IMMUNITY OF THE STATE AND LOCAL GOVERNMENTS FROM LAWSUITS IN NORTH CAROLINA

Trey Allen, UNC School of Government (November 2015)[1]

Contents

[1] This section revises and expands a paper by former School of Government faculty member Michael Crowell, whose contribution is gratefully acknowledged.

I. Introduction. This section summarizes immunity doctrines that shield the state and local governments from lawsuits, with a particular focus on protections for local governments. It also briefly describes some of the immunities that can defeat civil claims made directly against public officials or employees.

II. Sovereign Immunity v. Governmental Immunity. Sovereign immunity precludes most kinds of lawsuits against the state, except insofar as the state consents to be sued. Governmental immunity is generally understood to be that limited portion of the state's sovereign immunity which extends to local governments. Both forms of immunity originate from the English concept that, as creator of the law, the "king could do no wrong." *See* Estate of Williams v. Pasquotank County Parks & Recreation Dep't, 366 N.C. 195, 198 (2012); Corum v. Univ. of North Carolina, 330 N.C. 761, 785 (1992).

III. Claims Not Barred by Sovereign or Governmental Immunity.

A. Contract Claims. Neither the state nor a local government is immune from a claim for breach of a *valid* contract; by entering such a contract a governmental body waives immunity and consents to be sued for damages for breach of its contractual obligations. Smith v. State, 289 N.C. 303, 320 (1976); Data General Corp. v. County of Durham, 143 N.C. App. 97, 100 (2001). On the other hand, if a contract is determined to be invalid, the state or local government has not waived its immunity from a breach-of-contract claim. *Data General*, 143 N.C. App. at 102-03.

B. Claims for Violations of the North Carolina Constitution. Governmental immunity ordinarily will not prevent plaintiffs from seeking relief for violations of rights guaranteed by the North Carolina Constitution. However, a plaintiff may not proceed with a state constitutional claim when an adequate alternative remedy is available. Corum v. Univ. of North Carolina, 330 N.C. 761, 782 (1992). For example, the availability of a tort claim for false imprisonment prevented a plaintiff from pursuing a claim that she was wrongfully imprisoned in violation of the state constitution. Davis v. Town of Southern Pines, 116 N.C. App. 663, 675-76 (1994).

An alternative remedy is not adequate if barred by sovereign or governmental immunity. Thus, the theoretical existence of a common law negligence action did not foreclose state constitutional claims against a local school board when governmental immunity blocked the plaintiff's negligence claim. Craig ex rel. Craig v. New Hanover County Bd. of Educ., 363 N.C. 334, 340-41 (2009).

C. Federal Constitutional Claims. Given the complexity of the topic, a few points will have to suffice regarding lawsuits under 42 U.S.C. § 1983 for deprivation of federal rights. Although the Eleventh Amendment to the United States Constitution generally bars federal lawsuits against the states, local governments in most instances are not considered part of the state and are therefore not entitled to immunity from § 1983 actions. *See* Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 690 n.54 (1978). Local governments may be sued for federal constitutional violations attributable to their official policies or customs. Individual local government officers and employees also may be sued under § 1983. Legislative or judicial immunity – discussed below – may shield public officials sued individually from liability for legislative, judicial, or quasi-judicial acts. Additionally, public officials may have a qualified immunity/good faith defense, which means they are subject to payment of monetary damages only if

they knew or should have known that their acts violated clearly established rights.

IV. Sovereign Immunity for Tort Claims Against the State. The state has waived its immunity against tort claims to the extent provided by the North Carolina Tort Claims Act ("TCA" or "Act"). The Industrial Commission has exclusive, original jurisdiction over claims covered by the TCA. *See* Guthrie v. North Carolina Ports Auth., 307 N.C. 522, 536 (1983). Nonetheless, the state may be brought into a tort action in superior or district court as a third party or third party defendant pursuant to Rule 14(c) of the North Carolina Rules of Civil Procedure.

