Chapter 2

Distinguishing Between Governmental and Proprietary Functions

The distinction between governmental and proprietary functions is a critical feature of governmental immunity because of the judiciary's decision to restrict the immunity to claims arising from governmental functions. This chapter reviews the origin of the distinction in immunity cases, the other uses to which the courts have sometimes put the distinction, the rationale for limiting governmental immunity to governmental functions, and the problems the courts have experienced in applying the governmental/proprietary distinction to particular activities. The chapter then turns to *Estate of Williams v. Pasquotank County Parks & Recreation Department*,[61] the 2012 case in which the North Carolina Supreme Court reformulated the criteria for classifying specific undertakings as either governmental or proprietary. The chapter examines each part of the *Williams* test and considers the potential impact of *Williams* on classifications made in earlier cases.[62]

2.1 Origin of Governmental/Proprietary Distinction

The North Carolina Supreme Court first held that cities are immune to tort claims arising from governmental but not proprietary functions in *Moffitt v. City of Asheville*,[63] an 1889 case. Prior to *Moffitt*, the default rule seems

61. 366 N.C. 195 (2012).

62. This chapter incorporates material from Trey Allen, *The Impact of* Williams v. Pasquotank County *on Local Government Liability, Part I: Public Parks and Government Office Buildings*, Loc. Gov't L. Bull. No. 137 (May 2015), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/lglb137.pdf.

63. 103 N.C. 237 (1889). *See* Daye & Morris, *supra* note 1, § 19.40[2][c][i], at 449 n.335 (the rule that cities are immune to tort claims stemming from governmental functions "was applied in North Carolina in 1889 by *Moffit* [sic] *v. City of Asheville*"); Joseph S. Ferrell, *Civil Liability of North Carolina Cities and Towns for Personal Injury and Property Damage Arising from the Construction, Maintenance, and Repair of Public Streets*, 7 Wake Forest L. Rev. 143, 144 (1971) (the court "adopted the doctrine of governmental immunity" in *Moffitt*).

It can be argued that the state supreme court endorsed governmental immunity for city governmental functions five years before *Moffitt* in *Bunch v. Town of Edenton*, 90 N.C. 431, 433 (1884) ("An action does not lie against a municipal corporation for

to have been that cities were liable for the negligence of their officers and employees, regardless of whether the particular activity that injured a plaintiff qualified as governmental.[64]

In *Moffitt* the defendant city argued that the trial court had incorrectly instructed the jury on the circumstances under which it could find the city liable for injuries the plaintiff had allegedly sustained during an overnight stay in the city jail. On the way to ruling in the city's favor, the North Carolina Supreme Court distinguished between a town's "corporate and governmental powers."[65] It explained that cities rely on their corporate powers when they manage property "for their own profit" or exercise powers "assumed voluntarily for their own advantage[.]"[66] The court identified the cleaning of sewers and grading of streets as examples of activities in the "corporate powers" category. When engaged in such undertakings, the court said, cities "are impliedly liable for damage caused by the negligence of officers or agents subject to their control."[67]

The court further explained that a city exercises governmental powers when it makes use of its "judicial, discretionary, or legislative authority" or discharges a duty "imposed solely for the [public's] benefit[.]"[68] For examples of activities in the "governmental powers" category, the court pointed to cases from other jurisdictions holding that cities were not liable for assault and similar claims arising from the efforts of police officers to enforce city ordinances or effect valid arrests. When a city's officers undertake endeavors of this kind, the supreme court opined, the city is not liable for their negligence "unless some statute (expressly or by necessary implication) subjects the [city] to pecuniary responsibility."[69]

---

damages . . . for the manner in which, in good faith, it exercises discretionary powers of a public or legislative character . . .").

64. *See*, *e.g.*, Manuel v. Bd. of Comm'rs of Cumberland Cty., 98 N.C. 9, 12 (1887) ("Cities and towns . . . are, in many respects, held responsible as such corporations for damages occasioned by the neglect of their agents."); Meares v. Comm'rs of Town of Wilmington, 31 N.C. 73, 86 (1848) ("[A] corporation, whether private or municipal, . . . in any and all of these cases, is liable for any damage resulting from a want of ordinary skill and caution in doing the work . . . ."). *See also* Ferrell, *supra* note 63, at 143–44 ("The general law of negligence continued to be the test of municipal tort liability until 1889, when Justice Avery, writing for the court in *Moffitt v. City of Asheville*, discovered the very New York cases which Justice Pearson had previously considered and rejected in *Meares*.")

65. *Moffitt*, 103 N.C. at 260. The terms "governmental function," "proprietary function," and "governmental immunity" do not appear in *Moffitt*. The present nomenclature of governmental immunity developed over succeeding decades.

66. *Id*. at 254.

67. *Id.*

68. *Id.* at 255.

69. *Id.*

In the nearly 130 years that have elapsed since *Moffitt*, the initial distinction between corporate powers and governmental powers has developed into the current jurisprudence on governmental and proprietary functions. The number of undertakings classified as governmental, on the one hand, or proprietary, on the other, has grown significantly over the decades as plaintiffs have pursued tort claims against local governments in varied contexts. Chapter 3 catalogues many classifications made by the courts.

2.1.1 Other Uses of Governmental/Proprietary Distinction

Although the governmental/proprietary distinction plays a major role in the law of governmental immunity, state law puts the distinction to other uses.[70]

- *Statutes of Limitation.* The courts invoke the governmental/proprietary distinction when they must decide whether a statute of limitation or repose prevents the state or a local government unit from pursuing a claim of its own in a lawsuit. If a civil claim by the state or unit involves a governmental function, the relevant statute of limitation or repose will not bar the claim, unless the statute expressly includes the state. The court of appeals thus held that a one-year statute of limitation did not bar the City of Greensboro from suing an individual over unpaid parking tickets because "the collection of fines and fees to enforce [a city's] parking regulations . . . is a governmental function."[71]
- *Constitutional Funding Restraints.* The courts have employed the term "governmental function" to assert that an activity satisfies the requirement in Article V, Subsection 2(1) of the state constitution that public funds be spent for public purposes only.[72] In one case, the court upheld the constitutionality of a statute authorizing the expenditure of public funds on economic development programs because "[e]conomic development has long been recognized as a proper governmental function."[73]

---

70. In addition to the uses discussed here, the North Carolina Supreme Court has on one occasion employed the governmental/proprietary distinction to resolve a zoning dispute. McKinney v. City of High Point, 237 N.C. 66 (1953).

71. City of Greensboro v. Morse, 197 N.C. App. 624, 627 (2009).

72. "The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away." N.C. Const. art. V, § 2(1). "[T]his provision requires that all public funds, no matter what their source, be expended for the benefit of the citizens of a unit generally and not solely for the benefit of particular persons or interests." Kara A. Millonzi, *The Public Purpose Requirement*, *in* Introduction to Local Government Finance 4 (Kara A. Millonzi ed., 4th ed. 2018).

73. Maready v. Winston-Salem, 342 N.C. 708, 723 (1996). Similarly, the court held that a city could take on debt to finance the construction and operation of water and power plants because such activities were "necessary to fully protect the lives and

The same endeavor may be classified as governmental for one purpose but not for another. If this were not so, neither the state nor local governments could spend public funds on any of the many undertakings that have been deemed proprietary functions in governmental immunity cases. The constitutional ban on the expenditure of public funds for non-public purposes would outlaw such expenditures.

2.2 Rationale for the Distinction in Immunity Cases

Why has the North Carolina Supreme Court held that governmental functions warrant immunity but proprietary functions do not? The distinction "grows out of the dual character of municipal corporations."[74] Every city "has a two-fold existence—one as a governmental agency, the other as a private corporation."[75] In other words, cities perform some functions for the public good on behalf of the state and some primarily for the benefit of their respective compact communities. To the degree that cities act in place of the state "in promoting or protecting the health, safety, security, or general welfare of [their] citizens," the court has deemed it appropriate to grant them the state's immunity from tort liability.[76] On the other hand, to the extent that cities act like corporations by engaging in commercial undertakings for the benefit of their compact communities, the court has been inclined to let them face tort liability on roughly the same basis as private corporations.[77]

2.3 A Different Rule for Counties?

The state supreme court initially declined to apply *Moffitt*'s distinction between governmental powers and corporate powers to tort claims against counties. It continued to hold, as it had in pre-*Moffitt* cases, that counties were liable in tort only when a statute provided for such liability.[78] In other words,

---

comfort and property of [the town's] inhabitants" and to preserve "the peace and order of the community." Fawcett v. Town of Mt. Airy, 134 N.C. 125, 129 (1903). *See also* Rhodes v. City of Asheville, 230 N.C. 134, 137 (1949) ("Since this Court handed down . . . *Fawcett v. Mt. Airy* . . . the construction, maintenance, and operation of a water and light plant by a municipality, has been held to be a necessary governmental expense.").

74. Daye & Morris, *supra* note 1, § 19.40[2][c][ii], at 451.

75. Britt v. City of Wilmington, 236 N.C. 446, 450 (1952).

76. *Id*.

77. See Section 4.3, *infra*, for more on the liability of local government units for harms arising from proprietary functions.

