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Governmental Immunity: Five Questions and (Some) Answers

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Introduction

The defense of governmental immunity is a frequent source of judicial confusion in lawsuits brought against counties, cities, and other units of local government. Following a basic description of the immunity's key features, this session takes up five questions involving the immunity.

- **Governmental immunity defined**. The doctrine of sovereign immunity precludes most kinds of lawsuits against the state, except insofar as the state consents to be sued. Governmental immunity is the limited portion of the state's sovereign immunity that extends to units of local government. Both forms of immunity originate from the English concept that, as creator of the law, the "king could do no wrong."
- **Scope of governmental immunity**. Governmental immunity bars tort claims against units injuries caused by their officers or employees acting within the scope of their duties, but only if the officers or employees were performing governmental functions.
  - Governmental immunity does not protect units from tort claims arising from the performance of proprietary functions.
  - Similarly, it is not a defense to contract claims, state constitutional claims, or federal constitutional claims.
- **Waiver**. Units of local government may waive governmental immunity, as explained in more detail in the response to Question 3 below.
- **Official capacity claims v. individual capacity claims**. Governmental immunity applies to tort claims asserted against local government officers or employees in their official capacities. It has been held not to bar tort claims against local government officers or employees in their individual capacities, though other common law immunities or statutory protections can shield them from personal liability in certain situations.

Question 1: **How does a court analyze whether a local government activity is governmental or proprietary?**

Answer: **By applying the three-part inquiry set out in *Williams v. Pasquotank County*, 366 N.C. 195 (2012).**

Classification difficulties. Determining whether an activity is governmental or proprietary can be difficult, and court decisions making these classifications are not always consistent. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 528 (1972) ("[A]pplication of [the distinction between governmental and proprietary functions] to given factual situations has resulted in irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary.").

- **Governmental functions.** Governmental functions are those local government activities undertaken for the benefit of the public at large. They are primarily "discretionary, political, legislative, or public in nature." *Britt v. City of Wilmington*, 236 N.C. 446, 450 (1952). Examples of activities deemed to be governmental functions include the installation and maintenance of traffic lights, *Hamilton v. Town of Hamlet*, 238 N.C. 741, 742 (1953); the operation of 911 call centers, *Wright v. Gaston*

County, 205 N.C. App. 600, 605-06 (2010); and the construction of municipal sewer systems, *McCombs v. City of Asheboro*, 6 N.C. App. 234, 240 (1969).

- **Proprietary functions.** Proprietary functions tend to be activities that are not traditionally performed by the government, that benefit a definable category of individuals rather than the general public, and that involve fees which do more than cover the cost of the activity. Undertakings long recognized as proprietary functions include the operation of municipal golf courses, *Lowe v. City of Gastonia*, 211 N.C. 564, 566 (1937); county hospitals, *Sides v. Cabarrus Mem'l Hosp.*, 287 N.C. 14, 25-26 (1975); and civic centers, *Aaser v. City of Charlotte*, 265 N.C. 494, 497 (1965).
- **Activities with governmental and proprietary components.** Activities generally classified as governmental functions may have proprietary components and vice versa. Thus, although the construction of a sewer system is a governmental undertaking, a city acts in a proprietary capacity when it contracts with engineering and construction companies to build such a system. *Town of Sandy Creek v. East Coast Contracting, Inc.*, ___ N.C. App. ____, ___, 741 S.E.2d 673, 677 (2013).

The *Williams* inquiry. In *Williams v. Pasquotank County*, 366 N.C. 195 (2012), the North Carolina Supreme Court reformulated the standards for classifying activities as governmental or proprietary, establishing a three-step inquiry that the lower courts should employ when they must make these determinations.

