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Trying to Recover Public Costs Incurred in Dealing with Man-Made Disasters: The Free Public Services Doctrine

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A train running through the city derailed, apparently because the railroad was negligent in maintaining its track. Several cars carrying flammable and toxic substances were among those derailed, resulting in a fire that quickly spread, causing toxic liquids to escape into the atmosphere. While the fire department labored at containing the fire, the mayor declared a state of emergency and the police department implemented a mandatory evacuation of the surrounding residential neighborhoods. When the dust finally settled, the city had spent more than $50,000 in fighting the fire, paying overtime to the police, and sheltering and feeding for two to three days the families who had been driven from their homes. The city council has inquired about whether the city might be able to sue the railroad to recover the city's costs in dealing with the emergencies arising from the railroad's negligence. What would be the city's chances of success?

The Basic Rule

The city's chances of recovery in the above scenario are probably zero. Although there is no North Carolina case law on point, the uniform rule elsewhere does not allow a public entity in the city's situation to sue in tort, citing what has become known as the *free public services doctrine*. Under this doctrine and in the absence of legislation to the contrary, a public entity may not recover its costs in cleaning up and otherwise protecting the public from the effects of health or safety hazards from the party or parties whose negligence or other unlawful actions led to the specific hazards in question. (In the scenario set out above the mayor formally declared a state of emergency under G.S. 166A-19.22; having done so has no effect on the city's chances of recovering its costs from the railroad.)

The leading case articulating the doctrine is *City of Flagstaff v. Atchison, Topeka & Santa Fe Railway Co.*,[1] a 1983 decision of the Ninth Circuit Court of Appeals. In 1981, four tanker cars of the defendant railroad derailed in Flagstaff. The cars were carrying liquefied petroleum gas, and the derailment necessitated a very large evacuation of surrounding properties. The city's costs associated with the evacuation totaled more than $41,000, and it brought suit against the railroad

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1. 719 F.2d 322 (9th Cir. 1983).

seeking reimbursement. The federal district court dismissed the action, and the Ninth Circuit affirmed in an opinion written by Anthony Kennedy, then a judge on that court of appeals.

The case was in federal court under its diversity jurisdiction, and therefore the court was attempting to apply Arizona law. As there was none directly on point, the court drew on cases from around the country in its effort to judge how the Arizona courts would have reacted to the suit and concluded as follows:

> Although precedent on the point is limited, we conclude that the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service.[2]

In defending its conclusion the court made two arguments—one based on the expectations of businesses and individuals when they have been negligent, the other based on the proper allocation of responsibilities as between judges and legislators.

> Expectations of both business entities and individuals, as well as their insurers, would be upset substantially were we to adopt the rule proposed by the city. Settled expectations sometimes must be disregarded where new tort doctrines are required to cure an unjust allocation of risks and costs. . . . The argument for the imposition of the new liability is not so compelling, however, where a fair and sensible system for spreading the costs of an accident is already in place, even if the alternate scheme proposed might be a more precise one. Here the city spreads the expense of emergency services to its taxpayers, an allocation which is neither irrational nor unfair.
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> Though noting the practical difficulties of the approach, in earlier cases we have acknowledged the force of the suggestion that risks should be imposed on the party who can avoid them most economically or pass the costs on most efficiently. . . . Even if we were satisfied that we had the information to choose the more efficient cost avoider in this case, between the railroad with its ability to adjust its rates and take greater safety measures, and the city with its power to fix the burden and rate of taxation, an added factor counsels deference to the legislature. Here governmental entities themselves currently bear the cost in question, and they have taken no action to shift it elsewhere. If the government has chosen to bear the cost for reasons of economic efficiency, or even as a subsidy to the citizens and their business, the decision implicates fiscal policy; the legislature and its public deliberative processes, rather than the court, is the appropriate forum to address such fiscal concerns. . . . We doubt judicial intervention is needed to call the attention of Arizona's legislative authorities to the cost allocation presented by what we find to be the existing rule, for the state and its municipalities presently feel the pinch when they pay the bill.[3]

I have found no cases that allow recovery in such a suit, although a very few cases have found a statute that creates an exception to the doctrine on the facts of a specific case.

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2. *Id*. at 323. The court noted that precedent was limited and cited a single, 1976 case. I have found a handful of other cases antedating the court's decision, all of which are consistent with it.

3. *Id*. at 323–24 (citations omitted).

The Sorts of Emergencies to Which the Rule Applies

The free public services doctrine has been applied in other states to deny recovery to local governments against negligent tortfeasors and other wrongdoers in a variety of public health or safety emergencies. Below are some examples.