78. *See, e.g.,* Bell v. Comm'rs of Johnston Cty., 127 N.C. 85, 90–91 (1900) ("[C]ounties, being a branch of the State government, can be sued only in such cases and for such causes as are authorized by statute"); Prichard v. Comm'rs of Morganton, 126 N.C. 908, 912 (1900) ("Counties . . . are not liable for damages, in the absence of statutory provisions giving a right of action against them."); Manuel v. Bd. of Comm'rs of Cumberland Cty., 98 N.C. 9, 11 (1887) ("Generally, a county is not liable for damages

counties possessed the same immunity to tort claims as the state. The apparent rationale for treating counties and cities differently in tort cases was that cities exercised their corporate powers chiefly for the advantage of their own residents—much as private corporations exist to benefit their shareholders—while counties operated as extensions of state government.[79]

Subsequently, the supreme court began to apply the governmental/proprietary distinction to tort claims against counties.[80] This shift in the law appears to have resulted from the increasing tendency of counties, starting about the middle of the twentieth century, to undertake functions traditionally associated with cities, such as garbage collection.[81] Today it is clear that cities, counties, public school systems, and other local government units operate largely outside the protection of governmental immunity when they undertake proprietary functions.[82]

---

sustained by individuals by reason of the neglect of its officers or agents, and there is no statute of this State creating such liability."); White v. Comm'rs of Chowan, 90 N.C. 437, 439 (1884) ("[Counties] may be sued only in such cases and for such causes as may be provided for and allowed by the statute.").

79. *White*, 90 N.C. at 438, 440 (The primary purpose of counties is "to effectuate the political organization and civil administration of the state" at the local level, but cities use their corporate powers "not so much to aid in the administration of the government of the state as for local advantage and convenience."). *See also Bell*, 127 N.C. at 90–91 (describing counties as "a branch of the state government," unlike cities, which are "municipal corporations"); *Manuel*, 98 N.C. at 10, 12 (counties are "mere instrumentalities" of the state, whereas cities "are incorporated largely and mainly for the benefit of the corporators"); Lawrence, *supra* note 44, at 5 ("Originally, counties were established to serve state purposes, that is, to carry out government on behalf of the state. . . . Cities, by contrast, were created to adopt regulations and provide services more appropriate to built-up or urban areas.").

80. For an early example of this shift in the court's approach to county liability, see *Rhodes v. City of Asheville*, 230 N.C. 134, 141 (1949) ("But when it undertakes, with legislative sanction, to perform an activity which is proprietary or corporate in character, such a county may be liable in tort to the same extent as a city or town would be if engaged in the same activity.").

81. *See* Lawrence, *supra* note 44, at 5:

> Around the middle of the twentieth century, citizens living outside cities began to request some of the governmental services characteristic of cities but not of counties. They wanted community water or sewer systems, organized fire protection, and recreational spaces or programs. They wanted to be able to dispose of their trash in some way other than dumping or burning. And they wanted the protection of zoning. The General Assembly's response, over time, was to empower counties to engage in these city-like activities.

82. *See, e.g.*, Viking Utils. Corp., Inc. v. Onslow Water & Sewer Auth., 232 N.C. App. 684, 686–89 (2014) (explaining how the governmental/proprietary distinction should be applied to claims against a county water and sewer authority); Willett v. Chatham Cty. Bd. of Educ., 176 N.C. App. 268, 270–72 (2006) (applying the governmental/proprietary distinction to claims against a local board of education); Robinson v. Nash Cty., 43 N.C. App. 33, 35 (1979) ("It is well established in this State that counties or

2.4 "Governmental Function" and "Proprietary Function" Defined

By making the immunity of a local government unit dependent on whether the activity that damaged the plaintiff was governmental or proprietary, the state supreme court created the need for standards to distinguish the two kinds of functions. In one oft-cited formulation, the court described governmental functions as undertakings that are "discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State"; it described proprietary functions as activities that are "commercial or chiefly for the private advantage of the compact community."[83] In a later case, the court declared that it had consistently acknowledged "one guiding principle" for determining whether an activity is governmental or proprietary: "If the undertaking . . . is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and 'private' when any corporation, individual, or group of individuals could do the same thing."[84]

These standards had serious shortcomings, as discussed in more detail below. In practice, the court tended to regard as governmental functions those activities traditionally performed by local governments and ordinarily not engaged in by private corporations.[85] Undertakings classified by the court as proprietary functions usually involved some kind of monetary charge that generated revenue—though not necessarily a profit—for units of local government.[86] The court did not invariably classify fee-based activities as proprietary functions, however.[87]

---

municipal corporations have no governmental immunity for activities that are 'proprietary' in nature.").

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

84. Evans v. Hous. Auth. of City of Raleigh, 359 N.C. 50, 54 (2004) (quoting Britt v. City of Wilmington, 236 N.C. 446, 451 (1952)).

85. Sides v. Cabarrus Mem'l Hosp., Inc., 287 N.C. 14, 23 (1975) ("[I]t appears that all of the activities held to be governmental functions by this Court are those historically performed by the government, and which are not ordinarily engaged in by private corporations."). The court identified the following examples of undertakings traditionally performed by local governments but not by private corporations: erecting and maintaining a county jail, installing and maintaining traffic signals, operating a police car, erecting and maintaining a police and fire alarm system, and supplying water for extinguishing fires. *Id.*

86. *Id.* at 22–23. The court noted that it had previously ruled that cities act proprietarily when they impose charges for the use of a landfill, admission to a public park, the supply of drinking water, or the distribution of electricity. *Id.*

87. *See, e.g.*, James v. City of Charlotte, 183 N.C. 630, 631–33 (1922) (city was not liable for injuries caused by a speeding city garbage truck, even though it charged a fee to cover the cost of garbage removal).

2.5 Problems in Classifying Undertakings as "Governmental" or "Proprietary"

In some cases, the judiciary has had little trouble classifying the specific activities under consideration as governmental or proprietary. The state supreme court, for example, had no trouble summarily classifying a county's operation of a public library as a governmental function and a city's maintenance of a golf course as a proprietary function.[88] Yet in other instances the courts have found it quite difficult to categorize particular undertakings as governmental or proprietary.[89] Indeed, as the supreme court itself admitted, this difficulty has "resulted in irreconcilable splits of authority" and created a "tradition of confusion" as to "what functions are governmental and what functions are proprietary."[90] Thus, although the judiciary generally views the maintenance of public roads and highways as a governmental function, longstanding precedents allow cities to be held liable if they fail to maintain their streets and sidewalks in a reasonably safe condition.[91] The supreme court has described this significant wrinkle in the case law as an "'illogical' exception" to foundational principles of governmental immunity.[92]

The confused state of the case law set the stage for the court's 2012 attempt in *Estate of Williams v. Pasquotank County Parks & Recreation Department*[93] to formulate a more straightforward and systematic method for making governmental/proprietary determinations.

---

88. Lowe v. City of Gastonia, 211 N.C. 564, 566 (1937) ("Defendant's contention . . . that it is not liable to the plaintiff . . . because it owned and maintained the golf course in the exercise of a governmental function, cannot be sustained."); Seibold v. Kinston-Lenoir Cty. Pub. Library, 264 N.C. 360, 361 (1965) ("The operation of a public library meets the test of 'governmental function' . . . .").

89. *See* Millar v. Town of Wilson, 222 N.C. 340, 342 (1942) ("The line between municipal operations that are proprietary and, therefore, a proper subject of suits in tort and those that are governmental and, therefore, immune from suits is sometimes difficult to draw.").

90. Koontz v. City of Winston-Salem, 280 N.C. 513, 528 (1972). The court conceded that it had contributed to the confusion by adopting "apparently divergent views" on whether an otherwise governmental function becomes proprietary when a local government uses it to generate income. *Id*.

91. *E.g.*, *Millar*, 222 N.C. at 342 ("While the maintenance of public roads and highways is generally recognized as a governmental function, exception is made in respect to streets and sidewalks of a municipality . . . the maintenance of [city] streets and sidewalks is classed as a ministerial or proprietary function.").

92. *Id*. Another example of inconsistency is found in the law concerning city liability for sewer systems. Under current case law, a city's *construction* of a sewer system is a governmental function, even if the system will be fee-based, but the *operation* of a fee-based sewer system is proprietary. See Section 3.4.2, *infra*, for more information.

93. 366 N.C. 195, 201 (2012).

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.

---

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

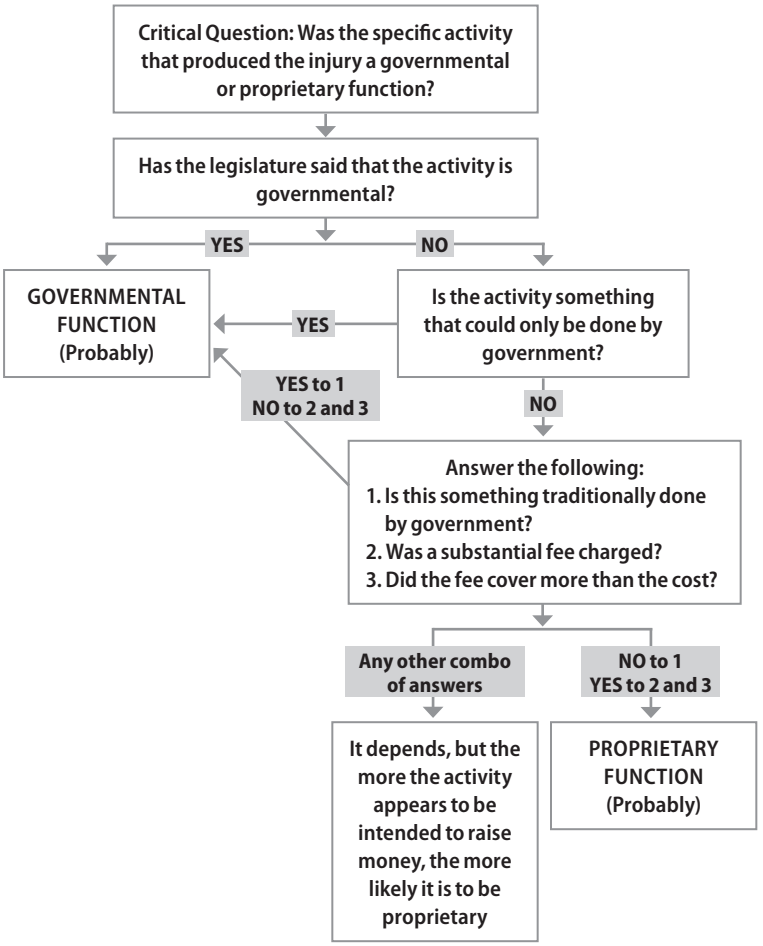
> The lack of adequate recreational programs and facilities is a menace to the morals, happiness, and welfare of the people of this State. Making available recreational opportunities for citizens of all ages is a subject of general interest and concern, and a function requiring appropriate action by 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.