- **Designation by Legislature.** The threshold inquiry is whether, and if so to what degree, the General Assembly has designated the specific activity that led to the plaintiff's injury as a governmental or proprietary function. If such a designation has been made, the court should usually defer to the legislature. *But see Rhodes v. City of Asheville*, 230 N.C. 759, 759 (1940) (holding that the operation of a municipal airport is a proprietary function for immunity purposes even though G.S. 63-50 characterizes it as a governmental activity). The General Assembly may make such a designation by expressly labeling an activity as governmental or proprietary, but this rarely happens. If a statute directs local governments to undertake a specific activity, it may be regarded as a legislative declaration that the activity is a governmental function. Examples of the second type of designation are discussed in the response to Question 2 below.
- **Nature of the Undertaking.** If the legislature has not definitively designated the specific activity as governmental or proprietary, the next question is whether the undertaking is one in which only a governmental agency could engage. If the undertaking is something only a government could do, it is a governmental function. The supreme court conceded in *Williams*, however, that "it is increasingly difficult to identify services that can only be rendered by a governmental entity" because "many services once thought to be the sole purview of the public sector have been privatized in full or in part." 366 N.C. at 202. Perhaps the most obvious examples of activities that only a government can perform concern the legislative powers of local governments. A city council's decision, for instance, to suspend an ordinance prohibiting the use of fireworks within city limits is a governmental function. *Hill v. City of Charlotte*, 72 N.C. 55, 57-58 (1875).
- **Other Factors to Consider.** If further analysis is required, the court should consider:
  - Whether the service is one traditionally provided by a governmental entity;
  - Whether a substantial fee was charged for the service; and
  - Whether the fee did more than cover the operating costs of the service provider. *Williams*, 366 N.C. at 200-03.
- **The Bottom Line:** If the legislature has not declared a particular activity to be a governmental function, and the activity is one that a private entity can perform, the activity is likely to be categorized as proprietary if the court concludes that one of its major purposes is to raise revenue. Thus, while a municipality's operation of a free public park has been characterized as a governmental function, the use of parks to generate more than incidental revenue can render their operation a proprietary function. *Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 36 (2012).

Question 2: **When is the maintenance of local government property a governmental function?**
Answer: **When (1) the property is being used for a governmental function or (2) the legislature has specifically designated maintenance of the property a governmental function.**

Historic approach. Whether governmental immunity barred personal injury claims allegedly caused by unsafe conditions on local government property depended on whether the property was being used for governmental or proprietary purposes. *See, e.g., Seibold v. Kinston-Lenoir County Public Library*, 264 N.C. 360 (1965) (holding that operation of a public library is a governmental function); *Aaser v. City of Charlotte*, 265 N.C. 494 (1965) (holding that operation of a municipal coliseum or arena to generate revenue from sporting events is a proprietary function).

- **Historic approach undermined following *Williams*?** Two important post-*Williams* cases can be construed to undermine the historic approach.

***Bynum v. Wilson County*, 367 N.C. 355 (2014):** When a county office building housed both governmental functions (planning department, finance department, county manager's office, meetings of board of commissioners) and proprietary functions (water department), governmental immunity barred tort claims against the county for serious – and ultimately fatal – injuries suffered by an individual in a fall allegedly caused by the county's failure to inspect, maintain, and repair the building's front steps. That the individual went to the building to pay his water bill did not matter: the county's upkeep of the building, not the operation of water department, allegedly produced the harm.

- **Majority opinion.** The majority opinion in *Bynum* applied the first two steps of the *Williams* inquiry to conclude that the county's maintenance of the office building was a governmental function.
  - Step 1. By enacting G.S. 153A-169, the General Assembly designated the locating, supervising, and maintaining of county buildings that serve discretionary, legislative, or public purposes as a governmental function. Although the words "governmental function" do not appear in the statute, G.S. 153A-169 expressly directs the board of county commissioners to supervise the maintenance, repair, and use of all county property.
  - Step 2. The county used the building for discretionary, legislative, and public functions only the county could perform.
- **Concurrence.** The concurrence agreed with the result reached by the majority but expressed concern that the majority opinion would be interpreted to create "a categorical rule barring *any* premises liability claims against counties or municipalities for harms that occur on government property." *Bynum*, 367 N.C. at 361 (Martin, J., concurring) (emphasis in original). Such a rule would depart from the court's many precedents showing that a case-by-case inquiry is necessary to decide whether tort claims arising from unsafe property conditions are barred by governmental immunity.
- **Questions unanswered in *Bynum*.** It is not clear from the majority opinion in *Bynum* what the outcome would have been if
  - the building had housed only proprietary functions or
  - the individual had fallen inside the water department rather than in the common area.

***Bellows v. Asheville City Bd. of Educ.*, ____ N.C. App. ____, 777 S.E.2d 522 (2015):** Governmental immunity barred claims against the defendant board of education (BOE) for injuries the plaintiff suffered in a fall from her wheelchair allegedly caused by unsafe conditions on school grounds.

- **Application of *Bynum*.** Citing *Bynum* as controlling authority, the NC Court of Appeals held that the legislature has designated the ownership, maintenance, and repair of school property as governmental functions. In support of this conclusion, the court pointed to G.S. 115C-40 and 115C-521, which collectively invest BOEs with responsibility for "the ownership and control of all school real and personal property, [and] the maintenance and care thereof." ____ N.C. App. ____, 777 S.E.2d at 524.

- While noting the concern expressed in the *Bynum* concurrence, the court did not consider itself "free to disregard the [*Bynum*] majority's reasoning." *Id.* at ____, 777 S.E.2d at 524 n.3.