A. Scope of Liability. The TCA permits recovery for injuries caused by the negligence of state officers, employees, or agents acting within the scope of their duties under circumstances that would expose the state to liability if it were a private individual. G.S. 143-291(a). The Act does not waive the state's immunity from tort claims arising from the intentional misconduct of state employees.

B. Applicable Principles. General tort principles apply to claims under the TCA. So, for example, contributory negligence can be a complete bar to recovery. *See id*.

C. Limitation on Damages. The Act places a limit of $1,000,000 on the amount the state may be required to pay for harm to an individual resulting from a single incident. G.S. 143-299.2. This monetary cap applies both in the Industrial Commission and when the state is brought in as a third party or third party defendant to a tort action in superior or district court.

D. Other Contexts. The state has waived sovereign immunity by statute in other contexts. Section 97-7 of the General Statutes, for instance, subjects the state and its political subdivisions to workers' compensation claims.

V. Governmental Immunity for Tort Claims Against Local Governments.

A. Scope of Liability. Governmental immunity bars tort claims against local governments for injuries caused by their employees or agents acting within the scope of their duties in the performance of governmental functions. It does not protect a local government from tort claims arising from the performance of proprietary functions.

B. Applicable Principles. Much of the case law involving governmental immunity focuses on (1) whether the employee who caused the injury was acting within the scope of the employee's duties and (2) whether the activity in which the employee was engaged was governmental or proprietary.

1. Scope of Employment. Local governments are not liable for the torts of employees acting beyond the scope of their duties. Accordingly, if an employee exceeded the scope of the employee's duties in causing a plaintiff's injury, there is no need to analyze whether the activity was governmental or proprietary.

a. Formal, Actual, or Customary Duties. An employee's duties include those formally prescribed, as well as the employee's actual or customary duties. Even when an employer did not expressly authorize the specific act in question, courts will usually

find that an employee acted within the scope of the employee's duties if the action furthered the employer's business. Put differently, employees do not act within the scope of their duties when they act for wholly personal reasons. For example, a town employee exceeded the scope of his duties when he took a town vehicle on a "pleasure trip" that resulted in the death of one of his passengers. Rogers v. Town of Black Mountain, 224 N.C. 119, 122 (1944).

b. Intentional Torts. Although employers are typically not liable for the intentional misconduct of their employees, it is possible for an employee to commit an intentional tort while acting within the scope of the employee's duties. Thus, it was for a jury to decide whether a sanitation worker was acting in furtherance of the city's business when he assaulted the plaintiff at her residence after she asked him to collect additional garbage. Edwards v. Akion, 52 N.C. App. 688, 698 (1981), *aff'd per curiam*, 304 N.C. 585 (1981). Similarly, the manager of a municipal water company acted in furtherance of the city's business when he repeatedly struck a patron who paid a portion of his water bill in pennies. Munick v. City of Durham, 181 N.C. 188, 196 (1921).

An employer will be liable for an employee's intentional misconduct if it expressly authorized the wrongdoing before-the-fact or approved it after-the-fact. This principle has led to the conclusion that an employer may be liable for sexual harassment between employees if the employer fails to take appropriate steps upon being informed of the problem. Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 492-93 (1986).

2. Governmental v. Proprietary Functions. Assuming the employee who inflicted a plaintiff's injuries acted within the scope of the employee's duties, the local government is liable for the plaintiff's injuries if the activity in which its employee was engaged was a proprietary function. If the activity was a governmental function, governmental immunity will bar the plaintiff's tort claim unless the local government has waived its immunity from suit as described below. Steelman v. City of New Bern, 279 N.C. 589, 592-93 (1971).