Supreme Court has interpreted the state's wrongful death statute, Chapter 28A, Section 18-2 of the North Carolina General Statutes (hereinafter G.S.), to make punitive damages available against local governments in wrongful death cases.[312] Of course, even when a statute allows punitive damages against a unit, the plaintiff may not recover them without evidence that the harm complained of resulted from the kind of aggravated misconduct that punitive damages are intended to punish and deter.[313]

4.4 Liability Insurance

State law expressly authorizes cities and counties to waive their immunity to tort claims through the purchase of liability insurance.[314] Without this express authority, the purchase of liability insurance by a city or county would not waive governmental immunity.[315] Like other statutes that waive governmental immunity, the city waiver statute, G.S. 160A-485, and the county waiver statute, G.S. 153A-435, must be strictly construed to preserve governmental immunity to the degree consistent with their provisions.[316]

4.4.1 Reasons for Waiver

It might be asked why a city or county would ever purchase liability insurance if the effect is to waive governmental immunity. There are several reasons why a unit might choose to purchase liability insurance in spite of, or even because of, the resulting waiver.

- A city or county that lacks liability insurance exposes itself to considerable financial risk for injuries caused by activities that the courts deem proprietary. As noted above, governmental immunity

---

policymaking level, would be deterred from wrongdoing by the threat of large punitive awards against the wealth of their municipality and its taxpayers." *Id.* at 207–08.

312. *Jackson*, 316 N.C. at 265.

313. *See* G.S. 1D-15 (setting out the standards for recovery of punitive damages).

314. G.S. 160A-485(a) ("Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance."); 153A-435(a) ("A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment. . . . Purchase of insurance pursuant to this subsection waives the county's governmental immunity . . . .").

315. Stephenson v. City of Raleigh, 232 N.C. 42, 47 (1950) (city's purchase of liability insurance did not waive governmental immunity because, at that time, no statute authorized cities to waive immunity in that way).

316. *See* Guthrie v. N.C. State Ports Auth., 307 N.C. 522, 537–38 (1983) ("Waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed.").

does not apply to claims arising from proprietary acts. Moreover, because many local government activities have not yet been classified as governmental or proprietary, and because courts may change their minds regarding the proper classification of an activity, a unit cannot always know in advance whether governmental immunity attaches to a particular undertaking.

- Certain kinds of claims fall outside the scope of governmental immunity, such as constitutional claims, most statutory claims, and breach of contract claims. Cities and counties may want to purchase liability insurance to limit their financial exposure to such claims.
- By purchasing liability insurance, a city or county can supply its officers and employees with liability protection from lawsuits filed against them in their individual capacities for acts or omissions within the scope of their duties.
- The purchase of liability insurance can provide a means of compensating citizens who have been injured by the performance of governmental functions and who, for that very reason, would otherwise be left without a remedy.[317]

4.4.2 What Counts as Purchase of Insurance

There are three ways in which a city or county may waive governmental immunity through the purchase of liability insurance, each of which is discussed below. The first is by purchasing liability insurance from a company licensed to execute insurance in the state. The second is by participating in a local government risk pool pursuant to Article 23 of Chapter 58 of the General Statutes. The third pertains to cities or counties that set aside their own funds to pay tort claims. Although ordinarily such self-insurance does not waive governmental immunity, the city council or board of county commissioners may adopt a resolution that, for immunity purposes, treats the creation of its fund as the equivalent of purchasing liability insurance.[318]

4.4.3 Extent of Waiver by Liability Insurance

The waiver statutes grant cities and counties total discretion to decide which categories of tort claims and which of their officials, employees, or agents to cover or exclude.[319] Any waiver of governmental immunity by the purchase

317. Brown-Graham, *supra* note 119.

318. Baker, *supra* note 127, at 103; G.S. 153A-435(a); 160A-485(a).

319. G.S. 160A-485(b) ("An insurance contract purchased pursuant to this section may cover such torts and such officials, employees, and agents of the city as the governing board may determine."); 153A-435(a) ("The board of commissioners shall determine what liabilities and what officers, agents, and employees shall be covered by any insurance purchased pursuant to this subsection.").

of liability insurance is limited to the extent of coverage.[320] Often, disputes over the extent of coverage in immunity cases have focused on whether (1) the plaintiff's tort claim was subject to an exclusion in the unit's insurance policy or (2) the amount of damages sought by the plaintiff fell outside the policy's monetary limits.

4.4.3.1 Policy Exclusions

An exclusion is a provision in an insurance policy "specifying the situations, occurrences or persons not covered by the policy."[321] When a plaintiff's tort claim is subject to an exclusion, the unit has not waived immunity as to the claim. In one case, the court ruled that no waiver had occurred because (1) the plaintiff's wrongful discharge claim concerned the sheriff's decision to fire the plaintiff and (2) the unit's liability policy excluded claims between law enforcement officers.[322]

The courts disfavor exclusions in insurance policies.[323] Although unambiguous exclusions must be enforced as written, the courts will construe any ambiguity in an exclusion against the insurance company and in favor of the insured.[324] The court of appeals adhered to these principles in the wrongful death case of a man who died of a heart attack while being held in the county

---

320. G.S. 160A-485(a) ("Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability."); 153A-435 ("Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function.").

What happens if a tort claim is covered by the unit's insurance contract but the insurance company is unable to pay it? In *McDonald v. Village of Pinehurst*, 91 N.C. App. 633, 634 (1988) (cited in Daye & Morris, *supra* note 1, § 19.40[2][c][iii][A][a], at 459 n.415), the defendant municipality argued that its purchase of liability insurance did not waive immunity as to the plaintiff's wrongful death claim in that the insurance company had become insolvent. The court of appeals agreed in principle that a city's waiver of immunity is "negated" as soon as the city ceases to be indemnified by liability insurance purchased in accordance with G.S. 160A-485. It nonetheless reasoned that no such negation had been proved in *McDonald* inasmuch as, "to some extent and under certain conditions," the North Carolina Insurance Guaranty Association (NCIGA) assumed the indemnification obligations of liability insurance companies that became insolvent. *Id*. at 635. Because the court disposed of the waiver issue on other grounds, its remarks about waiver and the NCIGA are merely *dicta* and, thus, not binding in future cases.

321. Black's Law Dictionary 563 (6th ed. 1990).

322. Phillips v. Gray, 163 N.C. App. 52, 56–57 (2004).

323. *E.g.*, State Capital Ins. Co. v. Nationwide Mut. Ins. Co., 318 N.C. 534, 538 (1986) ("[P]rovisions which exclude liability of insurance companies are not favored . . . .").

324. *Id*. ("[A]ll ambiguous provisions [in an exclusion] will be construed against the insurer and in favor of the insured."); Doe v. Jenkins, 144 N.C. App. 131, 134 (2001) (quoting Nationwide Mut. Ins. Co. v. Mabe, 342 N.C. 482. 492 (1996)) ("If an insurance policy is not ambiguous, 'then the court must enforce the policy as written . . . .' ").

jail's isolation cell. The complaint attributed the death partly to the negligent failure of sheriff's department employees to have the man medically examined. The sheriff argued that the plaintiff's negligence claim fell under an exclusion in the county's liability policy for claims arising from "the acts of any Covered Person 'while engaged in any form of health care.'" [325] In holding that the exclusion did not apply, the court observed that the exclusion concerned efforts to provide health care, whereas the claim at issue arose from a total failure to make health care available.[326]

4.4.3.1.1 Exclusion for Governmental Functions?

A city or county can purchase liability insurance without waiving governmental immunity at all. In *Patrick v. Wake County Department of Human Services*, the county's liability policy contained the following provision:

> "'[T]his policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defense[] is asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable.'" [327]

According to the North Carolina Court of Appeals, the provision unambiguously excluded coverage for any tort claims that governmental immunity would defeat in the absence of liability insurance. The upshot was that the county had not actually waived its immunity from tort claims by purchasing the policy. Governmental immunity therefore barred the minor plaintiff's claims for negligence and negligent infliction of emotional distress against the county's human services department for failing to protect the plaintiff from domestic sexual abuse.[328]

The reasoning in *Patrick* is open to criticism. In a later case, the court of appeals referred to the "arguably circular nature of the logic employed in *Patrick*," while still acknowledging the decision's status as binding precedent.[329] The court has followed *Patrick* in several other cases construing

---

This rule of interpretation creates something of an inconsistency in the law on waiver of governmental immunity. Whereas the waiver statutes must be strictly construed in order to preserve immunity to the maximum extent consistent with their provisions, any ambiguity in an insurance policy purchased pursuant to one of those statutes must be resolved in favor of coverage, that is, in favor of waiver.

325. Myers v. Bryant, 188 N.C. App. 585, 590 (2008).

326. *Id.*

327. 188 N.C. App. 592, 596 (2008).

328. *Id*. at 596–97.