Fire Emergencies

- A construction company was clearing land for construction of a town's airport runway and lost control of a brush fire that it had set. The town's fire department had to extinguish the fire, and it sued for the cost of doing so.[4]
- Sparks from a train caused a brush fire in a town; the town's fire department had to extinguish the fire, and it sued for the cost of doing so.[5]
- A wholesale tire company had dumped 750,000 used tires on its property; when a fire occurred on the property, the tires significantly lengthened the time necessary for the fire department in the town where the property was located to extinguish it. The town sought compensation for the additional costs incurred because of the tires.[6]

Chemical Spills

- A railroad derailment included a tank car carrying a poisonous chemical, and the resulting spill contaminated a number of private wells in the rural community adjoining the derailment. Eventually the town had to construct a public water system to provide water in the area near the spill, and it sought to recover its construction costs.[7] (In this case the town was successful because the court held that a Wisconsin statute specifically permitted recovery in the circumstances of the case.)

Natural Gas Leaks

- A city incurred additional police costs in dealing with the aftermath of the explosion of a natural gas line, and it sued the gas company to recover those costs.[8]
- A construction company negligently caused the rupture of a gas line, and the township in which the line was located incurred additional police costs in managing the evacuation of the surrounding homes. The township sued to recover those additional costs.[9]

Airplane Crashes

- When an airplane crashed into a city bridge shortly after takeoff, the city incurred significant expenses—more than $750,000—in rescuing survivors, recovering bodies, and raising the airplane from the river. The city sued the airline to recover those costs.[10]
- When an airplane crashed into a house while approaching a county airport, the county incurred significant unanticipated expenditures—overtime pay for police and emergency workers, cleanup and removal of human remains, cleanup and removal of chemical

4. Portsmouth v. Campanella & Conti Constr. Co., 123 A.2d 827 (N.H. 1956).
5. Town of Howard v. Soo Line R.R. Co., 217 N.W.2d 329 (Wis. 1974).
6. Town of Freetown v. New Bedford Wholesale Tire, Inc., 423 N.E.2d 997 (Mass. 1981).
7. Town of E. Troy v. Soo Line R.R. Co., 653 F.2d 1123 (7th Cir. 1980).
8. City of Pittsburgh v. Equitable Gas Co., 512 A.2d 83 (Pa. Commw. Ct. 1986).
9. Cherry Hill Twp. v. Conti Constr. Co., 527 A.2d 921 (N.J. Sup. Ct. App. Div. 1987).
10. Dist. of Columbia v. Air Fla., Inc., 750 F.2d 1077 (D.C. Cir. 1984).

substances from the plane, removal of the plane itself, and counseling services to survivors on the ground. The county sued the airline to recover those costs.[11]

Electric Blackout

- When the city was subjected to a twenty-five-hour blackout, it incurred a variety of expenses in responding to the outage and sued the electric utility to recover those costs.[12]

The final two cases involve criminal rather than tortious activity, but the courts applied the same doctrine.

Mass Protest

- A protest was organized and carried out in a county in an attempt to keep a new nuclear power plant from coming on line. The protestors clearly went beyond their First Amendment rights during the course of the protest, violating trespassing statutes, and as a result the county sued the protest organizers to recover its very significant police expenditures incurred in coping with the protest.[13]

Public Health Emergency

- A crematory received bodies for cremation but did not carry out that service; rather, it stacked and scattered the bodies around its property in a county. When the fraud was discovered, the county spent $2 million in collecting the bodies and setting up a temporary morgue, identifying the remains, and providing for their proper cremation or burial; the county then sued the crematory to recover those costs.[14]

Possible Exceptions to the Basic Rule

The *Flagstaff* court identified two sorts of exceptions to the basic rule, only one of which has been followed by other courts. The first is a possible exception for cleanup of public nuisances; the second is an exception created by statute.

Public Nuisance Exception

The *Flagstaff* court suggested an exception to the free public services doctrine when a local government expends funds abating a public nuisance, but subsequent courts have not followed *Flagstaff* in this regard. In support of its suggestion the *Flagstaff* court cited two cases in which federal courts allowed recovery against the parties responsible for the nuisances at issue, both cases growing out of the federal common law of nuisances. This body of law evolved out of the federal government's special concern for navigable waterways, and both cases involved such waterways. The first arose from the long-term dumping of toxic chemicals into the Ohio River above Evansville, Indiana, which caused that city and other Indiana water systems to incur extra expenses in treating the water for drinking water purposes.[15] The Seventh Circuit Court of

11. Cnty. of Erie v. Colgan Air, Inc., 711 F.3d 147 (2d Cir. 2013).
12. Koch v. Consol. Edison Co. of N.Y., Inc., 468 N.E.2d 1 (N.Y. 1984).
13. Cnty. of San Luis Obispo v. Abalone Alliance, 223 Cal. Rptr. 846 (Cal. Ct. App. 1986).
14. Walker Cnty. v. Tri-State Crematory, 643 S.E.2d 324 (Ga. Ct. App. 2007).
15. City of Evansville v. Ky. Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979).