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

a. Proprietary Functions. Proprietary functions tend to be activities that are not traditionally performed by the government, that benefit a definable category of individuals rather than the general public, and that involve fees which do more than cover the cost of the activity. Undertakings long recognized as proprietary functions include the operation of municipal golf courses, *Lowe v. City of Gastonia*, 211 N.C. 564, 566 (1937); county hospitals, *Sides v. Cabarrus Mem'l Hosp.*, 287 N.C. 14, 25-26 (1975); and civic centers, *Aaser v. City of Charlotte*, 265 N.C. 494, 497 (1965).

b. Governmental Functions. Governmental functions are those performed by governmental bodies for the benefit of the public at large. They are primarily "discretionary, political, legislative, or public in nature." Britt v. City of Wilmington, 236 N.C. 446, 450 (1952). Examples of activities deemed to be governmental functions include the installation and maintenance of traffic lights, *Hamilton v. Town of Hamlet*, 238 N.C. 741, 742 (1953); the operation of 911 call centers, *Wright v. Gaston County*, 205 N.C. App. 600, 605-06 (2010); and the construction of municipal sewer systems, *McCombs v. City of Asheboro*, 6 N.C. App. 234, 240 (1969).

c. Distinguishing Proprietary v. Governmental. Activities generally classified as governmental functions may have proprietary components and vice versa. Thus, although the construction of a sewer system is a governmental undertaking, a city acts in a proprietary capacity when it contracts with engineering and construction companies to build such a system. Town of Sandy Creek v. East Coast Contracting, Inc., ___ N.C. App. ____, ___, 741 S.E.2d 673, 677 (2013).

d. Analytical Framework. The mere fact that an activity has been labeled as governmental or proprietary in a prior case is not necessarily dispositive. "[D]istinctions between proprietary and governmental functions are fluid and courts must be advertent to changes in practice." Estate of Williams v. Pasquotank County Parks & Recreation Dep't, 366 N.C. 195, 203 (2012).

In *Williams*, the North Carolina Supreme Court established the following framework for analyzing whether a particular activity is a proprietary or governmental function:

i. Designation by Legislature. The threshold inquiry is whether, and if so to what degree, the General Assembly has designated the specific activity that led to the plaintiff's injury as a governmental or proprietary function. If such a designation has been made, the court will usually defer to the legislature. *But see* Rhodes v. City of Asheville, 230 N.C. 759, 759 (1940) (holding that the operation of a municipal airport is a proprietary function for immunity purposes even though G.S. 63-50 characterizes it as a governmental activity). The General Assembly may make such a designation by expressly labeling an activity as governmental or proprietary, but this rarely happens. If a statute directs local governments to undertake a specific activity, it may be regarded as a legislative declaration that the activity is a governmental function. *See, e.g.*, Bynum v. Wilson County, 367 N.C. 355, 360 (2014) (explaining that the legislature has made the maintenance of some county buildings a governmental function by enacting G.S. 153A-169, which requires boards of county commissioners to supervise "the maintenance, repair, and use of all county property").

ii. Nature of the Undertaking. If the legislature has not definitively designated the specific activity as governmental

or proprietary, the next question is whether the undertaking is one in which only a governmental agency could engage. If the undertaking is something only a government could do, it is a governmental function. The supreme court conceded in *Williams*, however, that "it is increasingly difficult to identify services that can only be rendered by a governmental entity" because "many services once thought to be the sole purview of the public sector have been privatized in full or in part." *Williams*, 366 N.C. at 202. Perhaps the most obvious examples of activities that only a government can perform concern the legislative powers of local governments. A city council's decision, for instance, to suspend an ordinance prohibiting the use of fireworks within city limits is a governmental function. Hill v. City of Charlotte, 72 N.C. 55, 57-58 (1875).

iii. **Other Factors to Consider.** If further analysis is required, the court should consider:

(1) Whether the service is one traditionally provided by a governmental entity;

(2) Whether a substantial fee was charged for the service; and

(3) Whether the fee did more than cover the operating costs of the service provider. *Williams*, 366 N.C. at 200-03.

iv. **The Bottom Line:** If the legislature has not declared a particular activity to be a governmental function, and the activity is one that a private entity can perform, the activity is likely to be categorized as proprietary if the court concludes that one of its major purposes is to raise revenue. Thus, while a municipality's operation of a free public park has been characterized as a governmental function, the use of parks to generate revenue can render their operation a proprietary function. Horne v. Town of Blowing Rock, 223 N.C. App. 26, 36 (2012).

e. **Negligent Maintenance of Government Buildings**. When a local government building is used for governmental functions, the maintenance of the building is itself a governmental activity, even if the building is also used for proprietary undertakings, and governmental immunity will defeat a personal injury claim arising from an unsafe building condition. *Bynum*, 367 N.C. at 359-60.