329. Estate of Earley v. Haywood Cty. Dep't of Soc. Servs., 204 N.C. App. 338, 343 (2010).

> We acknowledge the arguably circular nature of the logic employed in *Patrick*. . . . [T]he legislature [has] explicitly provided [in G.S. 153A-435] that governmental immunity is waived to the extent of insurance

liability policies with similar or identical exclusion provisions.[330] In *Wright v. Gaston County*, for example, governmental immunity blocked the plaintiffs' wrongful death and related tort claims arising from the alleged negligence of 911 operators because the county's liability policy excluded claims subject to governmental immunity.[331]

4.4.3.1.2 Supplemental Insurance

Local governments often purchase insurance that supplements the coverage provided by their general liability policies. Depending on its terms, a supplemental policy may waive governmental immunity as to a plaintiff's claims, even when the claims are subject to an exclusion in the unit's general liability policy. In one case, a county's general liability policy excluded claims arising from the acts or omissions of public officials. Citing this exclusion, the county insisted that governmental immunity shielded it from liability for the department of social services' allegedly negligent supervision of a juvenile who had fatally stabbed her neighbor. The court held that, even if the general liability policy excluded the plaintiff's claim, the county had waived immunity from the claim by purchasing supplemental insurance that covered claims against its officials of the sort alleged by the plaintiff.[332]

4.4.3.2 Insurance Policy Monetary Limits

Liability insurance policies cap the amount payable for covered claims. The purchase of liability insurance by a city or county does not operate to waive governmental immunity for damages in excess of the policy limits. It is also common for liability insurance policies to exclude all claims below a

---

> coverage, but the [county's] insurance contract eliminates any potential waiver by excluding from coverage claims that would be barred by sovereign immunity. Thus, the logic in *Patrick* boils down to: Defendant retains immunity because the policy doesn't cover his actions and the policy doesn't cover his actions because he explicitly retains immunity. Nonetheless in this case, as in *Patrick*, where the language of both the applicable statute and the exclusion clause in the insurance contract are clear, we must decline Plaintiff's invitation to implement "policy" in this matter. Any such policy implementation is best left to the wisdom of our legislature.

Id.

330. Bullard v. Wake Cty., 221 N.C. App. 522, *discretionary review denied*, 336 N.C. 409 (2012); Lunsford v. Renn, 207 N.C. App. 298 (2010); Owen v. Haywood Cty., 205 N.C. App. 456 (2010); Wright v. Gaston Cty., 205 N.C. App. 600 (2010); Pryor v. City of Raleigh, ___ N.C. App. ___, 788 S.E.2d 684 (2016) (unpublished); White v. Stokes Cty. Dep't of Soc. Servs., 207 N.C. App. 378 (2010) (unpublished). *See also* Hagans v. City of Fayetteville, No. 5:14-CV-717-F, 2015 WL 4414929, at *3 (E.D.N.C. July 17, 2015) (governmental immunity barred the plaintiff's tort claims because the defendant city's insurance policy expressly provided that it should not be construed to waive such immunity).

331. 205 N.C. App. at 607–08.

332. Fulford v. Jenkins, 195 N.C. App. 402, 407–09 (2009).

designated amount, often referred to as a *retention* or *retained limit*.[333] Policies with this feature are often referred to as *excess insurance* because they provide coverage only for damages above the retention amount.[334] A unit whose only liability insurance is excess insurance has waived governmental immunity with regard to covered claims only to the extent that a claimant's damages fall within the policy's monetary parameters. Thus, a city with insurance coverage for claims in excess of $2 million but less than $4 million waived immunity only as to claims inside that range.[335] Likewise, because a county's liability policy excluded claims under $250,000, governmental immunity foreclosed a plaintiff's claims against the county for $73,000 in damages.[336]

Depending on the precise terms of the policy, a unit's retained limit can render the purchase of liability insurance ineffective as a waiver of governmental immunity. In a series of cases decided by the court of appeals, the policies specified that the insurance companies did not have to indemnify the units for damages in excess of the retained limits until the units had paid out the full retention amounts.[337] Because immunity protected the units from liability for damages below their retentions, they did not pay out the full retention amounts, leaving the insurance companies without any legal obligation to indemnify the units for excess damages. With the units effectively lacking coverage for damages above the retained limits, the court determined that no waiver of governmental immunity had occurred as to the plaintiffs' claims.[338]

Obviously, if a unit's liability insurance has a high retention, some individuals harmed by the unit's performance of a governmental function could find themselves without legal recourse. (The same may be said, though, of anyone whose claim is barred by an immunity defense.) Whether in the interest of justice or to promote good will, units sometimes settle personal injury or property damage claims not covered by their liability insurance. Such settlements typically provide financial compensation to the claimants, who in return agree to release the units from any liability.[339] Units do not

---

333. Jones v. Kearns, 120 N.C. App. 301, 303 (1995).

334. The term *excess insurance* is used more generically to refer to coverage that pays amounts beyond the limit another carrier is required to pay.

335. Dobrowolska v. Wall, 138 N.C. App. 1, 8 (2000). *See also* Clayton v. Branson, 153 N.C. App. 488, 493 (2002) (allegation by the plaintiff that he suffered more than $3 million in damages put his lawsuit within the limits of the city's liability insurance, which covered claims for more than $2 million but less than $4 million).

336. McIver v. Smith, 134 N.C. App. 583, 590 (1999).

337. Bullard v. Wake Cty., 221 N.C. App. 522, 531, *discretionary review denied*, 336 N.C. 409 (2012); Arrington v. Martinez, 215 N.C. App. 252, 264 (2011); Magana v. Charlotte-Mecklenburg Bd. of Educ., 183 N.C. App. 146, 148 (2007).

338. *Bullard*, 221 N.C. App. at 532; *Arrington*, 215 N.C. App. at 265; *Magana*, 183 N.C. App. at 149.

339. *See*, *e.g.*, Jones v. City of Durham, 183 N.C. App. 57, 60–61 (2007) (describing the city's approach to settling tort claims).

waive governmental immunity by entering into settlements of this sort.[340] Consequently, if a claimant were to file suit in violation of the terms of his or her settlement, the unit could still assert governmental immunity as a defense.[341] As discussed in Chapter 8, decisions by units to settle some claims subject to governmental immunity but not others have prompted constitutional challenges.

4.4.4 Local Government Risk Pools

According to the city and county waiver statutes, a unit's participation in a local government risk pool pursuant to Article 23, Chapter 58 of the General Statutes counts as the purchase of liability insurance.[342] In other words, like the purchase of liability insurance, participation in a local government risk pool waives governmental immunity for cities and counties to the extent of coverage. More precisely, the waiver is limited to the extent to which a unit is indemnified under its risk-pool agreement.

Many of the relevant cases concern whether the particular liability-sharing arrangement in dispute qualifies as a local government risk pool under Article 23, Chapter 58. The cases highlight key features of qualifying risk pools.

- The only units of local government authorized to form qualifying risk pools are cities, counties, and housing authorities.[343]
- A qualifying risk pool is required "to pay all claims for which each member [unit] incurs liability during each member's period of membership, except where a member has individually retained the risk, where the risk is not covered, and except for [the] amount of claims above the coverage provided by the pool."[344]
- A qualifying risk pool must include at least two units of local government. Thus, a city did not join a risk pool by organizing a corporation to pay tort claims against the city of $1,000,000

340. *See id*. at 60 ("Nor does the City's practice of executing settlement contracts with certain claimants constitute a waiver of [governmental] immunity in those cases.").

341. *See id*. at 61 ("[S]hould a tort claimant violate the settlement agreement by suing the City after executing the settlement contract, the City would be entitled to raise any applicable defense, including satisfaction and accord or [governmental] immunity.").

342. G.S. 153A-435(a) ("Participation in a local government risk pool pursuant to Article 23 of General Statute Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section."); 160A-485(a) (same).

343. Lyles v. City of Charlotte, 344 N.C. 676, 680 (1996) (citing G.S. 58-23-1) ("Only counties, cities, and housing authorities are defined as local governments for purposes of joining a local government risk pool.").

344. Dobrowolska v. Wall, 138 N.C. App. 1, 8 (2000) (quoting G.S. 58-23-15(3)).

Chapter 5

Governmental Immunity and Premises Liability

Many lawsuits filed against cities, counties, or other units of local government allege injuries sustained in falls or similar mishaps on government property. Such lawsuits commonly assert that the unit caused the injuries by negligently failing to keep the premises in a safe condition or to warn of hidden dangers, the legal duty of care that property owners owe to lawful visitors.[393] Local governments frequently raise governmental immunity as a defense to this kind of premises liability.

This chapter examines the relationship between governmental immunity and claims of negligent property maintenance. In particular, it explores the impact of *Estate of Williams v. Pasquotank County Parks & Recreation Department*[394] on governmental immunity as a defense to these claims.[395]

---

393. North Carolina law requires landowners to exercise reasonable care to keep their premises safe for lawful visitors and to warn lawful visitors of hidden dangers on their property. Rolan v. N.C. Dep't of Agric. & Consumer Servs., 233 N.C. App. 371, 382–83 (2014). In this context, the term "landowners" includes all possessors of real property. The reasonable care standard obliges a landowner to make a reasonable inspection of the premises for hidden defects and perils. Daye & Morris, *supra* note 1, § 17.30[2], at 311. It extends to all parts of the property a visitor may be expected to use, including parking lots, for example. *Id*. § 17.30[2], at 315. The precise measures that a landowner must take to satisfy the reasonable care standard can vary based on many factors, such as the use to which the property is being put or the mental capacity of a lawful visitor, if the landowner knows or should know that the visitor might be incapable of taking precautions for his or her own safety. *Id*. § 17.30[2], at 312–13.

To sustain a claim for negligence based on unsafe premises, a lawful visitor must show an actionable breach of the reasonable care standard. The visitor may establish such a breach by proving that the landowner negligently created the condition that led to his or her injury or negligently failed to correct that condition despite having actual or constructive notice of its existence. *Rolan*, 233 N.C. App. at 382.

Generally speaking, landowners do not owe a duty of care to trespassers and may not be held liable for injuries to them. G.S. 38B-2. *But see* G.S. 8-B-3 (setting forth the conditions under which a landowner may be liable for a trespasser's injuries).

394. 366 N.C. 195 (2012).

