spent on the activity, the statute may have little bearing on whether governmental immunity bars the plaintiff's tort claims. The presence of the words "public purpose" in the statute is a signal that the General Assembly was more worried about constitutional restraints on public funds than about tort claims against local governments.

- When a statute classifies the specific activity that resulted in a plaintiff's injury as a governmental function, and the court does not think that the classification was made for reasons unrelated to liability, the court should usually defer to the legislature's pronouncement. Even in such circumstances, though, it is not always a given that governmental immunity will cover the activity. As remarked in *Rhodes*, governmental immunity does not bar tort claims arising from a city's failure to keep its streets reasonably safe, even though cities are statutorily required to maintain their streets in a reasonably safe condition.[111]
- It may be appropriate for a court to reject the General Assembly's designation of a specific activity as governmental when the courts of other states have overwhelmingly classified the undertaking as proprietary for liability purposes.
- If a statute broadly defines a governmental function, a court may have to apply the second and third parts of the *Williams* test in order to properly characterize the precise conduct that led to a plaintiff's injury. The breadth of the language used in G.S. 160A-351, for instance, may make the statute a minor factor in most tort cases arising from the operation of public parks.[112]
- Even when the case law defines an activity as proprietary, the legislature has the power to exempt the undertaking from tort liability. An unambiguous declaration of the legislature's intent is required to create an exemption for a proprietary undertaking.

2.6.3 The *Williams* Test's Second Prong: Activities Only Governments Can Undertake

Like the first prong, the second prong of the *Williams* test may not help the lower courts identify particular functions as governmental or proprietary in very many cases. The state supreme court acknowledged that the usefulness of the second prong is limited in a changing world where the private sector now performs many services once thought to belong exclusively to the public

111. Rhodes v. City of Asheville, 230 N.C. 134, 138 (1949) (citing G.S. 160-54, a forerunner of G.S. 160A-296).

112. The implications of *Williams* for city and county liability for injuries at public parks is considered at length in Chapter 6.

sector. "[I]t is increasingly difficult," the court explained, "to identify services that can only be rendered by a governmental entity."[113]

One post-*Williams* case identifies an activity that, according to the court of appeals, only a county can perform. In *Fuller v. Wake County*, the court held that a county acts governmentally in deciding how to go about making emergency medical services (EMS) available to its residents.[114] State law requires counties to ensure that EMS are provided to their residents, and the court reasoned that it takes a county to fulfill this statutory obligation.[115] Although private entities can furnish EMS, they are not subject to the mandate.

2.6.4 The *Williams* Test's Third Prong: Other Factors

Given the limitations of the first two prongs in the *Williams* inquiry, it seems probable that judges will ordinarily have to resort to the third prong when they attempt to categorize activities as governmental or proprietary. The additional factors that make up the third step focus primarily on revenue, which, as noted in Section 2.6.1, *supra*, strongly indicates that an activity runs a high risk of being deemed proprietary if it yields substantial income for a unit of local government. The court's opinion in *Williams* cautions against overreliance on the third prong's additional factors, however. Why? According to the court, "distinctions between proprietary and governmental functions are fluid and courts must be advertent to changes in practice."[116] The implication seems to be that changing circumstances could make factors other than those listed in *Williams* pertinent to future governmental/proprietary determinations.

2.6.5 The Potential Impact of *Williams* on Precedent

If, as *Williams* says, "distinctions between proprietary and governmental functions are fluid and courts must be advertent to changes in practice,"[117] then *Williams* may call into question the ongoing soundness of prior cases that classify particular activities as governmental or proprietary. Even when confronting an activity designated as governmental or proprietary by a pre-*Williams* decision, a lower court should apply the *Williams* test to the facts of the case. It may be that, at least in a few instances, the application of this test will lead to a different classification, especially if the relevant precedent employs criteria inconsistent with the factors set out in *Williams*. Given the

113. Estate of Williams v. Pasquotank Cty. Parks & Recreation Dep't, 366 N.C. 195, 202 (2012).

114. ___ N.C. App. ___, ___, 802 S.E.2d 106, 112–13 (2017).

115. While it is up to the county to make EMS available, it may satisfy this obligation by contracting for EMS, as explained in Section 3.2.2.2, *infra*.

116. *Williams*, 366 N.C. at 203.

117. *Id.*

cloud of uncertainty that *Williams* has hung over prior classifications, the decision may not represent quite the positive break from the "tradition of confusion" in governmental immunity cases that the state supreme court hoped to achieve.