VI. **Sovereign/Governmental Immunity From Equitable Claims.** When a party furnishes goods or services to another and payment is not forthcoming, it may seek relief through a claim for breach of contract, provided a valid contract governs the parties' respective obligations. If there is no contract, or if the contract is invalid, the injured party can attempt to obtain relief through any of various equitable claims, such as unjust enrichment, restitution, contract implied in law, quasi contract, quantum meruit, or estoppel. These equitable claims are legally distinct from breach-of-contract and tort claims, and a separate body of case law addresses when sovereign or governmental immunity can erect a barrier to them.

A. Equitable Claims Against the State. Sovereign immunity bars *quantum meruit* and similar equitable claims against the state. Whitfield v. Gilchrist, 348 N.C. 39, 42-43 (1998).

B. Equitable Claims Against Local Governments. Governmental immunity can defeat equitable claims arising from governmental functions, but uncertainty exists regarding its status as a defense against equitable claims stemming from proprietary functions. In *Data General Corporation v. County of Durham*, the North Carolina Court of Appeals held that governmental immunity barred the plaintiff's claims for *quantum meruit* and estoppel, even though the activity giving rise to them was proprietary. 143 N.C. App. at 103-05. Roughly thirteen years later, however, the court ruled in *Viking Utilities Corporation v. Onslow Water and Sewer Authority* that governmental immunity could not block the plaintiff's equitable claims if they stemmed from a proprietary undertaking. ___ N.C. App. ___, 755 S.E.2d 62, 65-66 (2014). The United States Court of Appeals for the Fourth Circuit subsequently interpreted *Viking Utilities* to call the ongoing soundness of *Data General* into question. AGI Associates, LLC, v. City of Hickory, 773 F.3d 576, 581 (4th Cir. 2014).

The Fourth Circuit's interpretation overlooks an important distinction between *Data General* and *Viking Utilities*. The equitable claims at issue in *Data General* concerned a contract subject to G.S. 159-28(a). That subsection prohibits a local government from incurring a financial obligation in certain situations unless its finance officer first conducts a "preaudit" to ensure that adequate funds remain to pay the obligation. If the preaudit is not completed, G.S. 159-28(a) renders the contract "invalid and unenforceable." In other words, the local government cannot be liable for breach of contract. In *Data General* and other pre-*Williams* cases, the court refused to let the plaintiffs seek equitable remedies in connection with contracts that were invalid under G.S. 159-28(a). M Series Rebuild, LLC, v. Town of Mount Pleasant, 222 N.C. App. 59, 67-68 (2012); Finger v. Gaston County, 178 N.C. App. 367, 371 (2006). Allowing a plaintiff to obtain equitable relief in such circumstances, the court explained, would effectively negate the preaudit requirement. *Finger*, 178 N.C. App. at 371.

It does not appear that the underlying contract in *Viking Utilities* was covered by G.S. 159-28(a). The disparate outcomes in *Viking Utilities* and *Data General* are therefore easily harmonized. Collectively, they seem to establish that governmental immunity is a defense to equitable claims arising from a proprietary function, but only if the claims are tied to a contract requiring a preaudit.

VII. Waiver of Immunity From Liability for a Governmental Function. Governmental immunity from tort claims can be waived, but waiver of immunity is not to be lightly inferred, and statutes waiving immunity are to be strictly construed. Guthrie v. North Carolina State Ports Auth., 307 N.C. 522, 537-38 (1983).