Appeals allowed Evansville and the other water system operators to bring an action against the dumper to recover those extra treatment expenses. The second case arose because of the incomplete demolition of a railroad bridge across the Illinois River; the piers that were left in the river at one end of the bridge were thought by the Army Corps of Engineers to constitute an obstruction of the waterway, and the federal district court allowed the United States to recover the cost of removing the piers from the company that last owned the bridge.[16]

Much of this federal common law of public nuisances has been preempted by later federal legislation,[17] and the federal courts have refused an invitation to extend that body of law from water to air pollution.[18] It is perhaps for these reasons that subsequent courts have rejected attempts to create a public nuisance exception to the free public services doctrine.

Walker County v. Tri-State Crematory[19] involved some $2 million in public costs incurred by a county in cleaning up the property of a fraudulent cremation service. Instead of cremating the bodies that were sent to it, the service stacked and scattered them around its property and returned various substitute materials to funeral homes in place of human ashes. The county recognized that an earlier case had introduced the free public services doctrine to Georgia law and sought an exception on the ground that the cremation service had created a public nuisance. The appellate court rejected the county's argument, responding that the exception would swallow the rule, inasmuch as any good lawyer could cast any major disaster expenditure as abating a public nuisance. *Walker* was then cited by federal district and appellate courts in *County of Erie v. Colgan Air, Inc.*, in which the county sought to create a public nuisance exception to the doctrine in order to recover significant public costs incurred in responding to an airplane crash outside of Buffalo, and the courts refused.[20]

Statutory Exceptions

The *Flagstaff* court also cited cases in which courts have allowed a public entity to recover the costs of responding to an emergency when there was a statute that clearly allowed such recovery. Such an exception certainly is reasonable, inasmuch as the basic doctrine is a common law doctrine, and at least one post-*Flagstaff* court has allowed recovery on the basis of an applicable statute.[21]

Possible North Carolina Statutory Exceptions

A number of North Carolina statutes seem to create exceptions to the free public services doctrine in this state. Here is a list of potentially applicable statutes, with no warranty that the list is complete:

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16. United States v. Ill. Terminal R.R. Co., 501 F. Supp. 18 (E.D. Mo. 1980).

17. Middlesex Cnty. Sewage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981).

18. Nat'l Audubon Soc'y v. Dep't of Water, 869 F.2d 1196 (9th Cir. 1988).

19. 643 S.E.2d 324 (Ga. Ct. App. 2007).

20. 711 F.3d 147, 152 (2d. Cir. 2013), *affirming* Cnty. of Erie v. Colgan Air, Inc., No. 10-CV-157S, 2012 WL 1029542, at *2 (W.D.N.Y Mar. 26, 2012) .

21. Kodiak Island Borough v. Exxon Corp., 991 P.2d 757 (Alaska 1999).

The courts do seem to read these sorts of statutes narrowly, denying recovery under them unless the statute clearly covers a situation. *See, e.g.,* Portsmouth v. Campanella & Conti Constr. Co., 123 A.2d 827 (N.H. 1956), *and* Town of Howard v. Soo Line R.R. Co., 217 N.W.2d 329 (Wis. 1974).

G.S. 166A-19.62. Rescue costs of persons who ignore a warning in an emergency. This statute allows government agencies to recover any costs incurred in rescuing someone during an emergency when the rescued person has ignored a warning regarding personal safety.

G.S. 166A-27. Recovering costs when hazardous materials are released. This statute makes a person who causes the release of a hazardous material liable for certain costs incurred by government agencies in responding to the release.

G.S. 106-947. Extinguishing illegal fires. This statute makes a person who sets a fire without a permit, or contrary to the conditions of a permit, liable for the cost of extinguishing the fire.

G.S. 130A-309.60. Cleaning nuisance tire collection sites. This statute allows the Department of Environment and Natural Resources to determine that a tire collection site is a public nuisance, which makes the person responsible for the site, or the owner of the property, liable for the costs of cleaning up the site.

G.S. 130A-310.7. Remediation costs for cleaning up inactive hazardous waste sites. This statute defines who is responsible for creating an inactive hazardous waste site and makes that person or persons liable for the state's costs in cleaning up the site.

G.S. 143-215.88. Costs of oil spill cleanups. This statute makes the person responsible for discharging oil or other substances hazardous to land or water liable for the costs incurred by government agencies in cleaning up the spills.

G.S. 143-215.104O. Costs of cleaning up dry-cleaning solvent contamination. This statute makes the person or persons who caused contamination by discharge of dry-cleaning solvents liable for the costs incurred by government agencies in cleaning up the contamination.

Summary

The free public services doctrine is a common law doctrine that denies recovery against a tortfeasor by a governmental agency that has incurred costs in remedying the public health or public safety hazards caused by the tortfeasor's negligence. It has been accepted by each court that has dealt with the question of whether such recovery is permitted, and therefore it is likely to be accepted in North Carolina as well. There are a few statutes, however, applicable in somewhat narrow circumstances, that appear to create exceptions to the common law doctrine in this state.