395. This chapter incorporates material from Allen, *supra* note 62.

5.1 Premises Liability and Governmental Immunity: The Basic Approach

North Carolina's courts have usually tied the availability of governmental immunity as a defense in a negligent maintenance lawsuit to the purpose served by local government property. When, for instance, a city or county has used a building for a governmental function, the courts have regarded maintenance of the building as a *governmental* function, and governmental immunity has barred unsafe premises claims. Several cases cited in Chapter 3 illustrate this approach. In one such case, the court held that governmental immunity foreclosed the plaintiff's attempt to recover damages for injuries she allegedly sustained in a fall down the public library's front steps.[396] In rejecting the plaintiff's negligence claim, the court explained that the operation of a public library is a governmental function akin to "the operation of a fire department, the operation of a fogging machine to eradicate insects, the maintenance of a police force, or the operation of public schools."[397] In another case, the court evaluated a county's liability for the death of a woman who fell down a stairway in the office of the register of deeds.[398] The court held that "the operation and maintenance of a register of deeds office in a county courthouse is clearly a governmental function for which the county enjoys immunity from suit for negligence."[399]

On the other hand, when a building has been reserved for a proprietary function, the judiciary has deemed its upkeep a *proprietary* function and has ruled that the local government may be liable for injuries resulting from its failure to keep the premises reasonably safe. In one of several cases cited in Chapter 3 that support this view, the court held that a city had acted proprietarily in operating a coliseum to generate revenue from sporting events; consequently, "the liability of the city . . . to the plaintiff for injury, due to an unsafe condition of the premises, [was] the same as that of a private person or corporation."[400]

396. Seibold v. Kinston-Lenoir Cty. Pub. Library, 264 N.C. 360, 360 (1965), discussed in Section 3.6.7, *supra*.

397. *Id.* at 361.

398. Robinson v. Nash Cty., 43 N.C. App. 33, 36 (1979), discussed in Section 3.5.4, *supra*.

399. *Id.*

400. Aaser v. City of Charlotte, 265 N.C. 494, 497 (1965), discussed in Section 3.6.2, *supra*.

5.2 The Basic Approach and *Williams*

How does *Estate of Williams v. Pasquotank County Parks & Recreation Department*[401] fit into the framework just described? In short, *Williams* provides the test a trial judge must now employ to evaluate whether local government property was being used for a governmental undertaking or a proprietary endeavor. Once this initial determination has been made, the judiciary's traditional approach to unsafe premises claims against local governments will dictate whether governmental immunity bars the plaintiff's lawsuit. Nonetheless, it appears that *Williams* has already had and will continue to have a big impact on the exposure of local governments to liability, especially for unsafe building conditions. In *Bynum v. Wilson County*, the first post-*Williams* case involving a local government building to reach the North Carolina Supreme Court, the court applied *Williams* to arrive at a holding that could significantly limit local government liability for injuries allegedly caused by the failure to keep buildings reasonably safe.[402] The case posed a question the court had not yet answered: When a building houses both governmental and proprietary endeavors, should a unit's maintenance of the building be regarded as governmental or proprietary?

5.2.1 Bynum v. Wilson County

The plaintiff in *Bynum v. Wilson County*[403] visited a county office building to pay his water bill. After leaving the water department, he fell down the building's front steps and suffered serious injuries, including paralysis in his legs and right arm. The plaintiff filed suit against the county, alleging that the county had negligently failed to inspect, maintain, and repair the steps.[404] He later died, allegedly due to his injuries, but the administratrix of his estate continued the lawsuit.

The county asserted that governmental immunity barred the claims against it. In addition to housing the water department, the building contained the planning department, the finance department, the human resources department, the county manager's office, and the board of commissioners' meeting room—governmental functions all. The court of appeals rejected the county's immunity argument, holding that the lawsuit was not subject to governmental immunity inasmuch as (1) the state supreme court had previously ruled that a water department's sale of water for private consumption is a proprietary

401. 366 N.C. 195 (2012).

402. 367 N.C. 355 (2014).

403. 228 N.C. App. 1 (2013), *rev'd in part, remanded*, 367 N.C. 355 (2014).

404. The lawsuit also alleged that the county had failed to install a required handrail and to meet the requirements of the North Carolina Building Code. 367 N.C. at 357.

activity and (2) Mr. Bynum had gone to the county office building on the date of his fall to pay his water bill.[405]

All seven justices of the North Carolina Supreme Court voted to reverse the court of appeals, but three of the justices did not join the majority opinion for reasons explained in a concurring opinion. According to the majority, the court of appeals' approach in *Bynum* would erroneously base the availability of governmental immunity on a plaintiff's reason for visiting a city or county facility. That standard, the majority explained, is contrary to *Williams*, "which mandates that the analysis should center upon the governmental act or service that was allegedly done in a negligent manner."[406] In *Bynum*, it was not the county's operation of the water department that allegedly inflicted injury; it was the failure to keep the building's steps in good repair. The critical question, then, was whether the county's maintenance of the building constituted a governmental or a proprietary function.

Taking the *Williams* inquiry's first two steps in reverse order, the majority reasoned that the upkeep of the building was a governmental function inasmuch as the building was used for discretionary, legislative, and public functions only the county could perform.[407] The majority also held that the General Assembly has designated as a governmental function the locating, supervising, and maintaining of county buildings that serve discretionary, legislative, or public functions. In support of this conclusion, the court cited Chapter 153A, Section 169 of the North Carolina General Statutes (hereinafter G.S.),[408] which directs the board of commissioners to supervise the

---

405. Bynum v. Wilson Cty., 228 N.C. App. 1, 13 (2013). Curiously, although the court of appeals cited *Williams* in its discussion of governmental immunity, it did not attempt to apply the case's three-step inquiry in *Bynum*.

406. *Bynum*, 367 N.C. at 359.

407. Aside from the water department, all of the operations listed in *Bynum* as housed in the office building—the planning and inspection departments, for instance—constituted governmental functions. *See, e.g.*, City of Raleigh v. Fisher, 232 N.C. 629, 635 (1950) ("In enacting and enforcing zoning regulations, a municipality acts as a governmental agency . . . .").

408. G.S. 153A-169 provides:

> The board of commissioners shall supervise the maintenance, repair, and use of all county property. The board may issue orders and adopt by ordinance or resolution regulations concerning the use of county property, may designate and redesignate the location of any county department, office, or agency, and may designate and redesignate the site for any county building, including the courthouse. Before it may redesignate the site of the courthouse, the board of commissioners shall cause notice of its intention to do so to be published once at least four weeks before the meeting at which the redesignation is made.

The majority opinion in *Bynum* also cites G.S. 153A-351 and 153A-352, which collectively address the authority of counties to establish inspection departments and enforce state and local laws dealing with building construction.

maintenance, repair, and use of all county property.[409] Having found that the county's maintenance of the building qualified as a governmental function under the first two steps of the *Williams* inquiry, the majority did not proceed to the third step.

5.2.1.1 The Bynum Concurrence

The three concurring justices in *Bynum* agreed with the result reached by the majority but set out perceived problems with the majority's reasoning. Their chief worry was 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."[410] Such a rule, the concurring opinion argued, would be at odds with the court's many precedents demonstrating that a case-by-case inquiry is necessary to decide whether tort claims arising from unsafe property conditions are barred by governmental immunity.

Notwithstanding the concerns expressed in the concurring opinion, the *Bynum* majority pretty clearly did not intend to prohibit all premises liability claims against cities or counties. In the first place, the majority opinion nowhere states that the upkeep of local government property is always a governmental function. It holds that counties—and presumably other units of local government—perform a governmental function when they locate, supervise, or maintain "buildings that provide [discretionary, legislative, and public] functions."[411] A local government building devoted entirely to a proprietary function would not fall into this category. If the office building in *Bynum* had been occupied solely by the water department, there can be little doubt that the court would have classified its upkeep as a proprietary activity.

Similarly, the use of precedent in the majority opinion demonstrates that the majority did not mean to cloak all property maintenance by local governments in governmental immunity. The majority opinion approvingly cites the court's earlier decision holding that governmental immunity protected a county from a negligence claim based on the unsafe condition of the steps at the public library.[412] In that case, as the *Bynum* majority observed, the

409. The majority's reading of the statute is noticeably restrictive. As construed by the majority, G.S. 153A-169 classifies the upkeep of county buildings devoted to legislative, discretionary, or public functions as a governmental function. On its face, however, the statute applies to all county buildings. The majority appears to have interpreted the statute narrowly in *Bynum* to avoid the conclusion that a county undertakes a governmental function whenever it maintains or repairs a county building, including one dedicated exclusively to proprietary functions.

410. *Bynum*, 367 N.C. at 361 (Martin, J., concurring) (emphasis in original).

411. *Id.* at 360.

412. *Id.* (citing Seibold v. Kinston-Lenoir Cty. Pub. Library, 264 N.C. 360, 361 (1965)).

outcome turned not merely on the county's ownership of the property but on the property's service as a public library. The majority also cited *Williams* extensively without so much as hinting that the park's status as county property automatically entitled the county in that case to governmental immunity.

5.2.2 Governmental Immunity and Premises Liability after *Williams* and *Bynum*

Consistent with precedent, *Bynum* recognizes that when a local government facility serves a governmental function, maintenance of the facility becomes a governmental function and governmental immunity may bar personal injury claims arising from an alleged failure to maintain the premises in a reasonably safe condition. The *Bynum* decision expands on precedent by clarifying that, when a building houses both governmental and proprietary functions, the upkeep of the building will generally be deemed a governmental function, regardless of the plaintiff's reason for being there. Any local government unit that houses governmental and proprietary undertakings in the same facility is a potential beneficiary of the state supreme court's application of *Williams* in *Bynum*.