A. Waiver by Purchase of Liability Insurance. By statute, boards of county commissioners, city councils and local school boards waive governmental immunity in tort by the purchase of liability insurance, but only to the extent of coverage. G.S. 153A-435 (for counties); G.S. 160A-485 (for cities); G.S. 115C-42 (for school boards). For instance, if a school board's insurance policy expressly excludes injuries arising from athletic events, a student who slips and breaks his arm on a wet gym floor during basketball practice has no negligence claim against the district. Similarly, if a county's insurance policy covers a

particular type of negligence claim but only up to $50,000, the most a plaintiff may recover is $50,000.

B. Cities with Populations Over 500,000. A separate statute, G.S. 160A-485.5 allows cities with a population of 500,000 or more — only Charlotte qualifies — to waive immunity in tort and become subject to the TCA. Claims are heard in the local superior court rather than at the Industrial Commission. Charlotte has elected to waive immunity as provided by G.S. 160A-485.5.

C. Risk Pool Participation.

1. Counties & Cities. For counties and cities, participation in a governmental risk pool is considered the purchase of insurance and constitutes waiver of governmental immunity in tort up to the amount of coverage. A governmental risk pool is defined by the insurance statutes and requires that more than one governmental unit participate and share risk. Lyles v. City of Charlotte, 344 N.C. 676, 680 (1996).

2. School Boards. The statute governing school boards is worded differently than the statutes for counties and cities, and participation in the North Carolina School Boards Trust or a governmental risk pool is not considered a waiver of a school board's immunity. Hallman v. Charlotte-Mecklenburg Bd. of Educ., 124 N.C. App. 435, 438 (1996).

D. Equitable Claims. The waiver statutes for counties, cities, and school boards deal exclusively with the waiver of governmental immunity as to tort claims. Accordingly, the purchase of liability insurance or participation in a risk pool probably is not sufficient to waive immunity against unjust enrichment, restitution, *quantum meruit*, and similar equitable claims.

E. Supplemental Insurance. Local governments often purchase supplemental insurance, and the outcome of cases in which waiver of immunity is alleged often depends on a close reading of the wording of several policies and the limits of their coverage. *See, e.g.,* Fulford v. Jenkins, 195 N.C. App. 402, 407-08 (2009) (agreeing that the defendant county's general liability policy did not waive immunity as to the plaintiffs' claims but holding that the professional liability coverage purchased by the county amounted to a waiver of immunity).

VIII. *Dobrowolska* Claims. If a local government has governmental immunity for a tort claim, and has not waived its immunity by the purchase of insurance, but arbitrarily settles some such claims and not others, the local government may be liable under 42 U.S.C. § 1983 for denial of the constitutional rights of due process and equal protection. Dobrowolska ex rel. Dobrowolska v. Wall, 138 N.C. App. 1, 18-19 (2000).

IX. Punitive Damages. Punitive damages are not allowed against a governmental body unless specifically authorized by statute. Jackson v. Hous. Auth. of City of High Point, 316 N.C. 259, 262 (1986); Long v. City of Charlotte, 306 N.C. 187, 208 (1982).

X. Public Duty Doctrine and Negligence Claims. The public duty doctrine says that, even when a governmental body has undertaken to protect the public at large, it has no legal duty to prevent harm to specific individuals. When a negligence claim is barred by the public duty doctrine, there is no need to determine whether immunity applies because, in the absence of a duty of care, the plaintiff lacks a cause of action.