Issues with *Bellows*. The rationale in *Bellows* is questionable for at least two reasons.

- **Omission of G.S. 115C-524.** The court's opinion overlooks G.S. 115C-524, arguably the statute most directly on point.
  - G.S. 115C-524(b): "It shall be the duty of local [BOEs], in order to safeguard the investment made in public schools, to keep all school buildings in good repair to the end that all public school property shall be taken care of and be at all times in proper condition for use. . . ."
  - G.S. 115C-524(c)&(d) collectively provide that, under certain conditions, BOEs are not liable for personal injuries arising from the use of school property by non-school groups for non-school purposes or the use of outdoor school by the public for recreational purposes.
  - Why did the General Assembly insert liability protections in G.S. 115C-524 if it intended G.S. 115C-40 and 115C-521 to designate a BOE's maintenance of school property as a governmental function for immunity purposes?
- **Misreading *Bynum*?** The *Bellows* opinion seems to read *Bynum* to say that, when a statute makes a local government responsible for the maintenance of property, a local government's upkeep of the property constitutes a governmental function, regardless of whether the property is used for a governmental function. It is doubtful that this was the intent of the *Bynum* majority.
  - The majority opinion in *Bynum* takes care to point out that the county office building at issue was being used to perform governmental functions.
  - The majority opinion approvingly cites *Seibold*, in which the holding that governmental immunity barred the plaintiff's negligent maintenance claims turned on the county's use of the property for a governmental function, namely, a public library.
  - Reading *Bynum* to say that the use of the property is irrelevant would be inconsistent with *Williams*, which also involved allegations of unsafe property conditions. If the purposes served by the property are not a factor in a governmental/proprietary determination, the court plainly should have concluded in *Williams* that the governmental immunity barred the plaintiff's claims.
  - The *Bynum* decision is probably best read as addressing the narrow issue of whether the maintenance of local government property is a governmental function when the property serves both governmental and proprietary functions.

Question 3: **What is necessary to allege a waiver of governmental immunity?**
Answer: **Sufficient facts that, taken as true, demonstrate the immunity is not a defense to the plaintiff's claims.**

The concept of waiver. In the context of governmental immunity, waiver can be thought of as a unit of local government's consent to be sued.

Waiver mechanisms. A unit of local government consents to be sued by (1) engaging in a proprietary activity, (2) entering into a valid contract, or (3) purchasing liability insurance. *Fuller v. Wake County*, ____N.C. App. ____, 802 S.E.2d 106 (2017).

Extent of waiver. The degree of exposure depends on the type of waiver.

- **Proprietary activity.** For the most part, a unit sued for injuries arising from a proprietary activity is liable in tort on the same basis as a private employer; however, punitive damages are not available against the unit unless they are expressly authorized by statute. *Long v. City of Charlotte*, 306 N.C. 187, 208 (1982).

- **Valid contract**. By entering into a valid contract, a unit consents to be sued for damages for breach of its contractual obligations. *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 102-03 (2001).
- **Liability insurance**. By purchasing liability insurance, a unit becomes liable in tort but only as to claims and amounts covered by the insurance policy. G.S. 115C-42 (school boards); 153A-435 (counties); 160A-485 (cities).

General pleading requirement. "The complaint must specifically allege a waiver of governmental immunity to overcome a defense of sovereign immunity." *Phillips v. Gray*, 163 N.C. App. 52, 55 (2004). "Absent such an allegation, the complaint fails to state a cause of action." *Wray v. City of Greensboro*, ____N.C. ____, 802 S.E2d 894, 899 (2017).

No precise formula necessary to allege waiver. The requirement to allege a waiver of governmental immunity "does not. . . mandate that a complaint use any particular language. Instead, consistent with the concept of notice pleading, a complaint need only allege facts that, if taken as true, are sufficient to establish a waiver . . . [of] immunity." *Fabrikant v. Currituck Cnty.*, 174 N.C. App. 30, 38 (2005). In other words, if the facts alleged in the complaint show that the unit has consented to be sued, the omission of the term "waiver" in the complaint does not justify dismissal.

- **Alleging waiver by proprietary function**. When the undertaking alleged to have produced the plaintiff's injury constitutes a proprietary function, no express allegation of waiver is required. *Town of Sandy Creek v. East Coast Contracting, Inc.*, 226 N.C. App. 576 (2013).
- **Alleging waiver by contract**. Allegations that a unit has entered into a valid contract establish a waiver of governmental immunity as to actions on the contract. Put differently, in contract actions, "a waiver of governmental immunity is implied, and effectively alleged, when the plaintiff pleads a contract claim." *Wray*, ____ N.C. at ____, 802 S.E.2d at 899.
- **Alleging waiver by purchase of insurance.** A complaint adequately pleads waiver by alleging that, upon information and belief, the unit maintained at all times relevant to the complaint liability insurance covering the plaintiff's claims. *Anderson v. Town of Andrews*, 127 N.C. App. 599, 602 (1997).