Although the *Bynum* majority probably did not intend to say that the maintenance of local government property is always a governmental function, a panel of the North Carolina Court of Appeals may have adopted something close to that interpretation in *Bellows v. Asheville City Board of Education*.[413] There the court held that governmental immunity barred claims against the school board for injuries the plaintiff had allegedly suffered in a fall from her wheelchair caused by unsafe conditions on school grounds. Citing *Bynum* as controlling authority, the court opined that the General Assembly had designated the ownership, maintenance, and repair of school property as governmental functions. It pointed to G.S. 115C-40 and 115C-521, which together invest school boards with responsibility for "the ownership and control of all school real and personal property, . . . [and] the maintenance and care thereof."[414] While noting the *Bynum* concurrence's worry about the potential breadth of the *Bynum* majority's opinion, the court of appeals did not consider itself "free to disregard the [*Bynum*] majority's reasoning."[415]

The subsequent decision by the North Carolina Supreme Court in *Meinck v. City of Gastonia* calls the soundness of the *Bellows* reasoning into question.[416] In *Meinck*, the plaintiff sued over injuries allegedly sustained in a

413. 243 N.C. App. 229 (2015).

414. *Id.* at 232.

415. *Id.* at 232 n.3.

416. The validity of *Bellows* is suspect for other reasons. The court of appeals' opinion omits any reference to G.S. 115C-524, arguably the statute most directly on point. Under G.S. 115C-524, school boards have a duty "to keep all school buildings in

fall down unsafe steps at a building the city was leasing to a nonprofit arts organization. The city had entered into the lease as part of a downtown redevelopment and revitalization effort. After examining the facts of the case in light of the *Williams* inquiry, the supreme court characterized the lease as a governmental activity for purposes of governmental immunity. If the court had understood *Bynum* to designate the upkeep of local government buildings as a governmental function in every situation, it would not have bothered analyzing whether the city's use of the building amounted to a governmental activity. The *Bynum* decision, then, should not be read to extend governmental immunity to the maintenance of local government buildings that are being used solely for proprietary endeavors.

---

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." Subject to certain requirements, however, the statute exempts school boards from liability for personal injuries arising from the use of school property by non-school groups for non-school purposes or the use of outdoor school property by the public for recreational purposes. If it is correct to say that G.S. 115C-40 and 115C-521 make school maintenance a governmental function, then one may wonder why the General Assembly saw any need for the liability protections in G.S. 115C-524.

Chapter 6

Governmental Immunity for Public Parks

One of the more problematic topics in governmental immunity is the liability of cities and counties for injuries alleged to have resulted from unsafe conditions in public parks. This chapter analyzes the case law on this subject, paying special attention to the impact of *Estate of Williams v. Pasquotank County Parks & Recreation Department*[417]—itself a public park case—on the availability of governmental immunity as a defense to claims of negligent park maintenance.[418]

6.1 Liability for Park-Related Negligence Pre-*Williams*

In 1937, the North Carolina Supreme Court issued its first opinion on the relevance of governmental immunity to negligence claims arising from the operation of public parks. The plaintiff in *White v. City of Charlotte* alleged that a minor had been fatally injured when she fell—or was thrown—from a defective swing in a city park.[419] The city disputed liability, partly contending that its operation of the park amounted to a governmental function. Rejecting the city's argument, the supreme court reasoned that, even if the city's operation of the park constituted a governmental function, the city might still be held liable if the minor's death resulted from the breach of a legal duty to maintain the park in a reasonably safe condition.[420] The city charged fees for the use of certain facilities at the park, but the court did not highlight that fact in its opinion.

While describing the operation of public parks as a governmental function, the *White* decision left open the possibility that governmental immunity might not apply to tort claims arising from a local government's upkeep of a public park. Such an outcome would have been unusual but not

417. 366 N.C. 195 (2012).

418. This chapter incorporates material from Allen, *supra* note 62.

419. 211 N.C. 186 (1937).

420. The court speculated but did not rule outright that such a duty existed. *Id.* at 188–89. Furthermore, it went on to hold that the trial judge's dismissal of the lawsuit was proper because the plaintiff could not produce any evidence that negligence by the city had led to the minor's death. *Id.* at 189.

unprecedented. The court had previously held that the governmental nature of street maintenance does not protect a city from tort claims stemming from its failure to keep its streets in a reasonably safe condition.[421]

Roughly eight years after *White*, the General Assembly enacted Chapter 160, Section 156 of the North Carolina General Statutes (hereinafter G.S.), declaring that the establishment and operation of a "recreation system" is a "governmental function and a necessary expense as defined by . . . the Constitution of North Carolina."[422] It is tempting to assume that G.S. 160-156 represented a legislative response to *White*, but there are reasons to question this assumption. In the first place, the proximity of the terms "governmental function" and "necessary expense" in G.S. 160-156 suggests that the legislature had in mind not tort liability but constitutional challenges to the expenditure of public funds on local recreation programs.[423] Additionally, the statute's description of a recreation system as a "governmental function" did nothing to undermine the holding of *White*. The supreme court in *White* had conceded that the operation of a public park is a governmental function; the problem for cities and counties was that the court had then implied that they could still face tort liability for injuries resulting from unsafe park conditions. Presumably, if the General Assembly had wished to abrogate *White*, it would have added language to G.S. 160-156 unambiguously shielding local governments from park-related tort claims. Finally, although G.S. 160-156 referred to a "recreation system," public parks were not specifically mentioned in the statute. It might be expected that a legislature dissatisfied with *White* would have inserted an express reference to public parks into G.S. 160-156.

The state supreme court had a chance to consider the impact of G.S. 160-156 on park-related tort claims in *Glenn v. City of Raleigh*.[424] While picnicking in a city park, the plaintiff was struck in the head by a rock ejected from a lawnmower operated by a city employee.[425] According to evidence produced at trial, the park generated $18,531.14 in revenue for the fiscal year in which

421. Speas v. City of Greensboro, 204 N.C. 239, 241 (1933) ("The exercise of due care to keep its streets in a reasonably safe and suitable condition is one of the positive obligations imposed upon a municipal corporation. The discharge of this obligation cannot be evaded on the theory that in the . . . maintenance of its streets the municipality acts in a governmental capacity."). See Chapter 9 for more on the relationship between governmental immunity and the maintenance of city streets.

422. S.L. 1945, Ch. 1052, § 1.

423. For a case that discusses G.S. 160-156 in the funding context, see *Purser v. Ledbetter*, 227 N.C. 1 (1946).

424. 246 N.C. 469 (1957).

425. The mower was missing its front guard at the time of the incident, and the park superintendent testified that he had seen mowers throw rocks in the park on many prior occasions. *Id.* at 471.

the plaintiff was injured.[426] During that same year, the city spent a total of $43,995.96 on activities and maintenance at the park and $158,247.95 on maintenance and activities for its entire park system.[427]

The city argued that governmental immunity barred the plaintiff's negligence claims. The state supreme court agreed that if the operation of the park constituted a governmental activity, the plaintiff's negligence claims would be subject to governmental immunity. The court nonetheless concluded that the city's operation of the park did not qualify as a governmental function because (1) the park had produced more than "incidental income" and (2) the "pecuniary profit" to the city was large enough to transform the park into a proprietary undertaking.[428] In reaching this holding, the court did not explicitly compare the city's income from the park to the cost of operating the park.[429] Although the court noted the existence of G.S. 160-156, the statute played no discernible role in its analysis.[430]

The *Glenn* decision deviated from *White* in two important respects. First, the supreme court acknowledged in *Glenn* that governmental immunity could bar tort claims premised on unsafe park conditions. As previously noted, the court had suggested in *White* that immunity might not be available for park operations, even those regarded as governmental functions. Second, *Glenn* made the applicability of governmental immunity to park-related tort claims contingent on the revenue generated by the park. By contrast, in *White* the court had shown no interest in the fees charged by the city for certain park facilities.

---

426. Members of the public could take advantage of the picnic area for free. *Id.* at 472. The park did charge for the use of a train, merry-go-round, and swimming pool located in its amusement section. *Id.*

427. Adjusted for inflation, the income generated by the park during fiscal year 1952–1953 comes to about $172,166 in 2018 dollars, while the amount spent on maintenance and activities at Pullen Park, the site of the plaintiff's injury, totals approximately $408,745 and the system-wide amount comes to roughly $1,470,236. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, CPI Inflation Calculator, www.bls.gov/data/inflation_calculator.htm.

428. *Glenn*, 246 N.C. at 477.

429. In the much more recent case of *Meinck v. City of Gastonia*, which did not involve public parks, the North Carolina Supreme Court interpreted the *Glenn* decision to say that the earlier court did not consider the city's evidence of the cost of park maintenance and activities. No. 130PA17, 2018 WL 5310160, at *10 n.7 (N.C. Oct. 26, 2018). While not repudiating the approach taken in *Glenn*, the supreme court approved the trial court's consideration of relevant city revenues and expenditures in *Meinck*. *Id.* For more on *Meinck*, see Section 3.3.3, *supra*.

430. Here is the court's only comment about G.S. 160-156 in *Glenn*: "We are advertent to G.S. 160-156, which is a declaration of State Public Policy as to adequate recreational programs and facilities . . . ." 246 N.C. at 477.

In 1971, the General Assembly recodified G.S. 160-156 as G.S. 160A-351, altering the statutory text in the process.[431] In contrast to its predecessor, G.S. 160A-351 expressly designates the establishment and operation of "public parks"—not just recreation programs—as a governmental function. Moreover, the "necessary expense" reference in G.S. 160-156 is omitted in G.S. 160A-351. It is unclear what prompted these changes. Perhaps the legislature intended to signal that, notwithstanding *Glenn*, park operations should be deemed governmental functions for immunity purposes, regardless of the income they generate. If that was indeed its intent, the legislature could have achieved its objective more effectively by straightforwardly exempting cities and counties from liability for injuries allegedly caused by unsafe park conditions.