A. Law Enforcement Agencies. Although state agencies performing a variety of functions may invoke the public duty doctrine to avoid liability, at the local level the public duty doctrine applies only to claims made against law enforcement agencies for negligence in failing to protect individuals from harm by third parties. Lovelace v. City of Shelby, 351 N.C. 458, 460-61 (2000). Earlier cases extending the public duty doctrine to fire protection, animal control, building inspections, and other local services were overruled by *Lovelace*. Hargrove v. Billings & Garrett, Inc., 137 N.C. App. 759, 761-62 (2000); Willis v. Town of Beaufort, 143 N.C. App. 106, 110 (2001). The public duty doctrine has been applied, however, to bar a plaintiff from suing a county over the failure of private security guards to protect her from assault in the courthouse. Wood v. Guilford County, 355 N.C. 161, 167-69 (2002). Although the guards were not sworn officers in a law enforcement department, they were performing a functionally equivalent service. *Id.*

1. Limited Exception for Promise to Protect or Special Relationship. An exception to the public duty doctrine, giving rise to liability, is when the law enforcement agency has made an actual promise to protect an individual or when a special relationship has been created in which such protection is expected, as in the case of a police informant. *See* Multiple Claimants v. NC Dep't of Health and Human Servs., Div. of Facility Servs., Jails and Detention Servs*.,* 361 N.C. 372, 374 (2007).

B. Local Entity Acting as Agent of the State. A local agency may be serving as an agent of the state in performance of a particular function and be entitled to the protection of the public duty doctrine for that specific activity. For example, a county health department is an agent of the state's Department of Environment and Natural Resources for inspection of wastewater treatment systems and thus is protected by the public duty doctrine for that activity. Murray v. County of Person, 191 N.C. App. 575, 578 (2008).

C. Scope of Doctrine. Even with respect to law enforcement, the public duty doctrine is limited in scope. It is a barrier to lawsuits for failure of the law enforcement agency to protect the plaintiff from harm by third parties, but not a barrier to lawsuits for harm caused directly by the agency. It is a barrier to liability for negligence claims, but does not bar liability for intentional torts. It is a barrier to liability for discretionary actions that involve the active weighing of safety interests, but does not bar lawsuits based on failure to comply with mandatory, ministerial requirements, such as the statutory duty to report suspected child abuse. Smith v. Jackson County Bd. of Educ., 168 N.C. App. 452, 461-62 (2005).

The public duty doctrine provides protection from lawsuits for governmental bodies and for officers sued in their official capacity. It does not prohibit a lawsuit against someone in that person's individual capacity. *Murray*, 191 N.C. App. at 579.

XI. Claims Under State Law Against an Individual Public Official or Employee.

A. Official and Individual Capacity Claims. Public officials and employees may be sued in their official or individual capacities.

1. Official Capacity. An official capacity claim is really nothing more than a claim against the governmental body, and the governmental body, not the official or employee, is responsible for any damages awarded.

Governmental immunity bars an official capacity claim to the same degree that it would bar the claim if the governmental body were named as the defendant. *See* Mullis v. Sechrest, 347 N.C. 548, 554-55 (1998) (holding the plaintiffs' claims against the defendant in his official capacity were barred by governmental immunity).

2. **Individual Capacity.** An individual capacity claim seeks damages from the public official or employee personally. Williams v. Holsclaw, 128 N.C. App. 205, 208-09 (1998), *aff'd per curiam*, 349 N.C. 225 (1998). While governmental immunity is best viewed as protecting local governments and not individual public officials and employees, many of the immunities described below can foreclose individual capacity claims in certain situations.

3. **Presumption of Official Capacity.** The courts presume that a public officer or employee is sued in an official capacity. If a plaintiff intends to allege an individual capacity claim, the complaint should reflect this intention in the caption, allegations, or relief sought. The failure to specify whether the action is in the person's official or individual capacity will result in its being treated as an official capacity claim. White v. Trew, 366 N.C. 360, 364 (2013).

4. **Both Individual and Official Capacity.** It is common for lawsuits to contain both official and individual capacity claims. *See, e.g.,* Boyd v. Robeson County, 169 N.C. App. 460 (2005) (including claims against numerous local officials in their official and individual capacities).