Question 4: **Does governmental immunity bar declaratory judgment actions?**
Answer: **No, when the plaintiff (1) seeks to ascertain the rights and obligations of a contract with a unit of local government or (2) seeks relief against a unit that has exceeded its statutory authority and invaded or threatened to invade the plaintiff's personal or property rights.**

General rule. "[T]he Declaratory Judgment Act does not act as a general waiver of the State's sovereign immunity." *Atl. Coast Conference v. Univ. of Md.*, 230 N.C. App. 429, 442 (2013).

- Presumably the same may be said about the DJA and governmental immunity. *See Petroleum Traders Corp. v. State*, 190 N.C. App. 542, 546-47 (2008) (discussing the immunity from suit of the state and local governments in similar terms and rejecting the argument that the DJA waived the state's sovereign immunity as to the plaintiff's claims).

The case law makes it clear that there are at least two circumstances in which governmental immunity will not defeat a declaratory judgment action.

- **Action on a contract**. By entering into a valid contract, the state waives its immunity to "causes of action on contract." *Atl. Coast Conference v. Univ. of Md.*, 230 N.C. App. at 442 (internal quotation marks omitted). Such causes of action include not only breach-of-contract claims but also declaratory relief actions "seeking to ascertain the rights and obligations owed under an alleged contract." *Id.*

- This rules should be understood to apply to units of local government, inasmuch as they waive governmental immunity by entering into contract. *Data Gen.*, 143 N.C. App. at 102-03.

- **Action alleging action in excess of authority.** Sovereign immunity does not bar a declaratory relief action against the state when the plaintiff seeks a declaration that a state agency has acted in excess of its statutory authority and unlawfully invaded or threatened to invade the plaintiff's personal or property rights. *T and A Amusements v. McCrory*, ____ N.C. App. ____, ____, 796 S.E.2d 376, 380 (2017).
  - This principle has been applied to declaratory relief actions against local governments. *See, e.g., Phillips v. Orange Cnty. Health Dep't*, 237 N.C. App. 249, 256-57 (2014) (holding governmental immunity did not prohibit the plaintiff from seeking a declaration that defendant lacked statutory authority to inspect the plaintiff's spray irrigation wastewater system).

Question 5: **Is the denial of a motion to dismiss based on governmental immunity always subject to immediate appeal?**

Answer: **There is no right to an immediate appeal from the denial of a 12(b)(1) motion to dismiss asserting governmental immunity.**

Many appellate court decisions flatly state that a unit of local government may immediately appeal from an interlocutory order denying a motion to dismiss, if the MTD asserts governmental immunity. *E.g., Richmond County Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 586 (2013) ("This Court has consistently held that '[t]he denial of a motion to dismiss based upon the defense of sovereign immunity affects a substantial right and is thus immediately appealable.'"). Such statements have led to the widespread belief that a trial court's denial of a MTD asserting governmental immunity always triggers the right to an immediate appeal.

This belief is almost certainly wrong. In several cases involving governmental immunity, the NC Court of Appeals has conditioned the right of interlocutory appeal on whether the unit's MTD cited 12(b)(1) (lack of subject matter jurisdiction), 12(b)(2) (lack of personal jurisdiction), or 12(b)(6) (failure to state a claim for relief).

- **Immediate appeal from denial of 12(b)(2) and 12(b)(6) motions.** The court of appeals has consistently held that, when a 12(b)(2) or 12(b)(6) motion asserts governmental immunity, the defendant unit may immediately appeal the trial court's denial of the motion. *E.g., Davis v. DiBartolo*, 176 N.C. App. 142, 144 (2006); *Data Gen.*, 143 N.C. App. at 100
- **No immediate appeal from denial of 12(b)(1) motions.** Because Rule 12(b)(1) concerns subject matter jurisdiction, not personal jurisdiction, the denial of a 12(b)(1) motion does not trigger a right to an immediate appeal unless a substantial right is affected. In *Teachy v. Coble Dairies*, 306 N.C. 324 (1982) the North Carolina Supreme Court appears to have concluded that the denial of a 12(b)(1) motion does not affect a substantial right. Relying on *Teachy*, the court of appeals has held that there is no immediate appeal from a trial court's denial of a 12(b)(1) motion, even when governmental immunity is in play. *Davis*, 176 N.C. App. at 144-45; *Data Gen.*, 143 N.C. App. at 100.