The state supreme court issued an opinion in another park case not long after the enactment of G.S. 160A-351. The complaint in *Rich v. City of Goldsboro* alleged that the minor plaintiff had been injured in a fall from a seesaw in a city park and that her fall had resulted from the city's negligent failure to install handholds or other stabilizing devices.[432] The only income the city had derived from the park during the fiscal year of the plaintiff's injury was a $1,200 donation from the local Kiwanis Club, which operated a Kiddie Train in the park.[433] For that same year, the recreation program's total cost to the city was $167,912.66.[434] The supreme court reasoned that, unlike the revenue generated in *Glenn*, the Kiwanis donation plainly qualified as incidental income and, consequently, "was insufficient to constitute a waiver of [the city's] governmental immunity against suit."[435] The court did not discuss the potential relevance of G.S. 160-156 or the newly enacted G.S. 160A-351 to the city's immunity defense.

Prior to *Estate of Williams v. Pasquotank County Parks & Recreation Department*, then, the operation of a public park could qualify as a governmental function for immunity purposes, unless the park produced more than incidental income for the city or county in comparison with the total amount spent by the unit on park activities and maintenance. Aside from the specific dollar amounts at issue in *Glenn* and *Rich*, the case law did not offer local governments much guidance on the dividing line between incidental and substantial park revenue. Yet, as *Glenn* demonstrated, a park could operate at a financial loss and still be a proprietary function. Furthermore, though the General Assembly had twice enacted statutes describing recreation

431. S.L. 1971-698, §§ 1–2.

432. 282 N.C. 383 (1972).

433. The Kiddie Train was the only park activity for which there was a charge. *Id.* at 384.

434. In 2018 dollars, the donation amounts to about $7,235, and expenses for the city's recreation program equal roughly $1,012,320. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *supra* note 427.

435. *Rich,* 282 N.C. at 387.

programs as a governmental function, the judiciary seemed unmoved by its pronouncements.

6.2 The Approach to Park-Related Tort Claims in *Williams*

On its face, *Williams* represents a major departure from *Glenn* and *Rich*.[436] Whereas the earlier cases summarily discounted or ignored the legislature's description of park operations as a governmental function, *Williams* required the trial court to begin by considering the potential impact of G.S. 160A-351 on the defendant county's assertion that governmental immunity barred the plaintiff's wrongful death claim. Of course, *Williams* also states that G.S. 160A-351 will not always control the outcome of governmental/proprietary determinations in cases involving unsafe park conditions because not everything that occurs at a public park is covered by the statute.

The *Williams* opinion does not identify the criteria the lower courts should use to determine whether the specific activity that led to a plaintiff's injury in a particular case falls within the scope of G.S. 160A-351. The state supreme court could have provided some guidance on this score by deciding whether the statute encompassed the county's operation of the swimming area in which the decedent in the case had drowned, but it declined to rule on the matter. Alternatively, the court could have listed a few examples of the kinds of activities the statute likely encompasses. The lack of guidance as to what park activities fall within the ambit of G.S. 160A-351 handicapped the court of appeals when it confronted its first park case following *Williams*.

6.3 Application of *Williams* to Subsequent Park Cases

In *Horne v. Town of Blowing Rock*, the complaint alleged that the minor plaintiff was injured at a municipal park when he stepped into a drain hole that had been completely obscured by overgrown grass and grass clippings.[437] The complaint further alleged that the defendant town caused the plaintiff's injuries by negligently failing to maintain the grass around the drain hole.[438] The town argued that governmental immunity foreclosed the plaintiff's negligence claims because (1) G.S. 160A-351 classifies the operation of public parks as a governmental function and (2) there was nothing in the record showing that the town had received a profit or derived substantial income from the park.[439]

---

436. For a discussion of the *Williams* facts and holding, see Section 2.6, *supra*.

437. 223 N.C. App. 26 (2012).

438. The plaintiff also alleged that the town had negligently failed to inspect the premises and to warn visitors of hidden perils or unsafe conditions. *Id.* at 27.

439. The town further argued that the public policy of North Carolina favored a ruling that its operation of the park was a governmental function entitled to the

The court of appeals recognized that, under *Williams*, it first had to consider whether, and to what degree, the legislature had classified the specific activity that led to the plaintiff's injury as governmental or proprietary. It ruled that G.S. 160A-351 did not resolve the issue because, as observed in *Williams*, the statute does not cover "every nuanced action that could occur in a park[.]"[440] The court then turned to the other steps in the *Williams* test (see Section 2.6, *supra*), devoting special attention to the revenue factors found in step three. It viewed these factors and the ones relied upon in *Glenn* and *Rich* as essentially identical and concluded that it should evaluate the town's immunity defense in light of the two earlier cases. According to the court of appeals, *Glenn* and *Rich* establish that

- a local government's operation of a free public park for the recreation of its citizens is a governmental function for which ordinarily governmental immunity will apply and
- governmental immunity for park operations will be lost if a local government derives more than incidental revenue from either the operation of the park or the conduct of activities within the park.

Applying these principles, the court of appeals held that no governmental immunity determination could be made in *Horne* without evidence of the revenue the town had received from the park's operation. Such evidence, the court pointed out, could be obtained through the discovery process and presented to the trial court, enabling it to make an evidence-based assessment of the town's immunity defense.

6.3.1 The Treatment of G.S. 160A-351 in *Horne*

The rationale for the outcome in *Horne* is not wholly persuasive. For one thing, the opinion's treatment of G.S. 160A-351 is problematic. The court of appeals held that G.S. 160A-351 did not bar the negligence claims against the town, largely because *Williams* holds that the statute does not cover every *nuanced action* that could happen in a public park. Of course, the mere fact that G.S. 160A-351 will not *always* control the classification of a park activity does not mean that it will *never* do so. Like *Williams*, though, *Horne* says little about how a court should go about analyzing whether G.S. 160A-351 covers the specific park activity alleged to have harmed the plaintiff in a given lawsuit.

---

protection of governmental immunity. *Id.* at 32. The court of appeals did not address the merits of this contention, but the argument is not without foundation. The best statutory support for it is found in G.S. 160A-351, which states that "*the policy* of North Carolina [is] to forever encourage, foster, and provide" public parks and recreation programs for the state's citizens. G.S. 160A-351 (emphasis added).

440. *Horne,* 223 N.C. App. at 34 (quoting *Williams*, 366 N.C. at 202).

Interestingly, the *Horne* opinion offers a good reason for thinking that, contrary to its holding, G.S. 160A-351 encompasses a local government's upkeep of park lawns.

> [The] attempt to distinguish the particular activity of lawn maintenance from the general undertaking of operating the public park . . . is meaningless, as lawn maintenance of a public park is an indispensable aspect of establishing and operating such park.[441]

It stands to reason that if lawn maintenance is an indispensable aspect of operating a public park, it must be covered by G.S. 160A-351, or the statute is effectively meaningless. Put differently, if the broad language of the statute does not encompass the very activities necessary to operate a public park, then it does not cover park operations at all for purposes of governmental immunity. This conclusion seems at odds with the emphasis placed in *Williams* on the statute's relevance to immunity decisions in public park cases.

Additionally, the *Horne* opinion's reliance on *Glenn* and *Rich* might not be justified. In neither of those cases did the state supreme court consider in any substantive way the General Assembly's classification of park activities as a governmental function. The *Williams* decision does not expressly overrule *Glenn* or *Rich*—it actually cites *Glenn* approvingly—but it is not obvious that the outcome in *Glenn* would have been the same under the three-step inquiry mandated by *Williams*. At a minimum, if confronted with a case substantially similar to *Glenn*, the supreme court would need to explain in more detail than the court of appeals did in *Horne* why the legislature's designation of park operations as a governmental function did not apply to the city's maintenance of a public park.

6.4 Governmental Immunity and Park Cases: The Rules after *Williams* and *Horne*

After *Williams* and *Horne*, it is unclear when, if ever, G.S. 160A-351 will compel a court to designate the specific park-related undertaking that led to a plaintiff's injury as a governmental function. The state of the law seems to be that when a plaintiff alleges injury due to an unsafe condition at a city or county park, the court will deem the operation of the park a governmental function if the park is completely free to the public. In such cases, governmental immunity will shield the city or county from the plaintiff's claims, unless the unit has waived immunity through the purchase of liability insurance or participation in a government risk pool. If the unit receives income from the park—usually in the form of facilities or activity fees—the court will have to analyze whether the income qualifies as incidental, with the amounts at

441. *Id.* at 35.

issue in *Glenn* and *Rich*, adjusted for inflation, providing guidance. Incidental income will not transform the operation of the park into a proprietary function and thus will not deprive the unit of governmental immunity. If the park generates substantial income, the court will categorize its operation as a proprietary function, exposing the unit to liability on the same basis as a private landowner.

service of the original answer.[625] Thus, if the school board had characterized its immunity defense as a challenge to the trial court's personal jurisdiction over the board, the trial court would have been forced to deny the board's motion to amend.[626]

10.2.2 Pleading Governmental Immunity to Preserve Immediate Appeals

As a general rule, parties to a lawsuit may not immediately appeal a trial court's interlocutory orders. (An order is "interlocutory" if it does not dispose of all matters in dispute.) Two major exceptions to this rule are found in Chapter 1, Section 277 of the North Carolina General Statutes (hereinafter G.S.), which allows a party to appeal immediately from (1) a ruling on a legal issue that affects a "substantial right" or (2) an adverse ruling that concerns the trial court's jurisdiction over the defendant or the defendant's property. There is an enormous body of case law on what constitutes a substantial right under G.S. 1-277's first prong, but in broad terms, a substantial right is "one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment."[627] The second prong of G.S. 1-277 allows immediate appeals from orders rejecting challenges to the trial court's personal jurisdiction over the defendant in a case.[628]

A number of appellate court decisions flatly state that a unit may immediately appeal from an interlocutory order denying an MTD if the MTD asserts governmental immunity.[629] These broad statements have led some to believe that a unit always has a right to an immediate appeal when a trial court denies such an MTD. This belief is almost certainly wrong. In several cases involving governmental immunity, the court of appeals has conditioned the right of immediate appeal on whether the unit's MTD cited Rules 12(b)(1), 12(b)(2), or 12(b)(6) of the N.C. Rules of Civil Procedure. These three categories of dismissal motions will be examined in reverse order below, primarily

625. N.C. R. Civ. P. 12(h)(1), 15(a).

626. *See Mullis*, 126 N.C. App. at 95 (school board "amended [its] answer to plead [governmental] immunity as a defense 'pleaded in bar of any recovery by the plaintiffs,' not as a challenge to the [trial] court's personal jurisdiction over the [board]").