B. Absolute Immunity for Legislators and Judges.

1. **Legislative Immunity.** Like members of the General Assembly, local elected officials enjoy absolute immunity from claims arising from their actions so long as (1) they were acting in a legislative capacity at the time of the incident resulting in the alleged injury and (2) their acts were not illegal. Vereen v. Holden, 121 N.C. App. 779, 782 (1996); Scott v. Greenville County, 716 F.2d 1409, 1422 (4th Cir. 1983). The decision of a city council to eliminate a department for budgetary reasons is a legislative act, regardless of the specific intent of particular council members, and the employees who lose their jobs because of the decision have no cause of action against individual council members. *See* Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998) ("Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it."); *Vereen*, 121 N.C. App. at 783 ("[E]liminating a position for budgetary reasons has generally been found to be legislative . . . .").

   Legislative immunity does not extend to administrative acts by elected officials. Administrative acts include employment decisions such as whether to hire or fire particular employees. *Vereen*, 121 N.C. App. at 783.

   Legislative immunity includes a testimonial privilege. For this reason, a mayor and members of a city council could not be compelled to testify about their personal motives for certain zoning decisions. Novak v. City of High Point, 159 N.C. App. 229, *6 (2003) (unpublished).

2. **Judicial Immunity.** Judges are not liable in civil actions for their judicial actions, even when they behave maliciously or corruptly. Cunningham v. Dilliard, 20 N.C. 485 (1839); State ex rel. Jacobs v. Sherard, 36 N.C. App.

60, 64 (1978). Judicial immunity applies even when the judge acts in excess of jurisdiction but not when the judge acts in the clear absence of all jurisdiction. Stump v. Sparkman, 435 U.S. 349, 357 (1978). Thus, judicial immunity did not protect a judge sued over his jailing of an individual for contempt in a proceeding the judge plainly had no authority to conduct. Manning v. Ketcham, 58 F.2d 948, 949 (6th Cir. 1932). Judges also do not enjoy judicial immunity for purely administrative acts, like hiring or firing employees. Forrester v. White, 484 U.S. 219, 229 (1988).

a. **Judicial Immunity for Non-Judges.** Judicial immunity applies to non-judges when they are acting in a judicial or quasi-judicial capacity, such as a coroner conducting an inquest, *Gillikin v. United States Fid. and Guar. Co. of Baltimore, Maryland,* 254 N.C. 247, 249 (1961); a clerk of court acting as judge of probate, *Martin v. Badgett*, 149 N.C. App. 667, *4 (2002) (unpublished); or members of a licensing board hearing a complaint, *Mazzucco v. North Carolina Bd. of Med. Exam'rs*, 31 N.C. App. 47, 51 (1976).

Boards of county commissioners, city councils, and school boards hold a number of different kinds of hearings which would be considered quasi-judicial, and hence would entitle them to judicial immunity. Local officials may not be compelled to testify concerning their personal motives for actions taken in a judicial or quasi-judicial capacity. *Novak*, 159 N.C. App. at *6.

C. **Public Official Immunity.** Public official immunity bars civil claims against public officials for actions taken within the scope of their duties unless those actions were malicious or corrupt. Epps v. Duke Univ., 122 N.C. App. 198, 204 (1996). This immunity does not extend to public employees, who may be held personally liable for injuries caused by negligence in the performance of their duties. Baker v. Smith, 224 N.C. App. 423, 426 (2012).

1. **Public Official v. Public Employee.** Much of the litigation concerning public official immunity is devoted to distinguishing public officials from public employees. Generally public officials occupy offices created by statute, take an oath of office, and exercise discretion in the performance of their duties. Gunter v. Anders, 114 N.C. App. 61, 67 (1994); Pigott v. City of Wilmington, 50 N.C. App. 401, 403-04 (1981). Public employees, on the other hand, perform ministerial functions involving little or no discretion. Meyer v. Walls, 347 N.C. 97, 113 (1997).