627. Darroch v. Lea, 150 N.C. App. 156, 159 (2002) (internal quotation marks omitted) (citations omitted).

628. More information on appeals from interlocutory orders can be found in the guide prepared by the Appellate Rules Committee of the North Carolina Bar Association and available here: https://www.ncbar.org/media/758546/ncba-appellate-rules-committee-guide-to-appealability-2017.pdf.

629. *E.g.*, Richmond Cty. 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.' ").

because the court's pronouncements regarding governmental immunity and Rule 12(b)(1) are the most complicated.

10.2.2.1 Immediate Appeals and Rule 12(b)(6) (Failure to State a Valid Claim)

According to the court of appeals, when governmental immunity is raised in a Rule 12(b)(6) motion, the denial of the motion creates a right to appeal immediately under G.S. 1-277's "substantial right" prong.[630] The substantial right affected is the unit's right under the doctrine of governmental immunity to be free not just from liability for the plaintiff's injuries but also from the burden of having to litigate the plaintiff's claims. The value of governmental immunity to local governments would be significantly diminished if a unit that unsuccessfully asserts the immunity in a 12(b)(6) motion could be forced to proceed to trial without appellate review.[631]

10.2.2.2 Immediate Appeals and Rule 12(b)(2) (Lack of Personal Jurisdiction)

The court of appeals has repeatedly opined that the defense of governmental immunity constitutes a challenge to the trial court's personal jurisdiction over the defendant local government.[632] For this reason, the appellate court has treated the denial of a Rule 12(b)(2) motion asserting governmental immunity as immediately appealable under the personal jurisdiction prong of G.S. 1-277.[633]

10.2.2.3 Immediate Appeals and Rule 12(b)(1) (Lack of Subject Matter Jurisdiction)

Because Rule 12(b)(1) concerns subject matter jurisdiction, not personal jurisdiction, the denial of a 12(b)(1) motion doesn't trigger a right to an immediate appeal under G.S. 1-277 unless a substantial right is affected. In *Teachy v. Coble Dairies*, the North Carolina Supreme Court appears to have concluded that the denial of a 12(b)(1) motion does not affect a substantial right.[634] 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.[635]

---

630. *E.g.*, Davis v. DiBartolo, 176 N.C. App. 142, 144 (2006) ("The denial of a 12(b)(6) motion to dismiss for failure to state a claim is immediately appealable where the motion raises the defense of sovereign immunity.").

631. *See* Slade v. Vernon, 110 N.C. App. 422, 425 (1993) ("A valid claim of immunity is more than a defense in a lawsuit; it is in essence immunity from suit. Were the case to be erroneously permitted to proceed to trial, immunity would be effectively lost.").

632. Can Am S., LLC v. State, 234 N.C. App. 119, 123–24 (2014); Data Gen. Corp. v. Cty. of Durham, 143 N.C. App. 97, 100 (2001).

633. *Can Am S.*, 234 N.C. App. at 123–24; *Data Gen.*, 143 N.C. App. at 100.

634. 306 N.C. 324 (1982).

635. *Davis*, 176 N.C. App. at 144–45; *Data Gen.*, 143 N.C. App. at 100.

At first glance, the court of appeals' application of *Teachy* to immunity cases seems at odds with the court's treatment of Rule 12(b)(6) motions premised on governmental immunity. How can the denial of an immunity defense affect a substantial right if raised under 12(b)(6) but not 12(b)(1)?

The same decisions in which the court of appeals has held that governmental immunity calls a trial court's personal jurisdiction into question also declare that governmental immunity does not present a question of subject matter jurisdiction.[636] The decisions appear to imply that governmental immunity should not be viewed as affecting a substantial right when it is raised under Rule 12(b)(1) because a 12(b)(1) motion is the wrong vehicle for asserting that defense.

The court of appeals has not been entirely consistent in its approach to governmental immunity and 12(b)(1) motions. The court recently allowed an immediate appeal from the denial of a 12(b)(1) motion that raised the defense of governmental immunity, agreeing with the defendant that the trial court's ruling affected a substantial right.[637] The last word on whether governmental immunity may be used to challenge a trial court's subject matter jurisdiction belongs to the North Carolina Supreme Court, but so far it has resisted providing definitive guidance on the issue.[638]

In short, then, when governmental immunity is raised in a Rule 12(b)(2) or 12(b)(6) motion, the denial of the motion creates a right to an immediate appeal. On the other hand, if a unit unsuccessfully moves for dismissal on immunity grounds solely under Rule 12(b)(1), it may find itself unable to appeal immediately. The court of appeals' opinion in *Murray v. University of North Carolina at Chapel Hill* illustrates how these principles work in practice.[639] It also points to practical steps that a local government attorney should take to preserve the option for an immediate appeal from the denial of an MTD in which governmental immunity is asserted.

10.2.2.4 The Murray Decision

The plaintiff in *Murray* filed a grievance under the University's Title IX policy, alleging sexual misconduct on the part of a fellow student. She subsequently filed a lawsuit against the University, alleging it had unlawfully restricted her attorney's ability to participate in the grievance proceedings. The University

---

636. *E.g.*, *Data Gen.*, 143 N.C. App. at 100 ("[A]n appeal of a[n] [MTD] based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction . . . .").

637. Sandhill Amusements, Inc. v. Sheriff of Onslow Cty., 236 N.C. App. 340, 347–48 (2014), *rev'd on other grounds and remanded*, 368 N.C. 91 (2015) (per curiam).

638. *See Teachy*, 306 N.C. at 328 (declining to resolve "whether sovereign immunity is a question of subject matter jurisdiction or whether the denial of a[n] [MTD] on grounds of sovereign immunity is immediately appealable").

639. ___ N.C. App. ___, 782 S.E.2d 531 (2016), *aff'd*, 369 N.C. 585 (2017) (per curiam).

filed an MTD under Rule 12(b)(1) for lack of subject matter jurisdiction and under Rule 12(b)(6) for failure to state a valid legal claim. The MTD did not cite Rule 12(b)(2), nor did it expressly mention sovereign immunity. At the hearing on the MTD, however, the University argued for dismissal under both 12(b)(1) and 12(b)(2) based on sovereign immunity. The trial court issued an order denying the MTD, and the University pursued an immediate appeal from that order.

The court of appeals held that the University was not entitled to an immediate appeal. As it has in other cases, the court opined that there is no right to an immediate appeal from the denial of a 12(b)(1) motion, even when sovereign immunity is at issue. It thus declined to review the trial court's denial of the University's 12(b)(1) motion.

Although the University argued for dismissal under Rule 12(b)(2) at the MTD hearing, and a trial court's denial of a 12(b)(2) motion may be appealed immediately, the court of appeals determined that the University had not taken the procedural steps necessary to preserve an appeal on 12(b)(2) grounds. Under the North Carolina Rules of Appellate Procedure, a party must obtain a ruling from the trial court in order to preserve an issue for appeal.[640] In *Murray*, the trial court's order referred to Rules 12(b)(1) and 12(b)(6) but omitted any reference to 12(b)(2), and the University didn't ask the trial court to supplement the order with a ruling on its oral 12(b)(2) motion.

The appellate court likewise rejected the University's argument that it could immediately appeal the denial of its 12(b)(6) motion. While the denial of a 12(b)(6) motion is subject to an immediate appeal if the motion asserts sovereign immunity, the University's MTD did not expressly assert that defense. Furthermore, although the University brought up sovereign immunity at the MTD hearing, it did so only with regard to Rules 12(b)(1) and 12(b)(2). Inasmuch as the University had not argued governmental immunity in connection with 12(b)(6), the court of appeals concluded that the University could not immediately appeal from the trial court's denial of its 12(b)(6) motion.

The court's opinion in *Murray* offers several practical takeaways for local government attorneys. To ensure that a unit may immediately appeal a trial court's denial of an MTD based on governmental immunity, the unit's attorney should

- cite Rules 12(b)(2) and 12(b)(6) in the MTD,
- clearly assert governmental immunity in the MTD under both 12(b)(2) and 12(b)(6),

640. N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review . . . [i]t is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.").

- specifically argue governmental immunity under 12(b)(2) and 12(b)(6) at the hearing on the MTD, and
- obtain a ruling from the trial court that addresses both 12(b)(2) and 12(b)(6).

10.2.3 Immediate Appeal from Interlocutory Order Eliminating Claims Based on Governmental Immunity

The right to appeal immediately from interlocutory immunity rulings is not restricted to local governments. A plaintiff may immediately appeal a trial court's interlocutory order granting a unit's motion to throw out claims on immunity grounds.[641]

641. Greene v. Barrick, 198 N.C. App. 647, 650 (2009) (citations omitted) ("This Court has held that 'when the moving party claims sovereign, absolute or qualified immunity, the denial of a motion for summary judgment is immediately appealable.' Even though this case involves the grant, rather than the denial of sovereign immunity, we believe the same type of issues are called into question by the appeal, and therefore, plaintiff's appeal is properly before this Court."). *See also* Odom v. Lane, 161 N.C. App. 534, 535 (2003) (plaintiff could immediately appeal trial court's interlocutory order granting defendant hospital's summary judgment motion asserting governmental immunity).

The plaintiff's right to an interlocutory appeal can arise when, based on governmental immunity, the trial court throws out some but not all of the plaintiff's claims against a unit, or all of the claims against the unit but not the plaintiff's claims against other defendants.