a. **Examples of Public Officials.** Elected board members are public officials, *Town of Old Fort v. Harmon*, 219 N.C. 241, 244 (1941); as are chiefs of police and police officers, *State v. Hord*, 264 N.C. 149, 155 (1965); sheriffs and their deputies, *Messick v. Catawba County*, 110 N.C. App. 707, 718 (1993); the county director of social services, *Hare v. Butler*, 99 N.C. App. 693, 700 (1990); the chief building inspector, *Pigott*, 50 N.C. App. at 404-05; superintendents and principals, *Gunter*, 114 N.C. App. at 67-68; and jailors and assistant jailors, *Baker*, 224 N.C. App. at 427, 434-35.

b. **Examples of Public Employees.** Teachers are public employees, not public officials, and therefore are not entitled to public official immunity. Mullis v. Sechrest, 126 N.C. App 91, 98

(1997), *rev'd on other grounds*, 347 N.C. 548 (1998); Daniel v. City of Morganton, 125 N.C. App. 47, 55 (1997). Other examples of public employees include street sweepers, *Miller v. Jones*, 224 N.C. 783, 787 (1945); and emergency medical technicians, *Fraley v. Griffin*, 217 N.C. App. 624, 628-29 (2011).

c. **Social Workers.** Social workers can be either public officials or public employees, depending on the context. Whether a social worker qualifies as a public official turns on (1) the degree of discretion exercised by the social worker and (2) whether the social worker is functioning as the DSS director's representative in a matter delegated to the director by statute. Public official immunity protected a social worker in one case from liability for allegedly conducting an inadequate investigation into reports of infant neglect because DSS directors have a statutory duty to investigate cases of abuse and neglect. Hunter v. Transylvania County Dep't of Soc. Servs., 207 N.C. App. 735, 740 (2010). Inasmuch as DSS directors had no comparable duty regarding incompetent adults, public official immunity did not shield social workers in another case from negligence claims arising from the suicide of a mentally incompetent person placed under the legal guardianship of the county DSS. *Id.* (citing Meyer v. Walls, 122 N.C. App. 507 (1996), *rev'd on other grounds*, 347 N.C. 97 (1997)).

D. Statutory Immunities. The General Assembly has by statute created limited immunity for certain public officials or employees in particular circumstances. Here are three examples:

1. **Emergency Management Workers.** Emergency management workers enjoy immunity from civil claims for death, personal injury, or property damage arising from compliance with or reasonable attempts to comply with (1) the North Carolina Emergency Management Act ("EMA"), (2) any order, rule, or regulation promulgated pursuant to the EMA, or (3) any ordinance relating to emergency management measures enacted by one of the state's political subdivisions. G.S. 166A-19.60. This immunity does not shield emergency management workers from claims arising from willful misconduct, gross negligence, or bad faith.
2. **School Personnel.** School personnel may not be held civilly liable for using reasonable force in conformity with state law, as when necessary to correct students or to quell a disturbance threatening injury to others. G.S. 115C-390.3.
3. **Volunteer Fire Departments & Rescue Squads.** Members of volunteer fire departments or rescue squads who receive no compensation for their services are not civilly liable for their acts or omissions in rendering first aid or emergency health care treatment at the scene of a fire to persons unconscious, ill, or injured as a result of the fire, unless those acts or omissions amount to gross negligence, wanton conduct, or intentional wrongdoing. G.S. 58-82-5(c).

E. Defense of Local Officials and Employees and Payment of Claims Against Them. The statutes governing counties, cities, and public schools all authorize, but do not require, the governing board to provide for the defense of current and

former board members, officers, and employees against civil or criminal claims based on acts or omissions allegedly within the scope of employment. G.S. 153A-97 (for counties); G.S. 160A-167 (for cities and counties); and G.S. 115C-43 (for public school systems).

Collectively G.S. 160A-167 and G.S. 115C-43 allow, but do not require, boards of county commissioners, city councils, and school boards to pay civil judgments entered against current and former board members, officers, and employees for acts or omissions within the scope of their duties. No such claims may be paid, though, unless the governing board has adopted uniform standards stating when payment shall be made. For school boards, the uniform standards must also specify when the board will pay for the defense of claims.

APPENDIX

Does Governmental Immunity Bar a Tort Claim Against a Local Government?